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June 10, 2024

VIA ELECTRONIC FILING

Honorable Marc Lemieux, A.J.S.C.
Monmouth County Courthouse
71 Monument Street
Floor 3
Freehold, New Jersey 07728

Re: *Jo-Anne Olszewski vs. Atlantic Highlands Board of Education, Highlands Board of Education, and Henry Hudson Regional Board of Education*
Our File No.: pending

Dear Judge Lemieux:

We are counsel to Plaintiff Jo-Anne Olszewski in the above matter. Please accept this letter brief in support of Plaintiff's order to show cause and request for injunctive relief. As set forth below, Plaintiff comes before this Court and requests that Your Honor enter a preliminary injunction declaring a resolution passed by Defendants Atlantic Highlands Board of Education, Highlands Board of Education, and Henry Hudson Regional Board of Education void, and enjoining Defendants from implementing or otherwise acting upon the resolution.

PRELIMINARY STATEMENT

On May 28, 2024, at a special joint meeting, Defendants passed a resolution approving the "concept" of an agreement for a settlement that does not yet exist and authorized their officials to sign the yet-to-be developed agreement. Defendants apparently have been in settlement negotiations with the

Oceanport and Shore Regional Boards of Education to settle litigation between them currently pending in the Appellate Division. The litigation in question also includes the Boroughs of Highlands, Atlantic Highlands, and Sea Bright, and concerns whether Sea Bright may withdraw from Oceanport and Shore Regional to join the new, all-purpose Henry Hudson Regional School District. Prior to the May 28 meeting, Defendants received a proposed settlement agreement from Oceanport and Shore Regional. Despite that fact, the official notice for the special meeting fails to list the settlement as a topic of discussion, let alone a topic on which Defendants would take action. After failing to disclose the proposed settlement on the official notice, Defendants passed a resolution permitting their counsel and respective Board Presidents to negotiate, review, and execute a final settlement agreement with Oceanport and Shore Regional. By delegating these duties to individual board officers and agents, Defendants have secreted the agreement from effective public comment and scrutiny. By failing to list the settlement on the official agenda, Defendants ensured that those interested in the litigation would have no way to know that Defendants planned to take such action during the May 28 special joint meeting.

Defendants' actions violate the Open Public Meetings Act, the square corners doctrine, and the common law rule that public bodies cannot usurp the rights and responsibilities of successor public bodies in interest. Defendants violated the Act by attempting to circumvent it, both by failing to provide adequate notice of the proposed settlement on the meeting agenda, and by delegating the task of approving the final settlement agreement, effectively insulating it from public review. By engaging in this untoward conduct, Defendants also violated the square corners doctrine, which requires that public bodies act with the utmost integrity when dealing with the public. Defendants' intentional efforts here to hide the settlement agreement from public comment fails to meet that standard. Finally, Defendants'

actions usurp the interests of their successor. The Highlands and Atlantic Highlands Boards of Education will cease to exist after June 30, 2024. The current Henry Hudson Regional School District Board of Education will cease to exist in its current configuration as of June 30, 2024 as its members will be replaced with a provisional board whose terms expire at the end of the year; the Board will be an entirely new entity when its new members are elected in November and then take office in January 2025. Accordingly, the prerogative to enter into a binding settlement agreement, especially a binding settlement agreement that does not yet exist and may not go into effect until after some of the Defendants cease to exist, is the exclusive prerogative of the new Henry Hudson Regional Board of Education, which is the successor in interest to all Defendants.

For these reasons, the Court should declare Defendants' resolution void and enjoin them from implementing the resolution. The Open Public Meetings Act provides for injunctive relief among its express terms. Moreover, Plaintiff readily meets the standard enunciated in *Crowe v. De Goia* for immediate injunctive relief. As to the first element, irreparable harm, the final settlement terms may be agreed upon imminently. Once they are finalized and executed, Defendants will be bound by the terms and likely will be dismissed from the current appeal before the Appellate Division. A final settlement agreement which implicates the rights of several other public bodies will be difficult to undo. As discussed above, both the Highlands and Atlantic Highlands Boards of Education will cease to exist in a matter of weeks, and approval of the settlement agreement may be among their final official acts. Time therefore is of the essence to prevent irreparable harm and to curtail the resolution before it is further acted upon by Defendants.

