NJLM New Jersey State League of Municipalities

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July 31, 2014

Sean Thompson,
NJ Department of Community Affairs
PO Box 813
101 South Broad Street
Trenton, NJ 08625-0800

Re: Rule Comments

Dear Mr. Thompson,

On behalf of the New Jersey State League of Municipalities and its 565 member municipalities, I submit the following comments for your consideration regarding the newly proposed COAH "3rd round" regulations published in the June 2, 2014 *New Jersey Register.*

Procedural Rules

NJAC 5:98:3.2(a) Petition For Substantive Certification, Petition Requirement Comment: Please allow the submission to the Council in hard copy **or** electronic format, which would reduce costs for municipalities.

NJAC 5:98-3.4(a) Petition For Substantive Certification, Re-Petition Comment
COAH should not preserve the provision from the 2008 third round procedural regulations in which a municipality had only three chances to amend its plan and "re-petition." Municipalities must be provided every chance to comply and this opportunity to re-petition allows for this.

NJAC 5:98-3.4(c) Petition For Substantive Certification, Re-Petition Comment
This provision is unclear as to when a new site triggers a requirement to repetition. Please clarify these circumstances.

NJAC 5:98-3.5 Notice Comment
This new notice requirement would require multiple, redundant and costly notices for the municipality. This should be changed so that COAH notifies the appropriate service list upon the determination that a petition is complete. Moreover, COAH should routinely reexamine its service lists because these service lists often get unwieldy and many of those on the list no longer have an interest in the current petition. If COAH does not perform this task, municipalities should have a right to send a letter to each person on the service list, ask for written confirmation that the party wishes to remain on the service list and to remove that person from the service list if they fail to provide written confirmation. Finally, COAH should authorize electronic submissions to those noticed to reduce costs to municipalities.

NJAC 5:98 – 3.7(a)1. Service List Comment: The requirement that the names and addresses of sites in the plan also include the block and lot next to the owner's name and address provides an

administrative problem for municipalities in preparing service lists for regular mail. It is unnecessary and should be removed.

NJAC 5:98–3.7(b) Service List Comment: This requirement should continue to be the responsibility of the agency and is an unnecessary cost driver for municipalities. If COAH does not perform this task, municipalities should have a right to send a letter to each person on the service list, ask for written confirmation that the party wishes to remain on the service list and to remove that person from the service list if they fail to provide written confirmation.

NJAC 5:98-4.1 Objector Pro-Forma Requirement Comment: COAH should add a requirement to NJAC. 5:98-4.1 so that all objectors, who seek to include their property in the plan, to a municipality's affordable housing plan have an obligation to submit an economic feasibility study for their "proposed projects." This will facilitate a determination as to whether the proposed project, if permitted by the municipality, would indeed satisfy a portion of the municipality's obligations. Similarly, if an objector contends that a site the municipality is relying upon to satisfy its obligations is not economically feasible, then it should have an obligation to submit an economic feasibility study to support its contention.

NJAC 5:98-4.2(d) Objections To A Proposed Housing Element and Fair Share Plan, Review of objections Comment: The pre-mediation report by the Executive Director should be a requirement and not permissive.

NJAC 5:98-5.2 Review of Development Fee Ordinance and Spending Plans For Affordable Housing Trust Funds, Development fee ordinance review Comment: The imposition and collection of development fees is a municipal decision and should not require COAH authorization. This provision is unnecessary and should be removed.

NJAC 5:98-5.4(a) Review of Development Fee Ordinance and Spending Plans for Affordable Housing Trust Funds, Spending Plan Review Comment: The phrase "or commit" should be removed as municipalities regularly "commit" the funding and then amend the spending plan.

NJAC 5:98-5.4(a) Review of Development Fee Ordinance and Spending Plans for Affordable Housing Trust Funds, Spending Plan Review Comment: Spending plans submitted to the agency should be considered approved if COAH fails to disapprove within 60 days.

NJAC 5:98-5.5(a) Review of Development Fee Ordinance and Spending Plans for Affordable Housing Trust Funds, Amendment to an approved spending plan Comment: The phrase "and or to the commitment to spend funds" should be removed as municipalities regularly "commit" the funding and then amend the spending plan. Amendments to a spending plan submitted to the agency should be considered approved if COAH fails to disapprove within *60 days.*

NJAC 5:98-6.2(a) Consideration of a Municipality's Housing Element and Fair Share Plan When No Objections are Filed, Council Review Comment: This provision does not allow a "COAH Report Requesting Additional Information." This report allowed COAH to notify a municipality that a petition was incomplete and allowed the municipality to complete the petition. This report option should be added to the three options listed.

