

December 4, 2003

Lucy Voorhoeve, Executive Director
COAH
Department of Community Affairs
101 South Broad Street
PO Box 813
Trenton, NJ 08625-0204

Dear Ms. Voorhoeve:

On behalf of the New Jersey State League of Municipalities, I submit the following comments for your consideration regarding the proposed COAH regulations published in the October 6 New Jersey Register.

Since the League represents all 566 municipalities in the Garden State, we are in a unique and difficult position. The proposed regulations impact municipalities in different ways, depending on region, past history with COAH and growth trends. Our comments, therefore, are not specific to any one municipality, but of interest to municipalities in general.

GENERAL COMMENTS

First, COAH deserves credit for taking this innovative step to coordinate and integrate the concepts of “smart growth” with the constitutional obligations to provide affordable housing. The previous methodology clearly contributed to sprawl. The provision of affordable housing, however, does not necessarily contribute to sprawl. It was not the relative small portion of housing built for the low and moderate income families that led to sprawl, but the massive amount of housing built at or above market rates. This led to what we term as the “multiplier effect.” The over-development of market rate units put stress on the system, forcing municipalities to provide additional infrastructure, such as sewer, roads and water, and placed additional burden on school systems.

No longer will speculative housing projections drive the market. Instead, a municipality will be able to meet its housing obligation as it grows, and allows for a municipal to plan accordingly. That alone is a positive step.

That said, the League has heard from its members on a number of questions and issues that we believe need to be addressed.

- Municipalities that have reached development capacity should be recognized for the affordable housing that is already in place. Areas designated as development zones and are also brownfields will need greater flexibility than these regulations currently allow. There are intrinsic benefits to all in placing formerly abandoned properties back on the tax rolls. Affordable housing obligations should not be an impediment to this redevelopment.
- A number of developing communities have granted preliminary or final approvals for development, but the ensuing permits have not yet been issued. In these circumstances, these approvals may be counted towards 2004 as part of their housing obligations. These municipalities made reasonable and sound-planning decisions; not realizing these approvals would count against them in the future. For this reason, the League believes that the

proposed regulations should exempt all residential and non-residential projects that have preliminary or final approval prior to the implementation of these rules.

- COAH should consider the effect of the loss of jobs in a particular municipality or the loss of units and how the same will affect its prospective obligations.
- COAH should clarify that inclusionary developments approved prior to the effective date of the new Rules do not count for calculating prospective obligations under the Growth Share Formula.
- COAH should consider making it clear that municipalities that purchase a unit at a foreclosure sale can then resell that unit without bidding or transferring it to a local housing authority to do so, so long as it complies with the sales procedures as set forth in its affirmative marketing, including utilizing the pool of individuals eligible to purchase such a unit.

SPECIFIC COMMENTS

Subchapter 1. General Provisions

This section should be amended to clarify that the one in 10 housing units and one in 30 jobs creates the obligation and does not represent a method of compliance. It should be clear that municipalities can continue to utilize set-asides which could be in excess of one in 10 or all other mechanism as set forth in the proposed regulations to satisfy their obligation. We believe that there should a definitive statement clarifying this question.

The new definition of “fair share” and “growth share” with the latter providing for an obligation that there be a ratio of one affordable unit in every ten housing units constructed, plus one affordable unit for every thirty jobs created in the municipality is a sound approach. However, the ultimate obligation should emerge from the actual production of those housing or commercial developments and not be based upon zoning ordinance or prior approvals that have never been transformed into actual construction.

Proposed NJAC 5:94-1.3 Definitions

The definition of “accessory apartment” should not be limited to dwelling units within existing buildings. There may be instances where it makes planning sense to include an accessory apartment in a new detached garage or other new accessory building.

The definition of “suitable site: should be changed to allow for municipal adjustments as set for in NJAC 5:93-4.1 et. seq. as was previously referenced in the existing COAH regulations.

Subchapter 2 Municipal Determination of Need

NJAC 5:94-2.2 1999-2014 Low and Moderate Income Housing Need Estimates

We recommend this section be clarified so that the residential component of growth share is calculated by dividing by 9 the number of market units created.

