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**IN THE MATTER OF THE ADOPTION
OF N.J.A.C. 5:96 AND 5:97 BY
THE NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING**

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

**DOCKET NO. A-005752-07T3
LEAD DOCKET NO. A-5382-07T3**

Civil Action

**On Appeal From The Final Action
of the New Jersey Council On
Affordable Housing**

REPLY BRIEF ON BEHALF OF APPELLANT, TOWNSHIP OF WALL

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PRELIMINARY STATEMENT

Wall Township's challenge to COAH's regulations centers on the enormous fiscal impact of the regulations on municipalities in contravention of the FHA prohibition of requiring municipalities to expend their own money to comply. Specifically, Wall Township demonstrated (1) that COAH has created a multi-billion dollar burden on New Jersey municipalities; (2) that COAH's menu of compliance mechanisms forces municipalities to expend their finite fiscal resources; and (3) that available non-municipal funding mechanisms are insufficient to satisfy the statewide need.

In response to Wall Township's challenge and similar challenges by many others, COAH argued that municipalities do not have to expend their own money because they can rely upon inclusionary zoning, a technique that does not require the expenditure of municipal dollars. COAH also argued that it offers municipalities a "myriad of options" of various compliance techniques that purportedly eliminate the need for municipal expenditures. Finally, COAH provided unsubstantiated assurances that ample resources of revenue are available from other sources to adequately fund New Jersey's affordable housing programs.

None of COAH's defenses has merit. COAH has severely damaged the viability of inclusionary zoning by forcing municipalities to bear a growth share burden for the market units. The "myriad of options" do not represent a viable source of a substantial amount of affordable housing, much less a free source. Finally, while COAH has claimed that adequate subsidies are available from non-municipal sources, it has failed to substantiate this claim.

The impact of COAH's regulations is illustrated by Wall Township's experience. COAH regulations require Wall -- a municipality which has already complied with an affordable housing obligation of over 1,000 units -- to address a growth share obligation of **an additional** 667 units. Further, COAH regulations force the Township, as a practical matter, to rely upon "municipally sponsored projects" in order to meet such a high quota. This compliance technique requires enormous subsidies that are simply unavailable in sufficient quantities from non-municipal sources. Because of the operation of COAH regulations, COAH effectively forces Wall Township to expend enormous municipal resources to comply in direct violation of Sections 302 and 311 of the FHA.

For all these reasons, explained in detail below, this Court should invalidate COAH regulations.

POINT I

COAH'S REGULATIONS VIOLATE THE FAIR HOUSING ACT BY
"REALISTICALLY AND PRACTICALLY" REQUIRING
MUNICIPALITIES TO EXPEND THEIR OWN MONEY TO COMPLY,
AND COAH'S UNSUPPORTED ASSERTIONS TO THE CONTRARY ARE
NO SUBSTITUTE FOR SOUND FACTUAL AND LEGAL ANALYSIS.

Summary of Township's Argument

The Township's argument that COAH regulations "realistically and practically" force municipalities to expend their own money to comply in contravention of the FHA may be summarized as follows:

1. The Legislature expressly prohibits COAH from forcing municipalities to expend their own resources to comply with the FHA. Ab18.¹
2. The construction of 115,666 units of affordable housing in the next decade will create a multi-billion-dollar financial burden on the taxpayers of our state. Ab19.
3. Several factors force municipalities, **as a practical matter**, to rely on heavily-subsidized "municipally sponsored projects" -- a compliance technique which requires enormous subsidies. These factors include: COAH's destruction of "inclusionary zoning" as a viable compliance technique; the limited value of COAH's various other compliance techniques; and the Legislature's recent elimination of Regional Contribution Agreements. Ab19.
4. Since the requisite subsidies are unavailable from non-municipal sources, and since COAH requires municipalities to guarantee the gap in financing for all the compliance techniques in their plans, including municipally-sponsored projects, COAH regulations "realistically and practically" force municipalities to expend their own money to comply. Ab48-59. In this regard, **the Township explained that whether the regulations directly or**

¹ "Ab" refers to the Township's appellant's brief; "Rb" refers to COAH's respondent's brief; "Aa" refers to the Township's appellant's appendix; "Ara" refers to appellant's reply appendix.

by way of practical effect required municipalities to expend their own money should not matter. In either instance, COAH violates the FHA prohibition against forcing a municipality to expend its own money to comply. Ab20.