As to the remaining elements for immediate injunctive relief -- the likelihood of success on the merits, the presence of an established legal right, and the balancing of equities -- Plaintiff meets all of

them because Defendants' actions clearly are unlawful under the statutory and common law doctrines discussed above. Plaintiff therefore has an obvious and established legal right to pursue this matter, and an overwhelming likelihood of success on the merits of her claims. Finally, the balance of the equities weighs in Plaintiff's favor because public bodies do not maintain any interest in pursuing unlawful action. Accordingly, Plaintiff is entitled to immediate relief, and the Court can act without delay to declare the May 28 resolution void and to enjoin Defendants from acting upon it.

BRIEF STATEMENT OF FACTS

Plaintiff relies on the facts set forth in her verified complaint and adds only the following brief recitation. For the past several years, Defendants, along with the Borough of Highlands, Borough of Atlantic Highlands, and Borough of Sea Bright have been engaged in litigation with the Oceanport Board of Education and Shore Regional Board of Education. (*See* Verified Complaint at ¶¶ 7-20.) The litigation concerns whether Sea Bright may withdraw from Oceanport and Shore Regional and join the new, all-purpose Henry Hudson Regional School District. (*Id.*) On September 22, 2023, the Commissioner of Education determined that Sea Bright lawfully could withdraw from Oceanport and Shore Regional and petition to join Henry Hudson. (*Id.* at ¶ 11.) Oceanport and Shore Regional appealed the Commissioner's decision, and the matter remains pending before the Appellate Division. (*Id.* at ¶¶ 14-15.)

In recent months, Defendants have engaged in settlement discussions with Oceanport and Shore Regional. On information and belief, Defendants will agree to a series of measures designed to exclude Sea Bright ever from joining the Henry Hudson Regional School District. (*Id.* at ¶¶ 16-18.) In exchange, Oceanport and Shore Regional will agree voluntarily to dismiss Defendants from the pending appeal. (*Id.*)

Defendants called a special meeting for their three boards to meet on May 28, 2024. (*Id.* at ¶ 21.) The special meeting notice does not contain any reference to the subjects to be discussed or voted upon during the special meeting, including any reference to the specific litigation that would be discussed in executive session. (*Id.* at ¶ 22.) Despite its failure to reference the ongoing settlement negotiations in the special meeting notice, Defendants approved a resolution to "approve the concept of Settlement" of the appeal. (*Id.* at ¶ 24.) The resolution further states that it "authorize[s] counsel and the Presidents of the Boards, to negotiate a resolution with opposing counsel and if consistent with the parameters provided to Counsel, to execute the Settlement Agreement revised in accordance therewith." (*Id.*) No such settlement agreement currently exists, a fact verified not only by the resolution itself, but in a later communication by Defendants' counsel to the Appellate Division stating that Defendants are working with Oceanport and Shore Regional on a "proposed settlement agreement" that will be "finalized soon." (*Id.* at ¶¶ 28-29.) Defendants thus did not approve an actual settlement agreement, nor disclose the terms of the "proposed" settlement agreement to the public. Rather, Defendants impermissibly approved the "concept" of a future settlement agreement, and unlawfully delegated the task of finalizing and approving the settlement agreement to their Board Presidents and counsel.

To further compound the problem, Defendants will soon cease to exist in their present form. Both the Highlands Board of Education and Atlantic Highlands Board of Education will have their final meetings during the week of June 10, 2024, and will cease to exist after June 30, 2024. (*Id.* at ¶¶ 28-36.) Henry Hudson Regional will shift completely to a transitional board and its members' terms expire at the end of the year; the Board will be an entirely new entity when its new members are elected in November and then take office in January 2025. (*Id.*) Defendants have thus taken action to approve a prospective settlement agreement that ultimately will bind a future board.