NJAC 5:94-2.1 Municipal Determination of Need

The term “expansion of existing facilities” needs better clarification. It should not include the replacement of older floor space with new space, or the re-use or reoccupation of area.

NJAC 5:94-2.2 1999—2014 Low and Moderate Income Housing Need Estimates

Municipalities should be given the flexibility to counter the data in Appendix E related to the creation of obligation from new non-residential development.

Subchapter 3. Credits, Reductions and Municipal Adjustments

Subchapter 3, dealing with credits, reduction and municipal adjustments appears more complicated than necessary. This subchapter should include the following:

- a. No anticipated certificates of occupancy which are the result of prior round compliance efforts should be included in the growth share computation.
- b. Surplus credits and reduction in proposed NJAC 5:94-3.1(c) should apply.
- c. With reference to any remaining prior round obligation, it should be made perfectly clear that all methods of credits, reductions and adjustments contained in NJAC 5:93, et seq. should apply. Consider defining the term, “prior round obligation.”

With reference to the proposed language, it is unclear how the “credits” and “reductions” contained in NJAC 5:94-3.1(a) and (b) would be applied. Recognizing the obligation only includes “remaining” prior round obligation, not the total obligation, it is difficult to understand how the credits would be applied. The same can be said for “reductions.”

Additionally, the end of NJAC 5:94-3.1(b) should be eliminated, as municipalities should not have to prove realistic opportunity of prior approved plans, which should stand on their own merit.

NJAC 5:94-3.1(d) seems to confuse the remaining prior round with total need.

Subchapter 4. Preparing A Housing Element and Fair Share Plan

NJAC 5:94-4.1

The Housing Element and Fair Share Plan, and especially projected growth share, should be afforded a presumption of validity the same as a municipality would receive if it opted, under the Fair Housing Act, to voluntarily seek a declaratory judgment of compliance and repose. Without such a presumption, municipalities will find themselves in a battle of experts before COAH on a standard of preponderance of evidence, wherein developers may seek to inflate projections for their own gain. The presumption would convert the standard of proof on an objector to that of “clear and convincing evidence.”

NJAC 5:94-4.1(b)

What happens if the actual growth is less than the estimated growth? If the municipality’s fair share plan includes municipally sponsored units pursuant to 5:94-4.3(b) or an RCA pursuant to 5:94-4.3(c) which the municipality anticipates financing through development fees pursuant to subchapter 7 and the development fees do not materialize in the anticipated amounts, because of lower actual growth, must the municipality still construct the municipally-sponsored units or make the RCA contributions?

NJAC 5:94-4.1(c)

The residential portion of growth share is to be computed on “new construction.” The term, however, is not defined. It should not include a unit which is constructed in place of a knock-down. The manner of computation of growth share in NJAC 5:94-2.1 should specifically state that certificates of occupancy for new construction issued in place of prior existing construction should not be included in the growth share computation. In particular, the timing for construction needs to be outlined. A new unit of affordable housing is not going to be constructed after each nine units of conventional housing are constructed.

NJAC 5:94-4.1(d)

The phrase “provision of affordable housing” needs clarification, so it means a plan as opposed to the actual construction. It may well be that a one to one project of 100 affordable housing units done through a non-profit developer may not come on line until the fourth, fifth or sixth year after substantive certification and the municipality should not be penalized by not having an actual unit in place at the time that the first nine units are constructed.

This calls for an adjustment of the projected growth based upon actual growth every three years. The adjustment is permitted only when “directed” by COAH. In this regard, municipalities should be permitted the right to amend projections without being directed, and the process to amend should be not be made procedurally onerous. While an initial projection is necessary, the intent is to tie the obligation to “actual” growth. As a result, a municipality should be permitted to amend its projection based upon actual growth.

Additionally, section (d) should included language that a municipality has the right to be heard before being directed to adjust its plan.

We believe that the review period should be changed to four-year increments.

NJAC 5:94-4.2 Mandatory Requirement of the Housing Element and Fair Share Plan

NJAC 5:94-4.2(a) (1)

The mandatory requirements of the Housing Element and Fair Share Plan should be focus on projected certificates of occupancy, not concentrated on permits, approvals and applications. While such information may be required as support, COAH's focus should be on certificates of occupancy if growth share is to be based on those certificates. The regulation should avoid, to the greatest extent possible, creating conflicts at COAH as to how to compute the obligation. In this respect, unnecessary vestiges of prior submission requirement should be eliminated.

