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EXECUTIVE SUMMARY OF NJLM REPLY BRIEF

INTRODUCTION.

On April 9, 2009, we filed a reply brief with the Appellate Division on behalf of the League responding to the brief filed by the New Jersey Council on Affordable Housing ("COAH") in the League's challenge to the Third Round Regulations. As in our original brief, the reply brief revolves around three issues. First, we argue that when the actions of COAH are measured against the applicable standard of review that Appellate Courts must apply, the inevitable conclusion is that the Regulations must be invalidated. Second, we take the position that predictability by municipalities of where they will be ten years from now should not prevail over reliability of the data upon which those projections are based. Finally, we reiterate that the implementation of the Third Round Regulations will result in negative and overwhelming financial burdens on the taxpayers in violation of the Fair Housing Act.

THE REGULATIONS DO NOT PASS THE TEST ESTABLISHED BY THE COURT.

In their responsive brief, COAH misstates the test that it must meet in order for the Court to find its regulations sustainable. COAH argues that a broad "reasonableness" test should be applied and concludes that the decisions that they made in coming to their final methodology and in then applying and implementing it were reasonable. They argue that as the agency establishing the final regulations, they should be afforded broad discretion to make decisions in implementing their methodology. The League responds that there is no legal support for the theory and test that COAH wants to apply. We focus on the fact that there is a well established test that has been utilized for years by courts when reviewing administrative regulations which includes the following: (1) the agency action cannot offend the federal or state constitutions; (2) the action cannot violate the enabling act's express or implied legislative policies; (3) the record must contain substantial evidence to support the findings on which the agency based its actions; and (4) the agency cannot err by reaching a conclusion that could not reasonably have been made after weighing the relevant factors

in applying legislative policies to the facts. We also take the position that because these regulations involve affordable housing issues, there is a second level of scrutiny that applies, which requires that the methodology be based upon reliable data, have as few assumptions as possible, and have an internal system of checks and balances. We argue that when measured against those two levels of scrutiny, the regulations must fail.

PREDICTABILITY SHOULD NOT PREVAIL OVER RELIABILITY.

The League challenged the regulations for failing to provide a continuous updating of data sources utilized in COAH methodology thereby eliminating any real "checks and balances" which is a mandated component of an acceptable methodology as set forth above. COAH defends its position by stating that there must be predictability and certainty in its regulatory scheme and cites to the Supreme Court's decision in Mt. Laurel III that they say requires "certainty". In our reply, we dissect that section of the Supreme Court decision in Mt. Laurel III and reveal that the Court spoke of "consistency" (not certainty) and that the context in which the analysis was made related to the utilization of a universal methodology for all municipalities rather than ad hoc methodologies established by various courts throughout the State. The League supports a single methodology consistently applied to all 566 municipalities. We note in our brief, however, that such a methodology must be continuously updated to respond to the myriad of factors that influence and impact the projections that were made. Establishing a ten year projection and then providing no means to test the reliability or accuracy of that projection at any time prior to the expiration of the ten years will produce self-fulfilling prophecies, rather than produce properly regulated growth. In fact, we point out that the Supreme Court in Mt. Laurel III required that there be continuous revisions made to reflect the best data available at any given time.

IMPLEMENTATION OF THE REGULATIONS WILL IMPOSE FINANCIAL BURDENS ON TAXPAYERS.

In its brief, COAH argues that because there are a variety of compliance mechanisms which do not involve the direct expenditure of municipal funds, there is no violation of that provision of the Fair Housing Act which specifically provides that a municipality is not required to raise or expend municipal revenues to provide low and moderate income housing. In reply, the League takes the position that the methodology established in these regulations will necessitate the utilization of 100% affordable housing projects in order for a municipality to satisfy its obligation and therefore that the practical application of the methodology will result in the municipality expending taxpayer funds to satisfy its affordable housing obligations in violation of the Fair Housing Act. We reiterate that even COAH recognizes this position by including in its regulations a requirement that municipalities adopt resolutions agreeing to provide funds from its own coffers to ensure that 100% affordable housing

projects can be built if outside funding is unavailable. It is interesting that on the one hand COAH takes the position that municipalities must provide for an alternate source of funding, while on the other hand, stating that there is almost \$1.0 Billion available for the construction of affordable housing and that such amount is sufficient for a municipality to not have to tap its own sources in order to satisfy its obligation.

CONCLUSION.

The League reiterates its position that the regulations must be invalidated and the methodology scrapped. To do otherwise will continue a flawed system which will discourage the production of affordable housing.

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