to adopt rules based on the Prior Round methodology.[1] Pursuant to R. 1:10-3, FSHC moves for enforcement of the Court's September 26, 2013 decision and March 14, 2014 remand order.

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). The relief that may be provided in a motion in aid of litigant's rights is limited to remediation of the violation of 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 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 "endorse[d] the remedy imposed by the Appellate Division in order to fill the void created by COAH. COAH shall adopt regulations, as directed by the

[1]This brief uses the term "Prior Round methodology" or "Prior Round rules" to refer to the regulations adopted by COAH for the First and Second Round, which utilized, as this Court noted, basically the same methodology and which form the basis of this Court's remand order. Specific regulatory citations throughout are to the Second Round rules adopted by COAH in 1994, N.J.A.C. 5:93.

Appellate Division, without delay." In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 586. Furthermore, 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." Id. at 620. The Appellate Division order affirmed by this Court "direct[ed] COAH to adopt new third round rules that use a methodology for determining prospective need similar to the ones used in the first and second rounds." In re N.J.A.C. 5:96 and 5:97, supra, 416 N.J. Super. at 485. The Court emphasized that, while the Legislature could modify the FHA consistent with the Mount Laurel doctrine, absent such modification "[t]he FHA's language is an impediment to COAH's unilateral decision to devise a wholly new approach to determining fair share. COAH may implement the FHA's scheme, not come up with a wholly new one." In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 616.

The Court's March 14, 2014 remand order extended the time to complete this remand, while reemphasizing the substance of the remand. The Court required "that the Council shall, by May 1, 2014, complete its actions preparing and formally approving the proposed Third Round Rules as required by this Court's decision in In re Adoption of N.J.A.C. 5:96 and 5:97" and required COAH to publish rules compliant with the Court's decision in the New Jersey Register on June 2, 2014. Ma2. 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.

Thus, the Court's decision and subsequent order required COAH by June 2 to propose Third Round rules based on COAH's Prior Round rules. The Court also prohibited COAH from devising yet another new regulatory scheme absent legislative modification to the FHA. COAH clearly is capable of complying with order: it has twice before adopted methodologies that are similar to the methodology it was required to adopt. See In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 592-93 (describing COAH's prior rule adoptions). Yet COAH has instead proposed rules vastly different from the Prior Round rules, as addressed in more detail below.

COAH will no doubt assert that FSHC should raise its objections first as comments to the proposed rule. But this is not an ordinary agency rulemaking; rather, it is a remedial action in which the Court ordered the agency to propose a specific kind of rule and in which the agency has contumaciously failed to do so. It is futile to proceed with the rulemaking because any comments would be addressed to a proposal that already violates the Court's order. See, e.g., Farmingdale Realty Co. v. Borough of Farmingdale, 55 N.J. 103, 112 (1969) (administrative process neither required nor prudent when issue is a question of law and "interests of justice and expediency negate the requirement of

exhaustion"); Rumana v. County of Passaic, 397 N.J. Super. 157, 174 (App. Div. 2007).

The Court should determine now that COAH has failed to comply with the Court's order to propose and adopt rules that are similar to the Prior Round methodology. The incessant delays have, as the Court has recognized, harmed the public interest. In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 620. The number and significance of the dissimilarities between the Prior Round rules and the proposed Third Round rules make clear that this proposal is only a source of further delay. The Court therefore should act to end the 15-year period of limbo that it recognized was frustrating the purposes of the FHA.

B. The rules proposed by COAH diverge substantially from the Prior Round methodology.

COAH's regulatory duty pursuant to the FHA includes three basic steps: (1) calculating "the present and prospective need for low and moderate income housing at the State and regional levels," N.J.S.A. 52:27D-307(b); (2) allocating "municipal determination of its present and prospective fair share of the housing need in a given region," N.J.S.A. 52:27D-307(c); and (3) specifying compliance mechanisms which "provide a realistic opportunity for the provision of the fair share," N.J.S.A. 52:27D-311(a). The Court recognized these basic steps in its September 2013 decision:

> For two decades following Mount Laurel II, the process of allocating municipal affordable housing obligations proceeded in steps. COAH first would calculate the need for affordable housing in each

> of the state's regions and then would allocate to each municipality its fair share of the present and prospective regional need. A municipality's fair share obligation was fixed as a specific number of affordable housing units. Each municipality was assigned a proportionate fair share of the region's need for housing based on its economic projections and its capacity to accommodate affordable housing. A municipality that failed to create a realistic opportunity for satisfying its assigned fair share would leave itself vulnerable to a builder's remedy challenge.
>
> [In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 593.]