NJAC 5:94-4.2 (ii) and (iv)

A municipality which in the past has relied upon earlier regulations of COAH should not be saddled with unrealistic fair share obligations based upon inactive approvals granted years previously. Accordingly, we recommend that NJAC 5:94-4.2(ii) (iv) be amended as follows:

ii. A projection of municipality's housing stock, including the probable future construction of affordable housing for the ten years taking into account, but not necessarily limited to: construction, permits issues, ;

iv. A analysis of the existing jobs and employment characteristics of the municipality and a projection of the probable future jobs and employment characteristics of the municipality for the ten years taking into account, but not necessarily limited to: construction permits issues, market absorption rates for housing and non-residential development, existing environmental and other constraints on development.

NJAC 5:94-4.2(b)iii

This requires that "draft fair share ordinances necessary for the implementation of the programs and projects designed to satisfy the fair share need" shall be "approved" by the municipal governing body prior to the petition for substantive certification and formally adopted within forty-five days of the grant of substantive certification. This section should be clarified as to if this is accomplished by introduction of the ordinance or whether it is simply an approval of an attachment to the Petition for Substantive Certification.

NJAC 5:94-4.3 Optional Components of the Fair Share Plan

The regulation should be made clear that municipalities are not limited to a maximum of a 10% set aside in inclusionary developments.

NJAC 5:94-4.3(a)1

. We recommend amending this section as follows:

1. A fair share may provide for inclusionary development that will require a percentage low and moderate income housing units [provided sufficient density bonuses or other incentives are provided] to ensure a realistic opportunity for construction.

NJAC 5:94-4.3(a)

We recommend that NJAC 5:94-4.3(a) be supplemented and amended by inserting a new paragraph “4” to read as follows:

- “4. *A fair share plan may provide for more than one unit in ten to be affordable to households of low or moderate income in an inclusionary development, provided that density bonuses or other incentives are provided.*”

NJAC 5:94-4.3(g) Accessory Apartments

Using a flat cap of 10 accessory apartments rather than a percentage of a municipality’s fair share seems inequitable. Also, accessory apartments rented to moderate income households may generate a substantial income for the property owner. In those cases, it seems that the \$20,000 subsidy should not be required. Accessory apartments in people’s homes are not a realistic alternative if they have to be affirmatively marketed like other affordable units in accordance with *N.J.A.C.* 5:94-11. More flexibility should be given to owners of accessory apartments as long as they meet all other applicable requirements. That is especially true in the case of illegal conversions which probably already have tenants.

NJAC 5:94-4.3(h) Buy Down Program

This section seems to contain an impractical and unnecessary market analysis requirement. This is not required for any other affordable programs and is an excessive, and expensive, requirement.

In the past, municipalities have been advised they may only use a buy down program if they can identify the units on the current multiple listing service. While this requirement from existing regulations is proposed to be eliminated, in light of past practice, it would be better to make an affirmative statement that such a procedure is not required.

Furthermore, we believe the provision in NJAC 5:94-4.3(h)(v) should be eliminated. While it may be unlikely that a municipality will be able to embark upon a program that will include more than 10 units, there is no reason to limit the amount of participants in the buy-down program.

NJAC 5:94-4.3(j) Assisted Living Residence

Subparagraph 1(i) contains a requirement that at least ½ of the affordable units in an assisted living residence shall be affordable low income households. This requirement seems unnecessary, since it is the credits that the municipality will seek that will determine whether they are eligible or not. It doesn’t matter whether the assisting living facility has 50% low and 50% moderate; the correct issue is whether the municipality should receive credit for the low and moderate income units depending upon their affordability. This section could be stricken

and municipalities and assisted living developments could address their credits on a site specific basis in the ordinance rather than by a mandatory percentage in the COAH rule.

NJAC 5:94-4.3 (Optional Components of the Fair Share Plan)

This states, “The municipality calculated need obligation shall be divided equally between low and moderate income households.” This is not a realistic expectation in some areas of the State.