5. The Township also challenged COAH's effort to discredit the chorus of voices predicting that its regulations would cause economic doom. Specifically, the Township provided a detailed analysis of why COAH's "myriad of options" was not the panacea asserted by the agency. Similarly, the Township exposed the flaw in COAH's conclusory assertion that ample sources of non-municipal subsidies are available to fund the State's affordable housing programs. Ab29-44.

6. Finally, Appellant invited the Court to remand the matter to the OAL for fact-finding, as it did in Non-Profit Affordable Housing Network of New Jersey v. New Jersey Council on Affordable Housing, 265 N.J.Super. 475, 482 (App. Div. 1993), in the event that it questioned the validity of appellant's claims as to the impact of its regulations. Ab60, n. 17.

COAH's Response

COAH did not dispute that the FHA expressly prohibits it from forcing municipalities to raise and expend tax money to comply. Nor did COAH dispute that its regulations will have a multi-**billion** dollar impact on the taxpayers of the state. Rather, COAH simply recycled the conclusory assertions made in its "Responses" to the many public comments warning of the devastating financial impact the regulations on municipalities.

Specifically, COAH asserted - literally for the 38th time - that its regulations provide a municipality "the option to select how to meet its obligation," and that such options "include numerous mechanisms which do not require the expenditure of municipal funds." Rb124. COAH provided no

rebuttal to the Township's criticisms of the individual compliance techniques. Instead, COAH focused on "inclusionary zoning" to support its conclusory claim that its regulations did not require a financial commitment from municipalities, and oddly cites two compliance techniques that *actually require* just such a commitment.² Ibid.

With regard to the availability of outside financial subsidies, COAH merely refers the Court to its unvetted list of "significant federal and state funding programs," Rb125, and asserts that these programs -- coupled with the availability of affordable housing development fees -- eliminate the need for municipalities to expend municipal funds for affordable housing. Ibid. COAH concludes by stating that a municipality can choose whether or not to use such funds based upon "how it desires to meet its affordable housing obligation." Rb126.

The Township's Reply

Appellant's reply to these arguments may be summarized as follows:

A. COAH correctly acknowledged that the FHA expressly prohibits it from requiring municipalities to expend their own money to comply, and, therefore,

² COAH cited N.J.A.C. 5:97-6.10 and 6.11 as two "options that do not require municipal expenditures. . . ." Rb124. Evidently, COAH is not completely familiar with its own regulations, since both of these regulations require a formal funding commitment. See N.J.A.C. 5:97-6.10(e)(8) and 6.11(d)(8): Requiring "[a] municipal resolution **appropriating funds** or a **resolution of intent to bond in the event of a shortfall.**" (Emphasis added).

the sole issue before this Court is whether the regulations violate the FHA.

B. Contrary to COAH's claims, inclusionary zoning does not represent a legitimate alternative to compliance techniques that necessitate municipal expenditures.

C. COAH failed to provide a substantive response to appellant's claim that the so-called "myriad of options" does not eliminate the need for municipalities to expend their own money to comply.

D. COAH failed to provide a substantive response to appellant's claim that there is insufficient funding from non-municipal sources to enable municipalities to comply without their own resources.

E. If this Court finds the record before it inadequate to support appellant's claims despite COAH's failure to provide a substantive response, it should remand the factual dispute to the OAL for expedited fact-finding.

F. At a minimum, if a municipality demonstrates that Mount Laurel compliance compels it to expend its own money in violation of the FHA, COAH should relieve the municipality of the burden to expend its own money - not force the municipality to bond to cover the potentially enormous costs.

A more detailed explanation of these points follows.

A. COAH Correctly Acknowledged That The FHA Expressly Prohibits It From Requiring Municipalities To Expend Their Own Money To Comply, And The Sole Issue Before this Court, Therefore, Is Whether the Regulations Violate the FHA.