At all three steps, COAH's proposed regulations deviate significantly from the Prior Round rules, in specific ways that this Court expressly proscribed. Accordingly, the Court must act to enforce its order.

1. Calculation of Need

COAH's first regulatory task is to calculate regional prospective need for low- and moderate-income housing. The First and Second Round Rules - and even the 2008 Third Round Rules - take the same basic approach to this calculation. COAH's proposed rules, by deviating substantially from this approach, reduce the prospective need by 70 percent compared with the Prior Round and therefore violate this Court's order.

First, in the Prior Round rules, COAH used the Department of Labor's official forecasts of population growth to determine the number of low- and moderate-income households needing homes in each housing region. 26 N.J.R. 2347. These data are calculated independently of the COAH process, and thus cannot be manipulated

to reduce or increase affordable housing need. In contrast, in the proposed rules, COAH departs from these official State numbers, and assembles its own significantly lower population projections showing slower growth than the State itself projects. Through what it describes as "using our procedures" to alter the Department of Labor data, COAH projects that New Jersey will grow by 133,394 fewer people from 2010 to 2025, or 20 percent slower than the official projections. Compare Proposed N.J.A.C. 5:99 Appendix A, 46 N.J.R. 952, with Ma26.[2] COAH uses this proprietary procedure's suggestion of lower rates of growth in New Jersey to reduce regional prospective need by 30,610 households. Ma27-36. This deviation in the initial calculation of fair share departs from the Prior Round methodology even more than the 2008 rules already invalidated by the Court, which, despite their many flaws, still used the Department of Labor projections. N.J.A.C. 5:97 App. F-2, 40 N.J.R. 6108. This change specifically violates the Court's holding that "[t]he FHA's language is an impediment to COAH's unilateral decision to devise a wholly new approach to determining fair share. COAH may implement the FHA's scheme, not come up with a wholly new one." In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 616 (emphasis added).

Second, COAH then further reduces need by over 37,000 homes

[2]The latter reference is to N.J. Department of Labor Economic-Demographic (Preferred) Model Population Projections, available at http://lwd.dol.state.nj.us/labor/lpa/dmograph/lfproj/sptab1.htm (last accessed June 16, 2014), which is included in our Appendix.

through the "buildable limit reduction," which did not exist in the Prior Round methodology. The proposed rules provide that a municipality's Third Round obligations "shall be adjusted to that which can be accommodated as determined by land capacity" as set forth in an appendix. Proposed N.J.A.C. 5:99-3.3, 46 N.J.R. 931. This is a permanent reduction that simply eliminates regional need. This buildable limit reduction replicates the features of growth share this Court specifically held the FHA "precludes COAH" from using: "1) the devising of residential and commercial affordable housing ratios for projected need that are not tied to a regional need for affordable housing, and 2) leav[ing] open-ended how or whether projected need for a housing region will be fulfilled." Id. at 613. Instead of addressing exclusionary zoning through specified fair share numbers that in total meet the regional need, the buildable limit reduction eliminates need based on existing exclusionary zoning.

The buildable limit reduction institutes this growth share-like limit by first assuming that future growth "will be divided according to existing relationships between residential and commercial uses at the individual municipal level." 46 N.J.R. 1039. Thus, a municipality that has previously excluded homes in favor of office and retail development has its fair share reduced based on that prior exclusion. Next, COAH states as a further reduction of fair share through this buildable limit reduction, "a caveat was added that no new development would occur at densities

more than 25 percent higher than the municipality's current average density." Ibid. Thus, a municipality that has successfully practiced exclusionary zoning by only allowing homes on lots of one acre or more has its fair share reduced based on the assumption that it will never have any homes on lots smaller than three-quarters of an acre - even if building such homes would be consistent with sound planning.

The practical effects of this new methodology, comprised of caps and "caveats" not found in the Prior Round methodology, are extreme. For example, Holmdel's 2014-2024 obligation is reduced from 149 to 7; Manalapan's is reduced from 340 to 95; and Robbinsville's from 352 to 0. 46 N.J.R. 1000-01. And those reductions of over 37,000 homes in total are not reallocated to other municipalities to ensure regional need is met - rather, that portion of regional need simply vanishes. Like growth share, and in violation of this Court's decision, the buildable limit reduction thus ensures municipal obligations are neither "tied to the regional need for affordable housing" nor do they address "how or whether projected need for a housing region will be fulfilled." In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 613.

