NJLM New Jersey State League of Municipalities

407 West State Street, Trenton, New Jersey 08618
PHONE (609) 695-3481 • FAX (609) 695-0151
EMAIL league@njslom.com • www.njslom.com

William G. Dressel, Jr., EXECUTIVE DIRECTOR | Michael J. Darcy, CAE, ASSISTANT EXECUTIVE DIRECTOR

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Lucy Voorhoeve, Executive Director
COAH
Department of Community Affairs
101 South Broad Street
PO Box 204
Trenton, NJ 08625-0204

Dear Ms. Voorhoeve,

On behalf of the New Jersey State League of Municipalities and its 566 member municipalities, I would like to submit the following comments for your consideration regarding the newly proposed COAH "3rd round" regulations published in the August 16, 2004 *New Jersey Register.*

GENERAL COMMENTS.
COAH continues to deserve credit for retaining "growth share." As pointed out on many occasions, since the COAH process is a voluntary one initiated by the municipality, there must be inducements in the Regulations to encourage municipalities to participate.

PROPOSED SUBSTANTIVE RULES
SUBCHAPTER 1. GENERAL PROVISIONS.

NJAC 5:94-1.1(d).
This section should be modified to include a provision making it clear that the affordable housing ratios represent a method to establish a municipality's obligation but does not represent a set-aside which is handled elsewhere in the Regulations. NJAC 5:94-4.4a attempts to clarify that inclusionary developments and set-asides are not the same ratio as the obligation, but an affirmative statement should be made.

NJAC 5:94-1.2(d)2.
This section should be revised to allow municipalities to apply the previous substantive regulations (5:93-1, et seq.) to the satisfaction of that portion of their obligation related to their prior rounds and have the new regulations apply to the Growth Share portion, or apply growth share to the total obligation.

NJAC 5:94-1.4. Definitions.
The definition of the term "Growth Share" should be modified by inserting a statement that: "Growth Share creates the obligation and is not a compliance standard".

The definition of the term "Inclusionary Development" should be revised to make it clear that the Growth Share ratio is **not** the inclusionary ratio.

The definition of the term "Realistic Opportunity" should be revised by adding a provision that the ratio creating the obligation does not represent the set aside ratio to

create a realistic opportunity to again emphasize the fact that a set-aside ratio is different from the ratio that creates the affordable housing obligation.

The definition of the term "Receiving Municipality" should be expanded to address the receipt by a receiving municipality of non-Growth Share transfers for the period 1987 through 1999. We recognize that COAH may take the position that since the RCA is pre-third round Rules, the Rules in 5:94 will not apply, but in Section 5:94-1.2(d)2, the new regulations apply to RCA's if you did not petition for previous second round substantive certification.

The definition of the term "Regional Contribution Agreement" should be modified to clarify that it can also be utilized for the satisfaction of a portion of the prior round obligations.

The definition of the term "Set-Aside" should be modified to include a statement as follows: "The Set-Aside percentage is not the same percentage that creates the Growth Share obligation."

SUBCHAPTER 2. PREPARING A HOUSING ELEMENT AND DETERMINING MUNICIPAL FAIR SHARE OBLIGATIONS.

NJAC 5:94-2.1(d).
This is the first section that should be modified to address the concern of several municipalities that the calculation of Growth Share should be based upon Certificates of Occupancy issued after January 1, 2004 that result from development approvals that take place after January 1, 2004.

NJAC 5:94-2.2(b)4.
Consideration should be given to deleting the requirement that plan projections for 2015 or growth projections for 2015 in an endorsed Plan approved by the State Planning Commission be supplied as part of the supporting information for the Housing Element.

NJAC 5:94-2.3(a) & (b).
The providing of a presumption of validity of a municipality's Growth Share projections is appreciated. COAH, however, should also give all due consideration to municipal plans that are not consistent with the State Plan projections. COAH should make an independent evaluation of the municipalities' projections and not put an undue burden on the municipalities to provide consistency with the State Plan numbers.

NJAC 5:94-2.3(c).
We recommend the elimination of the requirement that a municipality obtain initial Plan endorsement from the State Planning Commission by the three year anniversary review. The "plan endorsement process" is itself an unknown process. To date, no municipalities have received initial plan endorsement. To date, only one municipality has applied for initial plan endorsement.

Plan endorsement is an untested process, and we must object to requiring it in order for municipalities to receive COAH certification. The Mount Laurel II decision is clear that when municipalities satisfy their affordable housing obligation, they have the discretion to zone as they deem appropriate.