NJAC 5:98-6.2(c) Consideration of a Municipality's Housing Element and Fair Share Plan When No Objections are Filed, Council Review Comment: When COAH issues a report recommending denial of substantive certification, the report is provided to the municipality and the service list for a 14-day comment period. The municipality has 60 days to resubmit, but could be vulnerable to litigation in the intervening period. This section should allow for the comment period to be the same amount of time that the municipality has to resubmit at 60 days.

NJAC 5:98-6.3(b) Consideration of a Municipality's Housing Element and Fair Share Plan When No Objections are Filed, Grant of Substantive Certification Comment: The proposed regulations identify December 31, 2024 as the end date for certification regardless of when COAH approves a municipality's affordable housing plan. That means that with each passing year it becomes increasingly impossible for a municipality to comply. To illustrate, a municipality that decides to comply in 2020 would only have four years to deliver the housing and the brevity of that time would likely foreclose the municipality from satisfying that obligation by December 31, 2024. We therefore strongly recommend that the 10 year period of compliance run from the date COAH certifies the municipality's plan as COAH has done in the past.

NJAC 5:98–7.2(a) and (b) Consideration of a Municipality's Housing Element and Fair Share Plan When Objections Are Filed, Municipalities that petition for substantive certification simultaneously with or within two years of filing their Housing Element and Fair Share Plan Comment: The pre-mediation report by the Executive Director should be a requirement and not permissive

NJAC 5:98–8.4(d) Mediation, Conclusion of mediation, mediation report Comment: There should be a deadline as to when the mediator prepares the mediation report, with the mediator provided the flexibility to extend the deadline.

NJAC 5:98–8.5(d) Mediation, Revision of Housing Element and Fair Share Plan as a result of mediation Comment: Under these circumstances the Executive Director should be authorized to grant an extension.

NJAC 5:98 – 8.6 (d) Mediation, Reopened mediation Comment There should be a deadline for a mediation report in a reopened mediation.

NJAC 5:98–13.1(b) Motions, Form of Motion Comment: Requiring only one original of all motions, answering papers and accompanying papers in hard copy and electronic should help reduce unnecessary costs for municipalities.

NJAC 5:98–14.5(a), Amendment of Substantive Certification, Review of Objections Comment: The pre-mediation report by the Executive Director should be a requirement and not permissive.

Substantive Rules

NJAC 5:99-1.1(c) General Provisions Comment: There should be a number of means for a municipality to meet its affordable housing obligation. Zoning is just one method and the regulations should authorize a long menu of other means in addition to zoning. The regulations should be revised to reinstate accessory apartment programs, market to affordable programs, assisted living residences, affordable housing partnerships, the extension of expiring controls and other innovative approaches. Municipalities cannot improve their ability to generate affordable

housing in a manner most beneficial to their communities if COAH discourages innovation or diminishes available mechanisms for compliance.

NJAC 5:99-1.1(c) General Provisions Comment: Bonuses should be restored because they incentivize the construction of certain type of housing, such as special needs housing and family rental housing.

NJAC 5:99-2.2 Rehabilitation Share Comment: Units rehabilitated between April 1, 2010 and July 1, 2014 should count toward a municipality's rehabilitation share. The regulations appear not to take units rehabilitated between these dates, which is disconcerting due to the arbitrary nature of the date and considering the high number of units rehabilitated following Superstorm Sandy.

NJAC 5:99-2.3 Unanswered Prior Round Obligation Comment: Please confirm that prior round numbers and adjustment includes a rebuttable presumption.

NJAC 5:99-2.3 Unanswered Prior Round Obligation Comment: Prior round bonuses, including but not limited to rental, redevelopment and special needs housing, should be counted in determining unanswered prior round obligations. Municipalities that complied under those rules should be credited accordingly. While we presume that this is the case since the proposed rules authorize municipalities to address their unanswered prior round obligation through NJAC 5:93-1.1 et seq., which include rental bonuses, COAH should eliminate any question about a municipality's right to rely upon all the standards set forth in NJAC 5:93-1.1

NJAC 5:99-2.3 Unanswered Prior Round Obligation Comment: "Sending" municipalities, which entered into executed regional contribution agreements, should be credited for these units when determining prior round obligation. Municipalities that complied under those rules should be credited accordingly. The transfer of the money should generate the credit because once the sending municipality makes the payment, it has satisfied its obligation and the sending municipality should not be accountable for any lack of performance by the receiving municipality.