N.J.A.C. 5:94-4.2(k) Status of Sites Addressing the 1987-1999 Municipal Obligation

This is an excessive and unnecessary requirement. COAH rules prohibit the municipalities from removing the sites without consent of the property owner and requiring the municipality to undertake studies to demonstrate continued viability of sites is inappropriate and not consistent with the Mt. Laurel II decision which merely requires the municipality to remove exclusionary zoning and provide a realistic opportunity for the construction of low and moderate housing through zoning and land use ordinances

NJAC 5:94-4.3

This eliminates any rental bonus granted for rental units in previous rounds. This is most unfair to municipalities that have developed fair share plans with the expectation that any rental bonuses would carry over to the third round. This subsection should be eliminated.

NJAC 5:94-4.3(p)

There should be a definition for "enhanced accessible townhouse style unit".

2. SUBCHAPTER 5. REGIONAL CONTRIBUTION AGREEMENTS (RCA)

NJAC 5:94-5.4(a)

Consideration should be given to providing an enhanced credit for an RCA if the amount is beyond \$35,000.00. Since the Statewide Bank amount will be \$35,000.00, there is no incentive for a municipality to contribute more than that amount to receive one credit and thus, the RCA's will likely be funded all through the Statewide Bank. Municipalities that have in the past had a relationship with a receiving municipality may want to work with that same receiving municipality who may be demanding more than the \$35,000.00 and there should be some incentive for the sending municipality to continue its relationship with that receiving municipality

NJAC 5:94-5.4 (b)

Paragraph “(b)” of *N.J.A.C. 5:94-5.4* as currently written would allow the council to increase the minimum amount without first obtaining comments from affected municipalities. This may be an issue worthy of reexamination by the Council. It would, however, be preferable to do this through the formal rule making process.

NJAC 5:94-5.4(g)

Paragraph (g) recognizes that the per-unit transfer cost of a rental obligation may be greater than \$35,000. Under the circumstances, the sending municipality should receive a two-for-one rental bonus for RCA rental units rather than the one-for-one credit established in *N.J.A.C. 5:94-4(3)(n)5*.

SUBCHAPTER 6. INCLUSIONARY DEVELOPMENT

NJAC 5:94-6.1(a)

Consideration should be given to adding to this section the clarification that the one in 10 and one in 30 is not related to the compliance mechanisms, but instead create the **obligation**. Thus, set-asides can be established based upon the municipalities' discretion, provided that they can demonstrate that the percentage set-aside will create a realistic opportunity for the construction of the units.

SUBCHAPTER 7. DEVELOPMENT FEES

NJAC 5:94-7.1(a)

Add that the development fees can be used by municipality to purchase an affordable unit that is under foreclosure.

NJAC 5:94-7.6 (d) & NJAC 5:94-7.7(c)

These sections, regarding nonresidential development fees, permit the collection of higher development fees following the approval of a use variance. Who sets those higher fees, the governing body or the zoning board of adjustment? The governing body and not the board of adjustment is responsible for providing affordable housing, however, only the board of adjustment, which is a semi-autonomous, quasi-judicial entity grants variances. In general, a governing body may not insert itself into board of adjustment proceedings involving use variances, especially in those municipalities which provide by ordinance that grants of use variances are appealable to the governing body.

Furthermore, this section, 5:94-7.6(d), does not give credit to any changes that might be instituted by a municipality by way of variance.

NJAC 5:94-7.8 Eligible Exactions, Ineligible Exactions and Exemptions

NJAC 5:94-7.8(a)

There should be exempted from developer fees one to one housing as well. The term "inclusionary development" is defined as containing both affordable and market rate units. One to one housing will not have a market component, yet should not pay any development fees.

NJAC 5:94-7.8(c)

This section is excessively broad and appears to prevent even Mt. Laurel complying rezonings. The section should be removed. It is clear that rezonings will be necessary in many circumstances and for many reasons and the blanket prohibition in Section 5:94-7.8 is excessive.

NJAC 5:94-7.8(d)

Merely receiving preliminary or final approval for a project without undertaking actual construction should not immunize a non-inclusionary developer from supporting the local fair share housing plan.