Moreover, COAH's manipulation of population projections and the buildable limit reduction - which reduce housing need by 67,000 homes - are not the only changes to the calculation of need. The additional substantial deviations from the Prior Round methodology include, for example, a new assumption that some low-

and moderate-income households are too wealthy to need homes. 46 N.J.R. 984-85, 1012 (showing a total of 19,868 "households with significant assets" subtracted from need).

All of these changes cumulatively have a dramatic impact. In the Prior Round rules, from 1987-1999, COAH projected a total statewide prospective need of 68,422 homes, or 5,702 per year over 12 years. From 1999-2024, COAH now proposes a total statewide prospective need of 43,075 homes, or 1,723 per year over 25 years.[3] COAH thus projects significantly less need for low- and moderate-income housing over 25 years than over the prior period that was half as long, by reducing the annual number of homes required by 70 percent. The Court's remand order did not permit COAH, absent legislative authorization, to deviate from the Prior Round methodology and simply shut out tens of thousands of low- and moderate-income households from any chance at a home. Thus, the Court should grant this motion in aid of litigant's rights.

2. Allocation of Need

Having calculated regional need, COAH's next regulatory duty is to allocate that regional need, in full, to municipalities. Here, too, COAH deviates substantially from the First and Second

[3] Municipal obligations for 1987-99 are 85,964, see http://www.nj.gov/dca/services/lps/hss/statsandregs/obligations.pdf (last accessed June 16, 2014), subtracting 17,542 homes that are attributable to Reallocated Present Need, 26 N.J.R. 2346, to reach a Prospective Need of 68,422. Municipal obligations for 1999-2024 are 41,280 for 1999-2014 minus a buildable limit reduction of 28,993 equals 12,287, 46 N.J.R. 1012-13, plus 39,361 minus buildable limit and other reductions of 8,572 equals 30,788, 46 N.J.R. 987; 12,287 plus 30,788 equals 43,075.

Round rules: first by allocating need based on a municipality's own decisions about growth, and not regional factors; and second by allocating need in significant part on a statewide, not regional, basis. Both of these deviations from the Prior Round methodology replicate flaws in the 2008 Regulations that this Court already found, in no uncertain terms, to violate the FHA.

First, as the Court recognized, the Prior Round rules "determined a municipality's allocated need 'based on employment within the municipality, projected employment within the municipality, the percentage of the municipality in a growth area, and the municipality's wealth.'" In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 591 (citation omitted). The Court invalidated growth share in part because, in contrast to these objective factors based on regional need, the 2008 Rules "reduced [municipal fair share] to reflect that slowed residential and job growth" if municipalities succeeded in exclusionary practices. Id. at 605. As Judge Skillman, in his decision affirmed by the Court, put it:

> the growth share methodology for determining a municipality's share of the prospective regional need for affordable housing set forth in the revised third round rules. . . 'permit[s] municipalities with substantial amounts of vacant developable land and access to job opportunities in nearby municipalities to adopt master plans and zoning ordinances that allow for little growth, and thereby a small fair share obligation,' and is thus invalid. [In re N.J.A.C. 5:96 and 5:97, supra, 416 N.J. Super. at 462 (citation omitted).]

Yet the new rules replicate the same flaw. Instead of allocating need solely based on employment, existing income levels in a

municipality, and growth capacity, the Prior Round factors the Court cited, COAH additionally proposes using a municipality's own decision-making on "residential growth" to allocate need. Proposed N.J.A.C. 5:99, App. A, 46 N.J.R. 982. The rules assume that communities that have been "taking housing . . . will probably do so in the future." Id. at 951. Thus, communities that have allowed residential growth in recent years and complied with their Mount Laurel obligations have a higher need, while communities with exclusionary practices have a lower need. As this Court has found, the FHA prohibits increasing or reducing need based on municipal decisions on growth. In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 605. Including a community's own choices on residential growth as a factor in allocating fair share substantially deviates from the Prior Round rules in violation of this Court's order.

Second, the proposed rules allocate much of the need on a statewide, not regional, basis. The Court specifically invalidated statewide allocations, holding that "[t]he FHA is replete with references tying affordable housing obligations to a region, not obligations formed on a statewide basis." Id. at 613. The Prior Round, consistent with the FHA, allocated all need on a regional basis. N.J.A.C. 5:93 App. A. ("All allocations. . . reflect the fraction reflecting the community's share of the regional total."). In contrast, in the proposed new rules, the portion of need associated with urban municipalities is allocated on a

statewide, rather than regional, basis. "Urban aid cities do not receive projected need and this need is distributed to all communities in the state according to a combined allocation factor that uses the four allocation factors (land capacity, relative income, nonresidential job growth/residential unit growth on a statewide basis.)" Proposed N.J.A.C. 5:99, App. A, 46 N.J.R. 986 (emphasis added). This novel formula, not found in the Prior Round rules, redistributes need associated with Newark and Camden, for example, to Cape May and Toms River. Through this statewide redistribution, COAH reduces fair share numbers substantially in regions with large urban centers. But in doing so, it violates the clear terms of this Court's decision which found that "obligations formed on a statewide basis" were simply incompatible with the FHA. In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 613.