LEGAL ARGUMENT

PLAINTIFF'S REQUEST FOR A PRELIMINARY INJUNCTION SHOULD BE GRANTED BECAUSE PLAINTIFF SATISFIES THE FOUR-PART TEST SET FORTH IN CROWE V. DEGIOIA.

Plaintiff respectfully requests that the Court issue a preliminary injunction declaring the resolution adopted at the May 28 meeting void and prohibiting Defendants, through their agents and counsel, from taking any further action to implement the resolution and its terms. Generally, a party must satisfy the four factors outlined in *Crowe v. De Gioia*, 90 N.J. 126, 132-134 (1982), to obtain preliminary injunctive relief. Those factors are as follows: (1) preliminary injunctive relief should not issue except when necessary to prevent substantial, immediate and irreparable harm; (2) an applicant must make a showing of a reasonable probability of ultimate success on the merits; (3) an applicant must have a well-settled legal right to the relief that it seeks; and (4) the court must balance the equities involved. *Id*. at 132-134.

Although "each of the above factors 'must be clearly and convincingly demonstrated,' a court 'may take a less rigid view than it would after a final hearing when the interlocutory injunction is merely designed to preserve the status quo.'" *Brown v. City of Paterson*, 424 N.J. Super. 176, 183 (App. Div. 2012) (quoting *Waste Mgmt. v. Union County Utils. Auth.*, 399 N.J. Super. 508-519-520 (App. Div. 2008) (additional citations omitted)). "[T]he point of temporary relief is to maintain the parties in substantially the same condition when the final decree is entered as they were when the litigation began." *Crowe*, 90 N.J. at 134. At the preliminary injunction stage, "[t]he court is not deciding which party ultimately wins or loses, but rather whether the applicant has made a preliminary showing of reasonable probability of ultimate success on the merits." *Brown*, 424 N.J. Super. at 183. When "exercising their equitable powers, courts 'may, and frequently do, go much farther both to give and withhold relief in

furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Id.* (citing *Waste Mgmt.*, 399 N.J. Super. at 520-21) (additional citations omitted). Thus, the Court may "place less emphasis on a particular *Crowe* factor if another greatly requires the issuance of the remedy." *Id.* (citations omitted).

The public interest obviously is implicated here to preserve the status quo and to prevent Defendants from taking further action to implement an unlawful settlement resolution.

A. An Injunction Is Necessary To Prevent Substantial And Irreparable Harm Because Time Is Of The Essence To Avert Defendants From Acting Upon An Unlawful Resolution.

The Open Public Meetings Act permits "any member of the public" to institute a proceeding in lieu of prerogative writ to challenge action taken by a public body. *N.J.S.A.* 10:4-15(b). A reviewing court shall declare the public body's action "void" if that action does not conform to the Act's requirements. *Id.* The Act further permits courts to issue "injunctive orders or other remedies to insure [sic] compliance with the provisions of this act, and the court shall issue such orders and provide such remedies as shall be necessary to insure [sic] compliance with the provisions of this act." *N.J.S.A.* 10:4-16. The Act thus expressly contemplates injunctive relief.

Moreover, relief through a preliminary injunction is appropriate to prevent irreparable harm if the harm in question "cannot be redressed adequately by monetary damages." *Crowe*, 82 N.J. at 132-33. *See also Waste Mgmt. of N.J., Inc. v. Morris Cty. Mun. Util. Auth.*, 433 N.J. Super, 445, 451 (App. Div. 2013) (noting irreparable injury will be found where party has no adequate remedy at law and injury is substantial and imminent). Plaintiff here clearly has no adequate remedy at law or entitlement to monetary damages, nor are such remedies contemplated in prerogative writ actions challenging a public body's action. Rather, Plaintiff here requests that the Court void Defendants' unlawful resolution

regarding the settlement agreement, and enjoin Defendants from further acting upon or implementing that resolution.