NJAC 5:99-2.3 Unanswered Prior Round Obligation Comment: Please confirm that municipalities need not address in their Fair Share Plans the 2024-2034 portion of their Unanswered Prior Obligation. It certainly would not make sense for a municipality to have to plan that far out given all the possible changes that could occur before that obligation ripens.

NJAC 5:99-2.3(b) Unanswered Prior Round Obligation Comment NJAC 5:99-2.3(b) reads, "municipalities shall be governed by the standards in NJAC 5:93 to address Unanswered Prior Obligations." Since 5:93 includes, among other things, a presumptive 20% set-aside, please confirm that municipalities will be able to address their unanswered prior round obligations through this technique, among others.

NJAC 5:99-2.4 Fair Share of Prospective Need Comment: Please confirm that the Fair Share Prospective Need includes a rebuttable presumption.

NJAC 5:99-3.2 1,000-unit cap reduction Comment: The Legislature clearly intended to apply the 1,000-unit cap to the entire obligation, not just prospective need. COAH should conform its regulations to address the objective that the Legislature intended when it used the words "fair share" and not redefine "fair share" so as to change what the Legislature intended when it used that phrase

NJAC 5:99-3.3 Buildable Limit Comment: The ability for a municipality to seek an adjustment based on development capacity, or buildable limit, should be preserved so to allow for sound planning and zoning decisions by the municipality.

NJAC 5:99-3.3 Buildable Limit Comment: Preserved farmland and other lands permanently preserved via easement ~~or~~ restrictive convenant should be considered in the determination of the buildable limit.

NJAC 5:99-3.3 Buildable Limit Comment: Please clarify which sewer service areas were applied in the determination of buildable limits.

NJAC 5:99-3.3 Buildable Limit Comment: COAH's rules apply the buildable limit adjustment to the prospective need or unanswered prior round obligation based upon the assumption that all the units would be affordable. However, COAH has established a new presumptive set-aside of 10 percent. The buildable limit adjustment should reflect the new presumptive set-aside.

NJAC 5:99-4.3(a)4 Fair Share Plan Comment: In the past, COAH has made clear that the 13 percent very low income requirement applies only prospectively. Consistent with its past guidance to municipalities, COAH's regulations should clearly provide that the 13% very low obligation applies only to prospective share.

NJAC 5:99-4.3(a)4 Fair Share Plan, Economic Feasibility Comment: Regulations should be clarified so that costs of this study are not borne by taxpayers. Towards this end, COAH should permit a municipality to use any portion of its trust fund monies, not just the 20 percent reserved for administration, to pay for the cost of these studies. Further, regulations should be clarified as to how to deal with developers/applicants unwilling to provide the requisite information to conduct such an analysis.

NJAC 5:99-4.3(a)4 Fair Share Plan, Economic Feasibility Comment: The requirement for a feasibility study should be waived when the municipality and developer enter into a developer's agreement. COAH should also confirm that it does not intend these regulations to become a basis for any developer to seek relief from an agreement previously entered.

NJAC 5:99-4.3(a)(6) Age Restricted Cap Comment: Allowing a municipality to exceed a cap of 25% on affordable age restricted units if it can demonstrate that the regional need for age-restricted housing supports the percentage proposed is a good idea. COAH should preserve this regulation since the regulation facilitates the ability of the municipality to address the need where it finds it.

NJAC 5:99-5 Vacant Land Adjustments Comment: Eliminating the term "Unmet Need" from the vacant land adjustment process and the requirements to address the unmet need is fully consistent with COAH's Round One regulations and we fully support the change. Please clarify the relationship between vacant land adjustments under the proposed rules and the buildable limits under the Fair Share Prospective obligation. COAH should provide clarity on what set-aside assumption a municipality should utilize after it determines the maximum number of units that can/should be built. Requiring economic feasibility studies to perform a vacant land analysis is too burdensome. Consequently, COAH should eliminate the requirement.

NJAC 5:99-7 Fair Share of Prospective Need Comment: The number of compliance techniques for municipalities should be expanded, including, but not limited to, extension of

expiring controls, market to affordable programs, permanent supportive housing, assisted living residences, affordable housing partnership programs, expanded crediting opportunities, veterans' preference, accessory apartments and such additional innovative approaches that the municipality may devise that indeed creates housing opportunities for lower income households.

NJAC 5:99-10.1 Applicability of UHAC Comment: A judgment of foreclosure should not extinguish controls on an affordable unit. It creates a windfall for the lender at the expense of maintaining an affordable housing unit. Because the amount secured by the mortgage is tied to the deed restricted value of the unit, the lender is at no greater risk than it would be if it lent the same amount for a unit that had a market value at the same reduced amount.