Seeking COAH certification and seeking plan endorsement should both continue to be voluntary and self-determining processes.

NJAC 5:94-2.4(a)1-4.
The count of the Certificates of Occupancy issued after January 1, 2004 is potentially detrimental to taxpayers in many communities. As drafted, an affordable housing obligation will be accumulated for approvals that date back many years. These newly proposed regulations are designed to weave the principles of smart growth and sound planning with the constitutional obligation to provide affordable housing. The League believes that many municipalities planned and planned well but could not anticipate that approvals granted 5, 10 or even 15 years ago and are now only coming online would create a future "growth share" obligation.

The League, which represents all 566 municipalities in the State, is also cognizant that while this proposal will negatively impact some municipalities, a change in regulations could negatively impact other municipalities. We ask, therefore, that COAH carefully reconsider this provision. We note that these municipalities do not have the authority to modify the terms under which these approvals were granted.

We ask that COAH give consideration to how municipalities in this situation will be impacted; how it will affect taxpayers and how it affect sprawl. We ask that COAH also consider how municipalities that host universities, other educational facilities, hospitals and other typical non-profits will be impacted by this proposal.

COAH should at least exclude from the calculation those units (both residential and non-residential) which were subjected to a development fee because those units have also provided their "fair share" of the obligation. In this way, at least those municipalities that have previously participated in the process and have been able to impose development fees will not have to count market units for which Certificates of Occupancy were issued and development fees imposed.

SUBCHAPTER 3. CREDITS, REDUCTIONS AND MUNICIPAL ADJUSTMENTS.

NJAC 5:94-3.2(b)1.
Municipalities should be able to address Growth Share obligations with surplus credits whether or not the unit has been built or a Certificate of Occupancy issued. Theoretically, COAH has determined that the particular site in question provides a realistic opportunity for the construction of those affordable units and consequently a municipality should not have to provide a new unit to satisfy a Growth Share obligation that it would otherwise be able to satisfy through a surplus unit to be constructed.

NJAC 5:94-3.2(b)2.
Municipalities should be able to address Growth Share obligations with bonus credits whether or not the unit has been built or a Certificate of Occupancy issued. To do otherwise undermines the determination that COAH has made that the particular site that is to be generating these affordable units represents a realistic opportunity for that to happen. If it does, then the municipality should get a credit for it since it does not control the timing of the construction. Moreover, if this is not done, municipalities will be "overbuilding" on their obligation because they will be providing for a Growth Share unit

when it could have been satisfied through a surplus or bonus credit from previous round and if that previous round unit is then built, the municipality has provided, in effect, twice the number of units created by that particular obligation.

NJAC 5:94-3.2(b)3.
Municipalities should be able to address Growth Share obligations with RCA units irrespective whether all funds have been dispersed.

NJAC 5:94-3.2(c).
This section appears to be inconsistent with the previous section. This section refers to municipalities being able to claim as credits surplus sites where affordable housing remains undeveloped.

SUBCHAPTER 4. PREPARING A FAIR SHARE PLAN.

NJAC 5:94-4.3(f).
If a substandard unit is brought up to Code for less than the $10,000 minimum, the municipality should still get credit for it. The establishment of this type of average fee encourages the use of funds just to comply with the calculated numbers.

NJAC 5:94-4.4(a).
This section will likely encourage developers to argue that anything greater than that imposes an unfair burden, despite the fact that immediately following that sentence is a sentence stating that the zoning may provide for greater than 1 affordable unit for 8 market units.

NJAC 5:94-4.4(a)1.
We recommend this section be deleted. Developers can well afford more than 1 for 8 set-asides even if there is not an increase in density.

NJAC 5:94-4.4(a)2.
These regulations need to be modified to not link the creation of the obligation to the compliance mechanism. Inadvertently, COAH is creating a controversy whereby municipalities that are going to provide for 20% set-asides, or greater, are going to be fighting to continue to have that provision in their Plans.

NJAC 5:94-4.4(b).
This section needs to be substantially revised. It provides that the affordable housing **obligation** accrues regardless of the size of any development and then provides that a municipality ". . . shall require a developer to construct the affordable units on-site or, alternatively, allow the option of a payment in lieu of constructing the unit on-site. That fee (not a development fee) is to be negotiated between the municipality and the developer [See NJAC 5:94-4.4(c)]. If that is the case, what units will ever be subject to a development fee under subchapter 6, 5:94-6.1 et seq.?