The harm Plaintiff seeks to prevent is imminent and substantial. As noted above and in Plaintiff's verified complaint, Defendants soon will cease to exist in their present form and already have moved to approve a settlement agreement before its terms are finalized and reduced to writing. The settlement agreement likely is to be approved and finalized imminently. Once the settlement agreement is approved and Defendants are dismissed from Oceanport's and Shore Regional's appeal, it will be difficult to undo the settlement, which will implicate the interests of various other parties, as well as the procedural posture of a matter presently pending before the Appellate Division. *See Naylor v. Harkins*, 11 N.J. 435, 446 (1953) (holding that plaintiffs were entitled to injunction prohibiting railroad from implementing settlement agreement which affected plaintiffs' union status, and that plaintiffs had shown irreparable harm if injunction did not issue because the settlement had the effect of "destroying" the plaintiffs' "status" and thus the "subject of the litigation"). The Court therefore should act now, before Defendants move further to approve the settlement agreement, before Defendants no longer exist in their present capacity, and before the interests of various other parties -- all of them public entities -- are implicated by a settlement agreement unlawfully entered into by a public body. *See Gen. Elec. Co. v. Gem Vacuum Stores*, 36 N.J. Super. 234, 237 (App. Div. 1955) (noting that irreparable harm may be shown where subject matter of litigation will be "substantially impaired" if injunction does not issue).

B. Plaintiff Can Show A Reasonable Probability Of Success On The Merits And A Well-Settled Legal Right Because Defendants' Actions Clearly Violated The Open Public Meetings Act As Well As Several Common Law Principles Applicable To Public Bodies.

Plaintiff can show a reasonable likelihood of success on the merits and the presence of an established legal right because Defendants' conduct clearly violated the Open Public Meetings Act, the common law square corners doctrine, and the common law doctrine preventing public bodies from usurping the rights of their successors in interest. Each will be addressed in turn.

1. Defendants Violated the Open Public Meetings Act By Failing To Provide Adequate Notice Of The Settlement Proposal And By Improperly Delegating The Task Of Approving The Settlement.

The procedures required by the OPMA are intended to advance the Legislature's declared purpose to ensure "the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies." *N.J.S.A.* 10:4-7. Such transparency is necessary because "secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society." *Id. See also In re Consider Distrib. of Casino Simulcasting Special Fund*, 398 N.J. Super. 7, 16 (App. Div. 2008). "To advance that stated public policy, the Legislature directed that the statute should be 'liberally construed in order to accomplish its purpose and the public policy of this State.'" *McGovern v. Rutgers*, 211 N.J. 94, 99-100 (2012) (quoting *N.J.S.A.* 10:4-21).

Except in certain instances not applicable here, "no public body shall hold a meeting unless adequate notice thereof has been provided to the public." *N.J.S.A.* 10:4-9(a). "Adequate notice" means "written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, ***the agenda*** of any regular, special or rescheduled meeting, which notice shall accurately state whether

formal action may or may not be taken .” *N.J.S.A.* 10:4-8(d) (emphasis added). “An agenda, as the term is used in the OPMA, is ‘a list or outline of things to be considered or done.’” *Edison Bd. of Educ. v. Zoning Bd. of Adjustment of the Twp. of Edison*, 464 N.J. Super. 298, 309 (App. Div. 2020) (quoting *Opderbeck v. Midland Park Bd. of Educ.*, 442 N.J. Super. 40, 56 (App. Div. 2015)). Thus, “where it can be shown that the governing body published an agenda calculated to mislead the public or otherwise intentionally omitted items from the agenda which it knew would be acted upon, . . . the action [should] be voided.” *Crifasi v. Governing Body of Oakland*, 156 N.J. Super. 182, 188 (App. Div. 1978).