In addition, if a developer does not proceed in a timely fashion to construct an approved project, that developer should be subject to an increased developer fee. Otherwise, there would be inconsistency between a municipality's prospective fair share and the ability to finance that municipality's fair share housing program. Therefore, we recommend amending this section to read:

d) Upon certification of a municipality's housing element and fair share housing plan, any development which has not begun construction pursuant to previously approved subdivision or site plan approvals may be subject to the developer fee in effect at the time construction of that development begins.

NJAC 5:94-7.12(a)

We recommend amending this section that the developer fee funds can be utilized to purchase a unit which is being subjected to foreclosure.

NJAC 5:94-7.16(b)

This section prevents a municipality from imposing a developer fee on a development that received preliminary or final approval after the expiration of substantive certification or a judgment of compliance. This proposed section should be eliminated since a municipality which has been attempting in good faith to receive certification could have its development fee place in jeopardy merely because of a delay in obtaining approvals. It would also expose an existing development fee ordinance to attack by developers who are obligated to contribute such fees.

NJAC 5:94-7.16(c)

This states that 30 percent of development fees "shall be used to increase affordability." In some cases, that 30% could be better used to fund an RCA or build a unit. The standard for a waiver should not be the ability to address affordability from another source. Does the municipality get credits for units where they are used? If not, this is a disincentive for using alternate methods of fulfilling the obligation.

SUBCHAPTER 8. ESTABLISHING RENTS AND SALE PRICE OF UNITS

NJAC 5:94-8.1

This section modifies the existing regulations regarding calculations of rents and sales prices in a way that will cause unnecessary conflicts between existing inclusionary developments and zones and new developments and zones. Retention of the prior sales price and rent calculation methods should be

considered. Uniformity would improve the ease of enforcement and provide other obvious benefits.

SUBCHAPTER 9. CONTROLS ON AFFORDABILITY

NJAC 5:94-9.1

Reference should be made as well to 5:93-9.1, et seq. The previous substantive Rules include a variety of provisions giving the governing body and others the right to purchase the units by options. N.J.A.C. 5:93.9.14 provides that in the event of a foreclosure sale, the owner of the affordable unit does not retain any surplus proceeds. These sections are not included in Housing Affordability Controls set forth in N.J.A.C. 5:80-26.1 and do not appear to be set forth anywhere else in said NJHMFA regulations.

SUBCHAPTER 10. COST GENERATION

NJAC 5:94-10.1(a).

There should be added to this Section a provision clarifying that utility fees such as connection fees or capacity fees shall not be considered cost generating features or alternatively, that development standards set forth in this section do not include the payment of such fees and costs. To the extent that there has been negotiated a reduced fee as part of a court settlement, the same will be binding.

NJAC 5:94-10.2(a)1

This section sites as example of impermissible cost generation requirements. These examples should be eliminated since inclusionary developments should adhere to appropriate setbacks, open space and other requirements. We should not abandon sound land use principles allowable under the Municipal Land Use Law.

This section should be amended to specify that applicants will comply with the Residential Site Improvement Standards and that this will not be considered a cost generating criteria.

NJAC 5:94-10.2(b).

Reference should also be included to "on-tract" improvements, so that the same reads ". . . on-site, **on-tract**, off-site and off-tract. . . ."

NJAC 5:94-10.2(c)

This section eliminates bedroom restrictions on market units. While it is understandable that COAH might want to regulate limitations on bedrooms within affordable housing units, a similar limitation on market units should not be imposed under COAH regulations. It is assumed that with density bonuses and the elimination of other cost generative requirements, that market units might be appropriately place under some limitation for bedroom units by a municipality.

NJAC 5:94-10.3(a)

This section suggests that developers have the option of utilizing the consultant retained by a municipality to reduce costs. It also suggest that if a developer opts to use a municipal expert that “no other report shall be prepared.” These provisions should be eliminated because they run directly contrary to the provisions of the Municipal Land Use Law, which authorizes municipalities to conduct appropriate studies through the use of escrow fees deposited by developers.

In addition, this requirement would create clear conflicts of interests with consultants working for parties who might have entirely divergent views.

NJAC 5:94-10.3(b)

This is unnecessary. Escrow deposits are already strictly regulated by NJSA 40:55D-53.1,2 and 2a.