COAH agreed, as it must, that the FHA prohibits the agency from forcing towns to raise and expend municipal funds to create affordable housing. Rb123. Therefore, there should be no issue

as to whether COAH can require municipalities to expend their own money to comply, whether directly or indirectly.

In taking this position, we are mindful of the following passage from Mount Laurel II: "Satisfaction of the Mount Laurel obligation imposes many financial obligations on municipalities, some of which are potentially substantial." Mount Laurel II, 92 N.J. at 265. However, for the following reasons, this passage in no way affects the legal import of Sections 302 and 311 of the FHA.

First, when the above quote is examined in context, the Supreme Court clearly was not saying that municipalities must spend tax dollars to achieve constitutional compliance. Rather, the Court merely required municipalities (a) to cooperate with developers in their efforts to obtain subsidies and (b) to provide tax abatements if lawful and necessary:

The trial court in a Mount Laurel case, therefore, shall have the power to require a municipality to cooperate in good faith with a developer's attempt to obtain a subsidy and to require that a tax abatement be granted for that purpose pursuant to applicable New Jersey statutes where that abatement does not conflict with other municipal interests of greater importance.

[Ibid.]

Second, assuming *arguendo* that the Mount Laurel II Court had asserted that municipalities must expend their own money to comply, the Legislature clearly extinguished any such requirement by enacting the FHA. Indeed, the Legislature **twice**

expressly rejected the notion that municipalities can be forced to spend taxpayer dollars to address their affordable housing needs. See N.J.S.A. 52:27D-311d and 302h. Where the Legislature "plainly and clearly" changes the common law, our courts must then defer to the subsequent legislative pronouncements. See, e.g. In re Lead Paint Litigation, 191 N.J. 405, 444 (N.J. 2007).

Third, even assuming *arguendo* that the Mount Laurel II Court had asserted that municipalities *must* expend their own money to comply, principles of comity call for judicial deference to subsequent legislative pronouncements. In this regard, in Hills Dev. Co. v. Tp. of Bernards, 103 N.J. 1, 46-47,65 (1986) ("Mount Laurel III"), the Supreme Court (a) applauded the Legislature's enactment of the Fair Housing Act; (b) announced its "readiness to defer" to the Legislature; and (c) promised comity even if it found that the Legislature had crossed the line and violated the separation of powers doctrine.

Since the above analysis eliminates any doubt as to whether COAH may require municipalities to expend their own money to comply, the only question is whether COAH's regulations directly **or indirectly** violate this limitation.

B. Contrary to COAH's Claims, Inclusionary Zoning Does Not Represent A Legitimate Alternative To Compliance Techniques That Necessitate Municipal Expenditures.

In response to the claims of many appellants that COAH regulations directly or indirectly force municipalities to expend their own money to comply, COAH argued that municipalities have alternatives to expending their own money and that, therefore, appellants' challenges lack merit. Rb124. In support of this argument, COAH touts "inclusionary zoning" as a technique readily available to municipalities that wish to avert expending their own money. Indeed, COAH asserts that inclusionary zoning is the **"primary tool"** available to municipalities to satisfy their affordable housing obligations. Rb125, n.34.

COAH's reliance on "inclusionary zoning" as the means by which municipalities may avert expending their own money is disingenuous and misplaced. The facts associated with Wall Township illustrate why. In this regard, COAH assigned the Township a fair share of 1,785 units, consisting of a rehabilitation component of 45 units; a prior round obligation of 1,073 units; and a growth share obligation of 667 units. N.J.A.C 5:97, Appendices B, C & F. Wall obtained judgments of repose in both the first and second housing cycles and thus, as a practical matter, has fully satisfied its prior round

responsibilities. Aa75. Nevertheless, COAH assigned the Township a colossal growth share obligation of 667 units.