In *McGovern*, 211 N.J. at 111, for example, the Supreme Court held that Rutgers University had violated the Open Public Meetings Act by issuing a “generic” meeting notice stating that the Board of Trustees would “act on a resolution to meet in immediate closed session to discuss matters falling within contract negotiation and attorney-client privilege.” The Court explained that the “record reveal[ed] clearly that by the time this notice was prepared and published, more was known about the extent of the proposed agenda than what was conveyed by the generic references to ‘contract negotiation and attorney-client privilege.’” *Id.*

The same principles apply here. It is beyond dispute that Defendants knew of the proposed settlement agreement before the May 28 special meeting. In fact, the resolution itself confirms that Defendants were aware of the settlement proposal and planned to act upon it. The resolutions states: “an offer of settlement (“Settlement Agreement”) has been received from Oceanport and Shore Regional that would permanently dismiss the Boards from the pending litigation.” (*See* Verified Complaint, Exhibit C.) Despite their advance notice of the settlement proposal and their clear plan to act upon it, Defendants’ meeting notice does not reference the settlement proposal or Defendants’ intention to act upon it, but

rather makes only a "generic" and inadequate reference to discussing (not acting upon or settling) "pending litigation."

A public body also violates the Open Public Meetings Act where it attempts to hide its actions from the public by improperly delegating authority to a single member of the body or to legal counsel. For example, in *Allan-Deane Corp. v. Bedminster Twp.*, 153 N.J. Super. 114, 115 (App. Div. 1977), a group of several municipalities and the county planning board held an "informal discussion session" in which each public body sent a single member. Given prior actions by both the municipalities and the county planning board, it was obvious that this "informal discussion session" was designed to facilitate a comprehensive discussion and concerted action plan for the municipalities and county planning board to respond to perceived "threat[s] by massive development proposals." By sending one member only, the public bodies involved hoped to circumvent the Open Public Meetings Act. The Appellate Division held that the public bodies had violated the Act by deliberately trying to circumvent its requirements and attempting to shield its discussions from the public. The panel explained:

> Having concluded that the meeting of March 18 was in fact in deliberate circumvention of the statute, we are satisfied that it was a nonconforming meeting within the corrective scope of the act. *See N.J.S.A.* 10:4-15 and 10:4-16. If any action was in fact taken during the meeting, such action must be deemed a nullity. There is other relief, however, to which plaintiff is entitled. In discharging the order to show cause and dismissing the complaint, the trial judge directed that a record of the meeting be made by a stenographic reporter at plaintiff's expense, but that no transcript be prepared until further order of the court. Since it is our conclusion that the meeting was required to have been open to the public pursuant to *N.J.S.A.* 10:4-12(a) and that comprehensive minutes available to the public were required to have been taken pursuant to *N.J.S.A.* 10:4-14, the vindication of both plaintiff's and the public's right to have been present dictates that the transcript of the meeting now be made available to plaintiff, at its expense.
>
> [*Id.* at 120.]

Defendants here engaged in a similar scheme. The resolution "approve[s] the concept of Settlement of the matter" only, and them impermissibly delegates authority to legal counsel and the respective Board Presidents to "negotiate a resolution" and "execute the Settlement Agreement revised in accordance therewith." The Board Presidents also are "authorized to sign the Settlement Agreement on behalf of the Boards," which "shall be made a part of the official minutes of the Boards' meeting held on May 28, 2024" only after the fact. The resolution thus robs the public, and indeed most of the Defendant Board members, of any ability to understand what Defendants are agreeing to or contemplating in terms of the settlement agreement. Defendants have done nothing short of creating a secret agreement, the terms of which will be known only after it is signed and binding upon Defendants, with no way for the public to know -- until it is too late -- the terms to which their elected officials have bound them.

2. Defendants Violated The Common Law Square Corners Doctrine By Attempting To Secret The Settlement Agreement And Its Terms From Public Scrutiny.

For similar reasons, Defendants have violate the common law square corners doctrine. The doctrine is rooted in the principle that government officials must "act solely in the public interest." *F.M.C. Stores Co. v. Borough of Morris Plains*, 100 N.J. 418, 426–27 (1985). Thus, "[i]n dealing with the public, [the] government must turn square corners." *Id.* Public bodies have "an overriding obligation to deal forthrightly and fairly" and "may not conduct [themselves] so as to achieve or preserve any kind of bargaining or litigational advantage." *Id.* Their "primary obligation is to comport [themselves] with compunction and integrity, and in doing so [they] may have to forego the freedom of action that private citizens may employ in dealing with one another." *Id.*