NJAC 5:94-4.4(b)1.
If the inclusionary component is not to be built on-site, are the market units of that inclusionary development subject to the development fee or does the developer make the negotiated contribution in lieu of construction and then is not subject to a development fee for the market units of that development?

NJAC 5:94-4.5(a)4.
For wetlands and category one waterways, there should be reference made to the buffer areas not being within portions of sites slated for construction.

NJAC 5:94-4.9.
Accessory apartments should be treated as other compliance mechanisms and not limit their occupancy to only ". . . low income households." Moderate income households should also be included.
The municipality should be able to present its reasons as to why, despite past history with accessory apartments generally, unique circumstances exist that would substantiate a municipality's claim that it has designed a program that is likely to create a realistic opportunity for over 10 units. At the very least, the municipality should be able to provide more accessory apartments if the first ten actually work. Alternatively, provide that a municipality can continue to always have up to 10 in its Plan and can shift during the course of the Plan implementation to add accessory apartments, provided they do not at any time go over 10 unconstructed accessory apartments.

NJAC 5:94-4.12.
Allow ECHO housing units to be utilized whether owned by the municipality or not.

NJAC 5:94-4.15.
COAH should be complimented on providing a general performance standard mechanism to evaluate innovative programs that municipalities may develop to accommodate their low and moderate income housing obligations.

NJAC 5:94-4.16.
Municipalities should not be penalized because affordability controls are expiring. They should not have to "reprovide" that unit as part of its new obligation.

NJAC 5:94-4.17(a)3.
Sites that were zoned for affordable housing during the first and second rounds that have not commenced construction should be allowed to be deleted by a municipality irrespective of whether the same was subject to a Mediation Agreement or part of a negotiated settlement. If previously designated sites have not been the subject of a development application or commenced construction, there should be no obligation for a municipality to include it in their Plan or retain the zoning. This is especially important for sites that were included in first round obligations. If those units that were zoned between 1987 and 1993 are not built in 2004, the presumption should be just the opposite if the municipality does not want to include it. At best, this should be a municipal option and developers should accrue no rights since they have sat on those rights for an extended period of time.

NJAC 5:94-4.17(b).
COAH should be complimented for including this provision and attempting to integrate the statutory amendment in 2002 with their regulations where a municipality has "effected the construction" of all of its affordable housing units. Nevertheless, to require the municipality to submit the filed Deeds with appropriate Deed restrictions and

Certificates of Occupancy is particularly onerous. Municipalities that have been implementing their programs annually submit monitoring reports to COAH setting forth the status of their Plans and implementation of their programs. The ability of a municipality to comply with this section should be made simpler.

Consideration should further be given to allowing municipalities to delete sites where they have "overzoned" where they are approaching the full satisfaction of their obligation. In other words, the statutory amendment only applies if a municipality has fully satisfied its obligation by actual construction. There should be some flexibility provided to a municipality if it is approaching the satisfaction but has not actually achieved it.

NJAC 5:94-4.20(d).
Municipalities should continue to obtain bonus credits for rental units. Assuming that the need for rental housing is still significant, the providing of bonus credits will encourage municipalities to develop affordable rental housing which is not a compliance mechanism favored by municipalities.

NJAC 5:94-4.22(a).
Consideration should be given to providing bonus units if municipalities provide housing to households earning 40% or less of the median income, as opposed to 30%. In addition, a higher bonus, i.e. 3 for 1 should be provided if a municipality creates affordable housing opportunities for persons at the 20% or less stage, in which case this section should be amended to create a 2 for 1 bonus for between over 20%, but not greater than 40% and then a 3 for 1 credit for anything under 20%. Again, incentives are the key to encouraging municipalities to participate.

SUBCHAPTER 5. REGIONAL CONTRIBUTION AGREEMENTS.

NJAC 5:94-5.1(a).
It should be clarified that municipalities can also utilize RCA's to satisfy their prior round obligations as well under 5:93.

NJAC 5:94-5.2(b).
The receiving municipality should be given the flexibility of providing all age restricted housing with monies received from an RCA. The sending municipality should receive credit irrespective of whether the receiving municipality utilizes the contribution for age restricted units.

NJAC 5:94-5.2(c).
RCA's for rentals should be able to be accommodated through rehabilitation of rental units as well. There are many urban areas where substantial rehabilitation to existing rental units should be a priority and funding received from an RCA should be available to the receiving municipality for those purposes.