In order to include enough affordable units through inclusionary development to create 667 affordable housing credits, the Township would have to zone for 10,672 units. Assuming a standard 25 percent set-aside on these 10,672 units, that would result in 2,668 affordable units. However, since 75 percent of the 10,672 units would be market units, those 8,004 market units would generate a growth share of 2,001 units: 8,004 market units divided by 4 units equals a 2001. Thus, of the 2,668 affordable units, the Township could use only 667 of these to address any growth share obligation generated outside the inclusionary projects.³

³ The problem with the viability of inclusionary zoning arises from COAH's decision to require municipalities to bear a growth share responsibility for the market units in Cycle III inclusionary projects. N.J.A.C. 5:97-6.4. Thus, municipalities like Wall Township and Freehold Township, which have satisfied their prior round responsibilities, are punished for having previously complied. They cannot achieve a meaningful yield through inclusionary zoning because the growth share obligation generated by the market rate units renders the technique of extremely limited value.

The New Jersey Builder's Association has separately challenged 25 percent set asides as rendering inclusionary developments economically unfeasible. If, for example, the NJBA persuades this Court to compel COAH to roll back set-asides to 20 percent, inclusionary zoning would be rendered useless toward satisfying Cycle III obligation. The affordable units would do no more than satisfy the growth share obligation generated by the market units.

The impact of the construction of 10,672 units by December 31, 2018 - the result necessary to satisfy the responsibilities COAH allocated - would have a devastating economic and developmental impact upon this community of 10,200 homes.⁴ From a development perspective, COAH itself concludes that a municipality is "radically transformed" if it more than doubles in size. See N.J.A.C. 5:97-5.5 (limiting a municipality's affordable housing obligation where satisfying the obligation "would exceed the number of existing housing units in the community"). From a fiscal perspective, doubling the size of a town in less than a decade would obviously force the municipality to build more schools, provide more services, and otherwise bear the types of municipal expenses associated with radical growth.

In view of the above, while COAH can correctly claim that Wall Township has a so-called "choice" as to whether to satisfy its 667-unit obligation through inclusionary zoning, no rational municipality would choose to overwhelm itself through the inclusionary zoning option COAH touts. The situation facing Wall Township is directly analogous to the situation the Supreme Court described in Mount Laurel II regarding the so-called

⁴ We ask the Court to take judicial notice of page 8 of the Township's current Housing Element and Fair Share Plan, adopted in December, 2008, which sets forth the current housing stock of the community.

choice Mount Laurel Township's inclusionary ordinance gave affected developers:

It is equally unrealistic, even where the land is owned by a developer eager to build, simply to rezone that land to permit the construction of lower income housing if the construction of other housing is permitted on the same land and the latter is more profitable than lower income housing. One of the new zones in Mount Laurel provides a good example. The developer there intends to build housing out of the reach of the lower income group. After creation of the new zone, he still is allowed to build such housing but now has the "opportunity" to build lower income housing to the extent of 10 percent of the units. **There is absolutely no reason why he should take advantage of this opportunity if, as seems apparent, his present housing plans will result in a higher profit.**

[Mount Laurel II at 261 (emphasis added).]

Just as Mount Laurel Township offered developers a "choice" that was not meaningful, COAH regulations offer Wall Township a similarly unmeaningful choice. There is "**absolutely no reason why [Wall Township] should take advantage of this opportunity**" to comply through inclusionary zoning.

Therefore, inclusionary zoning is not a viable option for most towns including Wall Township, and it is certainly no longer the "primary tool" as COAH asserts.

C. COAH Failed To Provide A Substantive Response To Appellant's Claim That The "Myriad of Options" Does Not Eliminate the Need For Municipalities To Expend Their Own Money To Comply.

Subchapter 6 of COAH's substantive regulations provides a list of "Mechanisms For Addressing The Fair Share Obligation."

See N.J.A.C. 5:97-6.1 et. seq. As the subchapter heading suggests, the mechanisms included in Subchapter 6 represent the "universe" of techniques available for inclusion in municipal fair share plans. Therefore, municipalities must choose from this list in designing their affordable housing plans.

In addition to analyzing the infirmities of COAH's "inclusionary zoning" technique as discussed above, the Township methodically analyzed each of the remaining compliance techniques in Subchapter 6, and demonstrated (1) why these options are of limited utility; and (2) how these options require towns to make significant financial commitments in exchange for securing affordable housing credits.