Defendants' conduct here lacks any such sense of fairness. Despite knowing of the settlement agreement before the May 28 joint special meeting, Defendants omitted it from the agenda. Then, they passed a resolution approving of a settlement agreement that does not yet exist, permitting their respective Presidents and counsel to negotiate and execute the agreement at a later time, prohibiting meaningful pre-approval public commentary and cordoning off the agreement from public scrutiny. Defendants clearly are uncomfortable with public knowledge and inspection of the agreement's terms. Whatever their reasons, they cannot take measures to limit the agreement to a clandestine document reviewed and approved away from the public's eyes, and then place it retroactively and without comment into the May 28 special meeting minutes, where few people are likely to find it. Their efforts to do so are a clear breach of the public trust and a failure to adhere to the requirements of forthrightness and fairness that courts demand.

3. Defendants Unlawfully Usurped The Authority Of Their Successor In Interest By Binding The Future Henry Hudson Regional Board To An Agreement That Does Not Yet Exist.

Finally, Defendants' action is improper because it forestalls the rights of a successor board. The common-law rule is that a public body "may not forestall the rights and obligations of [its] successor by" taking action that "will not take effect until after the expiration of the term of the appointing [body]." *Gonzalez v. Bd. of Educ. of Elizabeth Sch. Dist.*, 325 N.J. Super. 244, 251 (App. Div. 1999). The rule is particularly applicable to "lame-duck" public bodies that risk "usurp[ing] the will and power of a future board . . . based on the future board's consideration of prevailing policy, personnel and general welfare concerns." *Id.* at 252.

The Highlands Board of Education and Atlantic Highlands Board of Education will hold their final meetings this month, and their members' terms expire on June 30, after which the boards will cease

to exist. The Henry Hudson Regional School District Board of Education will transition fully to a provisional board whose members' terms expire at the end of the year. The successor in interest for all three boards will be the new Henry Hudson Regional School District Board of Education, whose members will be elected in November and will take office in January 2025. By approving an agreement that does not yet exist, and may not be executed until one or more of Defendants cease legally to exist, Defendants have usurped the new Regional Board's ability to implement its own policies and to resolve the current litigation as it sees fit. Indeed, Defendants' limited remaining time as legal entities may be part of the reason why they have rushed to approve a settlement agreement that does not exist, and have given their Board Presidents and legal counsel a blank check to execute the agreement on whatever terms they deem necessary. No matter the reason, Defendants have intruded upon the prerogative of the new Henry Hudson Regional Board to settle this matter in its sole discretion.

C. The Equities Favor Plaintiff Because Defendants Will Suffer No Harm If They Are Prohibited From Executing Or Otherwise Acting Upon An Unlawful Resolution.

The balancing of equities here clearly favors Plaintiff. As discussed above, Plaintiff will suffer irreparable harm if the Court does not grant immediate relief. On the other hand, Defendants will suffer no harm because they seek to take action that is unlawful. A public body or other state actor does not suffer harm when it is prevented from enforcing or otherwise acting upon an unconstitutional or otherwise unlawful statute, edict, or resolution. *See Garden State Equal. v. Dow*, 216 N.J. 314, 323-24 (2013) (explaining that the state does not have any interest in enforcing statute that is unconstitutional or otherwise unlawful).

Defendants will not face any adverse consequences if the Court imposes preliminary restraints. At most, they will be delayed in acting upon a settlement agreement that does not yet exist and that was

approved through preliminary and unlawful means. Simply put, because Defendants' action here was unlawful, no equitable interest weighs in their favor, and the Court properly can grant injunctive relief without harming their interests.

Accordingly, the balance of equities, as well as all other *Crowe* factors, weigh in Plaintiff's favor.

CONCLUSION

For the forgoing reasons, Plaintiff respectfully requests that the Court declare the resolution passed by Defendants at their May 28, 2024 joint special meeting void, and preliminarily and permanently enjoin Defendants from taking any action to implement the resolution.

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Attorneys for Plaintiff Jo-Anne Olszewski

By: Vito A. Gagliardi, Jr.
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