NJAC 5:99-11:9 Affordable Housing Trust Funds, Use of Funds for housing activity Comment: The costs for any feasibility study should be borne entirely by the developer. However, if any costs are borne by the municipality, it should be allowed to use the 80% non-administrative portion of the affordable housing trust fund.

NJAC 5:99-11:11 Affordable Housing Trust Funds, Use of Funds for administrative expense Comment: Please confirm that salary and benefits continue to be allowed use for the administrative expenses of the housing trust funds.

NJAC 5:99-11.16 "Commit To Expend" Comment: COAH should not require even more of a municipality than an agreement to satisfy the commit to expend requirement. Instead, COAH should interpret its regulations broadly to facilitate the ability of municipalities to expend trust fund monies on the various components of the municipality's affordable housing plan.

NJAC 5:99-11.17 Affordable Housing Trust Funds, Comment: The Council should build in a grace period for municipalities for the commitment or expenditure of the trust funds. Many municipalities, through no fault of their own, have been frustrated in their efforts to use their affordable housing trust funds. The Council should give every opportunity for the funding to be used locally, to provide affordable housing, help municipalities achieve their affordable housing obligations and provide a local economic benefit. The Council should also prioritize and expedite the approval of spending plans.

NJAC 5:99-11.17(d) Affordable Housing Trust Funds, Comment: The standards in the referenced section and the criteria to determine "committed" to expend should be expanded so to encourage and assist the use of the trust fund dollars.

General Comments:

10% Presumptive Set-Aside: As in prior rounds, the presumptive set-aside should be 20% for inclusionary development when the affordable units are for sale and 15 percent when the affordable units are for-rent. The increased number of market rate units that will result from the proposed 10% presumptive set-aside (i.e. 10% affordable--90% market rate), will increase sprawl, place greater demands on local infrastructure and could undermine local zoning. The 20% set-aside has been the standard presumptive set-aside for decades and has produced thousands of units of affordable housing in inclusionary developments throughout the state. We are unaware of any compelling evidence that would suggest that the standard can no longer be met or that the economics of inclusionary developments have changed so drastically to justify a 50% reduction in the presumptive set-aside.

Density Bonuses: The density bonus and/or other benefits needed to offset the burden of the presumptive set-aside should be the subject of a benefits/burdens analysis. Clearly, developers do not need the radical increases in density they have demanded in the past to offset the burden of providing affordable housing and to enable them to achieve a "reasonable", "adequate" or "sufficient" profit, which is all that our laws require. See Toll Bros., Inc. v. Tp. of West Windsor, 173 N.J. at 562) ("the incentive for instituting such litigation would be the opportunity to develop an inclusionary zoning site at a **reasonable profit.**")(emphasis added); Mount Laurel II, 92 N.J. at 267 n. 29 (A "program could be devised in such a way as to assure **an adequate profit** for developers.")(emphasis added); Allan-Deane Corp. v. Bedminster Tp., 205 N.J.Super. 87, 115 (Law Div. 1985) ("A review of projects feasibility relates to whether the rezoning and other affirmative measures will provide a builder with **a sufficient profit** to make the projects a likelihood.")(emphasis added).

Additional compliance methods: A number of highly successful compliance techniques would be eliminated under the proposed regulations or left for approval by discretion of COAH. The League recommends revisions to reinstate accessory apartment programs, market to affordable programs, assisted living residences, affordable housing partnership, the extension of expiring controls and other innovative approaches. Reducing such options for municipalities also reduces options for the very populations COAH, the Fair Housing Act and the Mount Laurel Doctrine is intended to serve.

"Credits Without Controls" Comment: The Fair Housing Act requires that COAH empower a municipality to apply credits without control to any component of its obligation, not just one component. Furthermore, the provision of a certificate of occupancy issued between April 1, 1980 and December 15, 1986 should suffice to enable the municipality to meet the first element of the four part test established by N.J.S.A. 52:27D-307. No more than that should be required

Extinguishing of controls through foreclosure: When a unit loses its deed restriction because of foreclosure, COAH provides that it adds to the municipal obligation. . Under no circumstances should COAH increase the municipal obligation if the deed restriction expires since the municipality bears no responsibility for the foreclosure. That said, COAH should make sure municipalities receive notice of the foreclosure in time to attempt to effectuate a cure and should allow COAH to use trust fund money to advance this objective

TDR Comment: The proposed new regulations should include a regulation facilitating the ability of municipalities to implement Transfer of Development Rights ("TDR") and to provide affordable housing, to the extent practical, through a TDR approach to land use control.

Very truly yours,

William G. Dressel, Jr.
Executive Director