COAH chose not to defend the detailed criticisms of its individual compliance mechanisms, but instead asserted that certain options "do not require the expenditure of municipal funds." Rb124. COAH listed "supportive and special needs housing" and "assisted living residences" as two compliance techniques⁵ that allegedly do not require expenditure of municipal funds.

⁵ COAH also included various "rental bonuses" to support its position that certain compliance mechanisms do not require municipal expenditures. See Rb124. However, in truth, COAH does not consider "rental bonuses" as "compliance mechanisms." See www.state.nj.us/dca/affiliates/coah/resources/checklists.html (COAH's web page listing checklists for "**each** of the affordable housing fair share compliance mechanisms or projects **that may be proposed** to address the municipality's rehabilitation share,

COAH is wrong. Other than inclusionary zoning, **every single** Cycle III compliance mechanism -- including the two cited by COAH -- requires the municipality to either demonstrate adequate funding or adopt a formal resolution committing to financially guarantee any funding shortfalls, no matter how great the potential expense. See N.J.A.C. 5:97-6.2(d)(3) (rehabilitation); N.J.A.C. 5:97-6.3(d)(2) (ECHO units); N.J.A.C. 5:97-6.7(d)(6)(ii) (municipally sponsored and 100 percent affordable developments); N.J.A.C. 5:97-6.8(d)(4) (accessory apartment programs); N.J.A.C. 5:97-6.9(d)(5) (market to affordable programs); N.J.A.C. 5:97-6.10(e)(8) (supportive and special needs housing); N.J.A.C. 5:97-6.11(d)(8) (assisted living residences); N.J.A.C. 5:97-6.14(c)(3) (extension of expiring controls); N.J.A.C. 5:97-6.15(a)(4) (Other innovative approaches).

Therefore, despite COAH's erroneous claim to the contrary, municipalities have absolutely no choice but to accept financial exposure through COAH's mandatory funding resolution. Without such formal action by the governing body, COAH will not grant credit, thereby making it literally impossible for a municipality to secure substantive certification. Therefore,

prior round and projected growth share obligation.") (emphasis added).

while COAH insists that towns have "choices," in reality, they have no real choice.

D. COAH Failed To Provide A Substantive Response To Appellant's Claim That There Is Insufficient Funding From Non-Municipal Sources To Enable Municipalities To Comply Without Violating the FHA.

Consistent with the detailed critical analysis of COAH's individual compliance mechanisms, the Township also provided a detailed analysis of the insufficiency and irrelevancy of the various sources of funds allegedly available for the creation of affordable housing. COAH again responded to the Township's detailed analysis with unsupported generalities and blind assurances, including reference to the new 2.5 percent nonresidential development fee, and fees already collected by municipalities. Rb125.

COAH's "all is well" assurances forces towns to play financial Russian Roulette with five bullets in the six chambers. While developers of municipally sponsored projects may secure funding, the demand for 9 percent tax credit projects will necessarily rise as municipalities realize that two major compliance techniques - regional contribution agreements and inclusionary zoning - are no longer a legitimate option. And the supply is severely limited. The HMFA funded less than one

third of the projects for which developers sought funding last year.⁶

In view of the Township's unrefuted analysis, this Court has sufficient grounds to conclude that a lack of sufficient subsidies will force municipalities to expend taxpayer funds to satisfy the statewide need. Thus, COAH regulations indeed directly or indirectly force municipalities to expend their own money in contravention of the FHA.

This Court should not succumb to COAH's smoke and mirrors efforts to trick the Court into believing that billions of dollars are available for the construction of 115,666 units of affordable housing. This is simply not true.⁷ Moreover, had COAH abided by the Administrative Procedures Act and conducted a bona fide Economic Impact analysis, it would have necessarily concluded that sufficient funds simply are not available.⁸ Throughout this process, COAH has taken a "trust me" attitude with regard to the availability and sufficiency of affordable

⁶ See <http://www.nj.gov/dca/hmfa/biz/devel/lowinc/awards.html>.