As with the invalidated growth share concept, COAH's proposed rules both base a municipality's fair share of the regional need on its own decisions about residential growth and allocate significant portions of need on a statewide, and not regional, basis. Because these changes deviate substantially from the First and Second Round methodology and violate the FHA, the Court should find that the proposed rules violate its order.

3. Meeting Need with a Realistic Opportunity

The final major step in COAH's rules is to ascertain whether a municipality "create[s] a realistic opportunity for satisfying its assigned fair share." Id. at 593. Again, the proposed rules in

this step deviate from the Prior Round rules in the same way as the growth share rules already invalidated by this Court. The proposed rules, like the growth share rules, deviate substantially from the clear rules on densities and set-asides at the heart of the Prior Round Rules' provision of a realistic opportunity. N.J.A.C. 5:93-5.6 (providing densities of 4 to 6 units an acre, with set-asides of 15 to 20 percent). Instead of adopting these densities and set-asides, the proposed rules provide no fixed densities at all and a presumptive set-aside of only 10 percent. Proposed N.J.A.C. 5:99-7.2(a), 46 N.J.R. 935. The proposed rules also include a novel requirement that every single development be evaluated through a complex economic feasibility study on a case-by-case basis based on nebulous factors such as "capital markets" and the "character of the community." Proposed N.J.A.C. 5:99-7.2(b), 46 N.J.R. 935.

This deviation from the Prior Round rules is particularly brazen given that it directly contravenes the Appellate Division's holding, affirmed by this Court. Judge Skillman explicitly held:

> The inclusion in the third round rules of presumptive minimum gross densities and presumptive maximum set-asides that do not appear to create a realistic opportunity for the construction of affordable housing in most circumstances, and consequently would require frequent resort to a waiver procedure, do not provide such workable "bright line standards." Therefore, we conclude that the revised third round rules, like the original third round rules, do not provide sufficient incentives for the construction of inclusionary developments to create a realistic opportunity for any substantial amount of

affordable housing.
[In re N.J.A.C. 5:96 and 5:97, supra, 416 N.J. Super. 492-493.]

Yet the new proposal has even fewer "bright line standards" than growth share, with every single inclusionary zoning site in the state to be analyzed on an individual basis, based on an "economic feasibility study . . . demonstrating a rational nexus between the density and affordable housing set-asides contained in the zoning and that the zoning provides adequate compensatory benefits to developers of affordable housing." Proposed N.J.A.C. 5:99-7.2(a), 46 N.J.R. 935. As the Appellate Division has already held and as this Court has affirmed, the lack of bright line standards simply is unworkable for developers and thus undermines the very notion of a "realistic opportunity."[4] This radical departure from the Prior Round Rules, which the Court's decision directly prohibited, violates this Court's order.

C. The Court should order COAH to make the proposed rules similar to the Prior Round rules or to hold that the trial courts provide the sole forum for the implementation of the Mount Laurel doctrine.

FSHC moves to enforce the Court's prior orders through an

[4] COAH's proposed rules contain a number of other substantial deviations from the Prior Round rules as well - such as limiting credit for special needs housing to the narrow category of community residences for the developmentally disabled, compare N.J.A.C. 5:93-5.8 with Proposed N.J.A.C. 5:99-7.4, 46 N.J.R. 936, and eliminating altogether the requirement that a minimum of 25 percent of municipal fair share be met with rental housing, compare N.J.A.C. 5:93-5.15 with Proposed N.J.A.C. 5:99-4.3, 46 N.J.R. 932. These proposed changes, which go beyond anything that COAH attempted in the 2008 Rules, would have a detrimental impact on many lower-income families looking for housing and deviate substantially from core elements of the Prior Round methodology.

order that directs COAH to adopt a methodology based on the Prior Round methodology. Alternatively, FSHC moves for the remedy advanced in the Court's March 14, 2014 order, which would end COAH's perpetual cycle of rule proposals by directing trial courts to determine Third Round fair share obligations and evaluate compliance using the Prior Round rules, consistent with the court-driven process authorized by the FHA, N.J.S.A. 52:27D-313.