SUBCHAPTER 6. DEVELOPMENT FEES.

General Comment.
There does not appear to be a clear coordination between this section and the in lieu of construction section under NJAC 5:94-4.4(b) through (e). It would appear that since the

affordable housing obligation affects every project, there is no room for a development fee, but instead a fee in lieu of construction. To illustrate, NJAC 5:94-6.8(a) provides that all affordable housing developments shall be exempt from development fees. Are not all developments now part of the creation of the obligation? The term "Affordable Housing Development" is defined in 5:94-1.4 as being an inclusionary development, a municipal construction project or a 100% affordable development. So, is it only inclusionary developments that have to pay a contribution in lieu of construction if the affordable unit is not constructed while other conventional developments, while creating an obligation (1 of 9), does not represent an affordable housing development and therefore those are responsible for the development fee?

NJAC 5:94-6.6(a).
The increase to 1% of equalized assessed valuation is appropriate.

NJAC 5:94-6.6(b).
The 6% maximum should be allowable if density is increased irrespective of whether that is done by variance. Moreover, a municipality should be permitted to establish a higher percentage if it can demonstrate to the satisfaction of COAH that the higher percentage represents a reasonable estimate of the increased value to the developer of the more intensive development.

NJAC 5:94-6.7(a).
The increase from 1% to 2% for non-residential development is laudable. However, the same issue is raised as to if that development creates an obligation of 1for 25, can the municipality negotiate a contribution in lieu of the construction of the one unit or can it simply impose development fees at the 2% level on that development?

NJAC 5:94-6.7(b).
The 6% maximum should be allowable if floor area is increased irrespective of whether that is done by variance. Moreover, a municipality should be permitted to establish a higher percentage if it can demonstrate to the satisfaction of COAH that the higher percentage represents a reasonable estimate of the increased value to the developer of the more intensive development.

NJAC 5:94-6.12(a).
There should be added to the uses of development fee the ability to purchase a unit upon which a foreclosure action is being brought (although since the affordability controls continue to apply, the unit is probably not removed from the housing stock and municipalities will not have to worry about losing a unit in the event of foreclosure, if we understand the revised affordability regulations correctly.)

NJAC 5:94-6.12(c).
A portion of the money should not be **mandated** to be utilized for providing affordability assistance to those households earning 30% or less of the median income by region.

NJAC 5:94-6.14(c).
COAH should be complimented for allowing the modification of development fee ordinances to merely increase the percentage in accordance with these new regulations without COAH approval.

NJAC 5:94-6.16(b).
COAH's direction to utilize development fee funds in a certain way should only be done after notice and an opportunity to be heard is provided to the municipality. Perhaps it does not have to be a hearing pursuant to the Administrative Procedure Act (NJSA 52:14B-1 et seq.) as set forth in 5:94-6.16(c), but there should be notice provided and some opportunity to be heard.

SUBCHAPTER 7. CONTROLS ON AFFORDABILITY AND AFFIRMATIVE MARKETING.

It should be clarified that municipalities will obtain all surpluses in the event of a foreclosure or the purchase at a foreclosure sale. It is not clear whether the uniform controls on affordability contain that requirement.

SUBCHAPTER 8. COST GENERATION.

NJAC 5:94-8.1.
There should be added to this section a provision clarifying that utility fees such as connection or capacity fees shall not be considered cost generating features or alternatively that the development standards set forth do not include the payment of fees and costs.

NJAC 5:94-8.2(a).
It should be clarified that while COAH should give "special attention to" these various requirements in ordinances, the ordinances should continue to enjoy a presumption of validity and should not be presumed to create improper cost generation obligations.

NJAC 5:94-8.3(a).
It should be made clear here that if a developer chooses a consultant from the municipality's list, the developer agrees to not challenge the suggested expansions as undue exactions or cost generating factors under the municipality's ordinance.

SUBCHAPTER 9. PROGRESS AND MONITORING REPORTING.

NJAC 5:94-9.1(a).
It should be clarified that progress and monitoring reporting will also be utilized to confirm whether a municipality has met the requirements of NJSA 52:27D-311(g).

Thank you.

Very truly yours,

William G. Dressel, Jr.
Executive Director

cc: The Hon. James E. McGreevey, Governor, State of New Jersey
The Hon. Susan Bass Levin, Commissioner, Department of Community Affairs
Edward J. Buzak, Esq., Chair, League's Affordable Housing Committee