⁷ The municipal hysteria and controversy surrounding COAH's current regulations is undeniable. Public bodies and elected officials are so incensed about the regulations because their professionals -- including planners and attorneys -- have an ethical duty to advise their clients of the predictable financial ramifications of these regulations. As reality sinks in, the public's outrage reasonably rises.

⁸ See the reply brief, dated April 13, 2008, submitted by the Township of Freehold, Docket No. A-5760-07T3,

housing subsidies. The time for granting blind trust in our state agencies has long passed.

COAH's regulations clearly require COAH directly or indirectly require municipalities to expend their own money to comply despite COAH's empty assurances to the contrary. Therefore, this Court should invalidate the regulations.

E. If This Court Finds the Record Before It Inadequate To Support Appellant's Claims Despite COAH's Failure To Provide A Substantive Response, It Should Remand The Factual Dispute to The OAL For Expedited Fact Finding.

The Township asserts that its proofs, compared to COAH's over-generalized, conclusory responses, provide a sufficient basis for this Court to conclude that the limited utility of COAH's compliance techniques coupled with insufficient subsidies "realistically and practically" force towns to spend their own money. If the Court agrees, it must invalidate COAH's regulations for violating Sections 302 and 311 of the FHA.

In the event that the Court concludes that it has insufficient facts to determine the issues, the Township proposed that this Court remand the matter to the OAL for fact finding, as it did in Non-Profit Affordable Housing Network of New Jersey v. New Jersey Council on Affordable Housing, 265 N.J.Super. 475, 482 (App. Div. 1993). While we maintain that the record is clear that there are insufficient non-municipal

subsidies available, the Court has this avenue available to it for fact-finding should it deem that necessary.

F. At a Minimum, If A Municipality Demonstrates That Mount Laurel Compliance, As A Practical Matter, Compels It To Expend Its Own Money To Comply, COAH Should Relieve The Municipality of The Burden To Expend Its Own Money - Not Force The Municipality To Bond To Cover The Potentially Enormous Costs.

Notwithstanding the foregoing, if COAH truly believes its repeated assurances that adequate funding is indeed available from outside subsidies, then *a fortiori* there is no need to require municipalities to make enormous financial commitments through mandatory gap-funding resolutions. If it truly believes its own story, COAH therefore should voluntarily amend its regulations to eliminate this requirement.

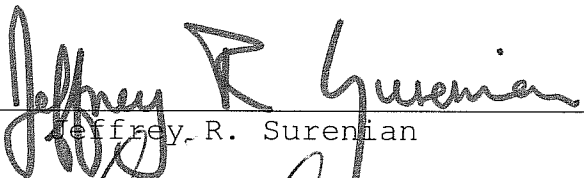
If COAH refuses to amend its regulations voluntarily, this Court should invalidate the discrete funding resolution requirement in each of COAH's individual compliance mechanisms, and allow municipalities who have already made their Hobson's choice to void such resolutions without risking loss of protections from Mount Laurel suits. Only then can this Court truly confirm that the regulations conform to Sections 302 and 311 of the FHA.⁹

⁹ The Township also incorporates by reference the reply brief submitted by the Township of Freehold, Docket No. A-5760-07T3, arguing that COAH violated the Administrative Procedures Act in adopting its current regulations.

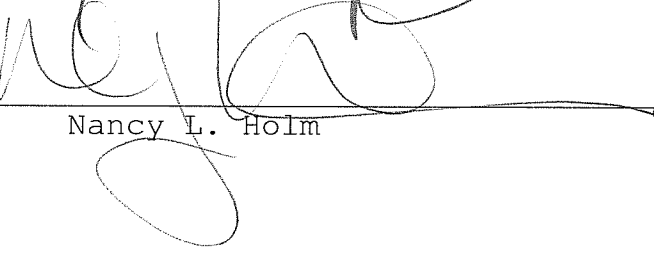
CONCLUSION

In view of the forgoing, Wall Township respectfully requests that this Court invalidate COAH's current regulations because they "realistically and practically" force municipalities to spend their own money to comply, in direct violation of the Fair Housing Act.

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Dated: April 13, 2009