The Court should grant one of these forms of relief because simply moving forward on the current course plotted by COAH's unlawful proposal leaves tens of thousands of lower-income families, seniors, and persons with disabilities waiting for decent homes but without an effective remedy. The terrible impact of the failure of the agency to operate in conformance with the law for 15 years requires a different course. As this Court has written, "We may not build houses, but we do enforce the Constitution." Mount Laurel II, supra, 92 N.J. at 213. The Court also held that if the FHA "achieves nothing but delay, the judiciary will be forced to resume its appropriate role." Hills, supra, 103 N.J. at 23. After 15 years, and after COAH acted in violation of the remand order, that promise will be hollow if the Court allows further delay and again declines to act.

1. The Court should order adjustments to proposed rules so they comply with the Court's mandate to adopt rules similar to the Prior Round rules.

The Court should direct COAH to calculate, allocate, and meet need consistent with the Prior Round rules. This approach is both

required by the Court's decision and order and by the FHA. In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 620; N.J.S.A. 52:27D-307, 311. The only way that a different approach could be used, according to the Court's decision, is if the Legislature adopted new legislation that modified or supplanted the FHA. In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 619. But no such legislative changes have been adopted, and COAH's discretion to adopt a new approach is thus narrowly circumscribed.

In order to conform COAH's conduct to what is required by the Court's order, and to prevent further delay, FSHC urges the Court to hold that COAH has violated the Court's remand order by proposing rules that deviate substantially from the Prior Round rules and to direct COAH to use the Prior Round methodology in its entirety to propose and adopt Third Round rules, as updated by current data. As the Court has made perfectly clear, the rules must use the same or substantially similar method for calculating and allocating need as used in the Prior Round. The rules should also employ the same or substantially similar approaches to ensuring a realistic opportunity that have previously worked.

This process should take no more than 30 days, which is the amount of time the State indicated at oral argument before this Court the whole process of drafting new rules would take. Ma46. The agency's expert is on contract, Ma18-25, and has assembled the basic data needed, much of which is in the rule proposal buried underneath layers of changes and manipulations. COAH has the

capacity to propose a compliant rule without the need for substantial further delay.

Given COAH's lack of compliance to date with clear orders and timeframes and the resulting delay, the Court should also put into place a mechanism to ensure that its order will result in compliance. The Court should, at the least, appoint a judge or special master to monitor COAH's progress on compliance with the order on a regular basis and report to the Court and the parties on such compliance, and if necessary assist COAH with completion of the required tasks. The Court should continue to retain jurisdiction for further review should such compliance not occur on the schedule ordered by the Court.

2. Alternatively, the Court should impose the remedy available under the Court's March 14, 2014 order.

FSHC alternatively moves for relief that would return the enforcement of the Mount Laurel doctrine to the trial courts. The Court's March 14, 2014 order indicates that if COAH fails to adopt Third Round rules by November 17, 2014, 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. 52:27-313 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;
> [Ma4.]

At this point, COAH has already violated essential aspects of the Court's order involving the timely proposal of rules that are based on the Prior Round rules. FSHC thus alternatively moves for

the very same relief that the Court indicated it would consider later this year, which is similar to that previously imposed in Six Month Extension, supra, 372 N.J. Super. at 105 (COAH's failure to comply with remand order means agency no longer protects against Mount Laurel litigation). Thus, the Court should alternatively hold that COAH no longer protects municipalities from Mount Laurel litigation and that the only currently viable forum for the adjudication of Mount Laurel claims is the Law Division, a forum already authorized by the FHA, N.J.S.A. 52:27D-313. To ensure that trial courts proceed expeditiously and consistently, trial courts should be directed to use the Prior Round rules, consistent with this Court's September 2013 decision, including the approach previously used to calculate and allocate need, count credits, and measure whether municipalities provide a realistic opportunity for their fair share obligations.

IV. Conclusion

For the foregoing reasons, FSHC respectfully requests that this Court find that COAH, by proposing yet another novel methodology that does not follow the Prior Round rules as required, has not complied with its order. The Court should order COAH to propose rules consistent with its order or alternatively lift COAH's protection from Mount Laurel litigation in N.J.S.A. 52:27D-313 and allow actions to proceed in the Law Division.

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Respectfully submitted,
FAIR SHARE HOUSING CENTER
Attorneys for
Appellant/Petitioner

Kevin D. Walsh, Esq.

Adam M. Gordon, Esq.