SUBCHAPTER 11. AFFIRMATIVE MARKETING

Consideration should be given to coordinating this subchapter with Subchapter 22 of the NJHMFA regulations, cited at N.J.A.C. 5:80-22.1 et seq.

SUBCHAPTER 12. PROGRESS; MONITORING; REMEDIES

NJAC 5:94-12.2(b)(8)

This section requires that a municipality provide a “comparison of the estimated growth share and the actual need on the date of the report with the estimate contained in the fair share housing plan” as part of its reporting. Given the reliance on growth share, this requirement in the reporting forms should be eliminated.

NJAC 5:94-12.4(a)

The municipalities should be provided with at least a 120 day period within which to submit a revised Housing Element and Fair Share Plan to restore realistic opportunities. Given the need to amend the Master Plan, find sites, develop Ordinances and so forth, it will realistically take more than 60 days to develop a revised Plan.

PROPOSED PROCEDURAL RULES

SUBCHAPTER 3. PETITIONS FOR SUBSTANTIVE CERTIFICATION.

NJAC 5:95-3.7(b).

This section should be clarified to allow owners of sites to participate in mediation or have the right of objectors only upon filing an objection.

NJAC 5:95-3.8(a)

An objector's site should not be automatically included in the Fair Share Plan if the Council determines that the municipal plan does not adequately address the obligation. The municipality should be permitted to resubmit within 90 days and be required to consider inclusion of the objector's site, but not mandated to use it.

SUBCHAPTER 4. OBJECTIONS TO A PROPOSED HOUSING ELEMENT AND FAIR SHARE PLAN.

NJAC 5:95-4.2(b)

A statement should be added that if the objector fails to revise the objection within the 14 day time period, the objection shall be considered withdrawn.

SUBCHAPTER 6. CONSIDERATION OF A MUNICIPALITY'S HOUSING ELEMENT AND FAIR SHARE PLAN WHEN OBJECTIONS ARE FILED.

This subchapter is unduly confusing. For example, included in Section 6.4 are municipalities who had not filed Housing Elements and Fair Share Plans. They should be handled in a different section. The following comments are more specific:

NJAC 5:95-6.3

Since municipalities cannot petition for substantive certification beyond two years of filing their Housing Element and Fair Share Plans, their submissions should simply be deemed withdrawn and returned to them.

NJAC 5:95-6.4(b)

This section assumes that there will be a report requesting additional information after the filing of the Petition for Substantive Certification. That may not be so. Alternatively, this section could be revised to make reference to N.J.A.C. 5:95-5.2 which sets forth the menu of actions that may be taken by the Council when a Petition for Substantive Certification has been filed.

SUBCHAPTER 7. MEDIATION.

It is not clear that the time periods set forth in the Mediation section dovetail with the other time periods set forth in the regulations.

NJAC 5:95-7.2(f)

This section should be clarified to acknowledge that municipal representatives cannot bind the municipality, but can only agree to take back to the entire governing body any proposed agreements.

NJAC 5:95-7.3(c)

Clarify either here or elsewhere that the Compliance Report does not represent an agreement between an owner of a site and the municipality.

NJAC 5:95-7.4(a)

The municipality should be required to publish notice of revisions within 7 days after notification by COAH that revisions are necessary as opposed to within 7 days after receiving their Mediation Report.

SUBCHAPTER 9. COUNCIL REVIEW OF CERTIFIED PLANS.

NJAC 5:95-9.1(c)

This section should be clarified so that if a municipality's Plan provides for the construction of the shortfall, even though the same have not as yet been constructed, the municipality does not have to amend its Plan. There must be clarification that so long as the municipality's Plan provides for the requisite number of projected affordable housing units, its Plan continues to be valid. COAH may consider adding some trigger to ensure that the affordable housing unit actual production does not fall too far behind of the obligation.

SUBCHAPTER 10. GENERAL POWERS.

NJAC 5:95-10.1(a)

This section should be revised to simply make reference to the municipality's obligations to fulfill its substantive certification requirements or to fulfill its obligations under the Fair Housing Act and COAH regulations.

Very truly yours,

William G. Dressel, Jr.
Executive Director

cc: The Honorable James E. McGreevey, Governor, The State of New Jersey
The Honorable Susan Bass Levin, Commissioner, Department of Community Affairs