

March 10, 2014

Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 West Market Street
P.O. Box 970
Trenton NJ 08625-0970

Re: In the Matter of the Adoption of N.J.A.C. 5:96
and N.J.A.C. 5:97 by the New Jersey Council on
Affordable Housing, Docket No. 67,126

To the Honorable the Chief Justice and Associate Justices of the
New Jersey Supreme Court:

Appellant-Respondent New Jersey Builders Association
(hereinafter "NJBA") submits this letter brief in lieu of more
formal brief in opposition to the motion by the New Jersey
Council on Affordable Housing (hereinafter "COAH") for stay or
modification of the interlocutory order issued by the Appellate
Division on March 7, 2014.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In its March 7, 2014 decision, the Appellate Division
fairly set forth the relevant facts and procedural history.

NJBA relies on the facts and procedural history set forth therein.

LEGAL ARGUMENT

THERE IS NO LEGITIMATE BASIS FOR A STAY OR MODIFICATION OF THE INTERLOCUTORY ORDER ISSUED BY THE APPELLATE DIVISION.

The Appellate Division found itself faced with a State agency that has not complied with the court's previous injunctive order requiring the agency to promulgate regulations within five months, which this Court affirmed. COAH's emergent motion for a stay would negate the goal articulated by this Court of speedy promulgation of regulations that would provide a long term solution to the implementation of the constitutional mandates enunciated in Southern Burlington NAACP v. Mt. Laurel Township, 67 N.J. 151 (1975) and 92 N.J. 158 (1983). COAH's request is supported only by a certification, also submitted by COAH below, that confirmed that COAH has taken no steps to comply with the previous order requiring the adoption of new regulations within five months.

The NJBA submits that the Appellate Division was well within its authority in issuing its March 7, 2014 order and opinion requiring COAH to take specific actions within specific

timeframes, and that COAH therefore does not enjoy a likelihood of success. Indeed, the NJBA respectfully suggests that the Appellate Division would have been well-justified in declaring that, until such time as COAH promulgates regulations that comply with the mandates issued by the Appellate Division and this Court, and demonstrates itself to be ready, willing, and able to implement such regulations, all parties - nonprofit housing organizations, builders, and municipalities alike - are free to seek municipal compliance with Mt. Laurel obligations in the courts without regard to COAH.

Such relief would not contravene the Fair Housing Act of 1985. While that statute does require exhaustion of remedies before the COAH, N.J.S.A. 52:27D-316(b), any current attempt to exhaust remedies would plainly be futile. When and if the agency promulgates compliant regulations and also demonstrates itself to be ready, willing, and able to implement such regulations, the courts may properly reconsider whether exhaustion is then futile.

The Appellate Division, having followed the more cautious and less efficacious course of merely ordering COAH to

promulgate regulations on a new fixed schedule, certainly did not abuse its discretion in the specifics of that timetable.

With respect to COAH's claims of immediate and irreparable harm in the absence of a stay, the task of promulgating regulations on a speedy time frame poses no extraordinary technical difficulties. Indeed, other experts have already performed the necessary planning and data analysis. The Certification of David Kinsey, submitted by the Fair Share Housing Center below in support of its motion, summarizes the approach for new regulations. See also Arthur Bernard, "Third Round Fair Share Projections" in COAH UPDATE: Goodbye Growth Share - Hello Again, Round One and Two, at pp. 149-172 (December 2013, NJ Institute for Continuing Legal Education). Indeed, even if COAH were to commence diligent efforts to promulgate regulations at this time, it could readily complete the task within the timetable established by the Appellate Division.

To the extent that, as urged by COAH, the New Jersey Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq. ("APA"), might impede compliance with the court's timetable, the Appellate Division had ample power to expedite the statutory timetable for promulgation of such interim regulations, and its

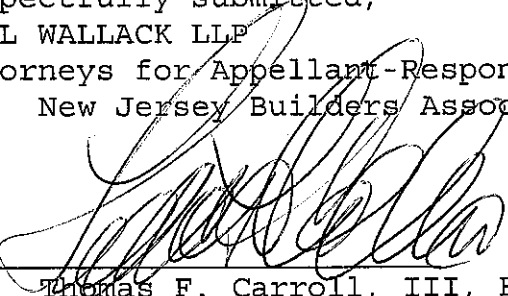
decision rejecting COAH's request for emergent stay filed with that court invited COAH to move before that court if it truly encounters difficulties complying with the APA.

For these reasons, there is no proper basis for this Court to grant COAH's application for a stay of the interlocutory order of the Appellate Division or to modify that order. Indeed, the proper course is to treat COAH's application to this Court for an extension of time as moot in light of the extension already granted by the Appellate Division.

CONCLUSION

For all the foregoing reasons, the NJBA respectfully urges the Court to deny COAH's application for a stay of the interlocutory order of the Appellate Division or to modify that order.

Respectfully submitted,
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