

The Regional Planning Partnership is a founding member of the Coalition on Affordable Housing and the Environment.(CAHE). The coalition is a statewide group of planning, environmental and housing advocates and organizations who recognize the interdependency of urban, suburban and rural communities. The Coalition is working to build unique partnerships for a just and sustainable New Jersey. The Coalition's goals are to increase affordable housing opportunities, to preserve New Jersey's natural resources and to rebuild cities throughout the state.

## **COALITION ON AFFORDABLE HOUSING AND THE ENVIRONMENT**

### **White Paper on COAH Third Round Policy Issues and Rules February 2002**

#### Introduction

COAH has completed its initial review of its rules in preparation for proposing its third round fair share housing obligation numbers and implementing regulations. While COAH has not yet made public the actual numbers, the COAH board reached consensus in December 2001 on 31 policy issues. COAH then released publicly an issue paper on these issues. The full paper may be accessed at: <http://www.state.nj.us/dca/coah/polissue.htm>

This White Paper has been prepared by the Coalition for Housing and the Environment. (A description of the Coalition and its membership is appended.) The White Paper identifies and comments on important affordable housing policy issues that COAH should consider as it begins public discussion of these issues and moves toward formal rule-making later in 2002. This White Paper addresses each of the 31 issues COAH has identified, as well as important policy issues that COAH has ignored and that should be considered now as affordable housing policies are developed and debated.

For the purposes of this White Paper, the issues have been collected into four groups:

- A. The first group consists of issues of major importance where the Coalition strongly disagrees with COAH's position.
- B. The second group consists of other important issues identified by COAH where the Coalition believes that major changes in the proposal as presented will be necessary to make it acceptable.
- C. The third group consists of equally important issues that COAH has failed to address in its 31 proposals. The Coalition believes that each of these issues must be addressed.
- D. The final group consists of the remaining issues identified by COAH. The Coalition either supports these proposals as made by COAH, or suggests relatively minor revisions.

For each issue discussed below, the White Paper summarizes the question presented, the current COAH rule, if there is one, COAH's proposal for the third round, if any, and finally the Coalition's recommendation.

#### **COAH PROPOSALS STRONGLY OPPOSED BY THE COALITION**

### **A.1. Growth Share as a Downward Adjustment to a Formulaic Fair Share Number**

*Issue:* What should be the role of growth share in calculating the municipal fair share housing obligation?

*Current COAH Rule:* None

*COAH Recommendation:* Allow municipalities the option of using growth share, based on their projected residential and non-residential growth, to seek a downward adjustment to lower their fair share obligations as calculated by the COAH third round formula. Require a mid-certification review to compare municipal projections with actual production.

#### **COALITION RECOMMENDATION**

*The Coalition strenuously objects to this proposal on constitutional and substantive grounds. "Growth share," as proposed to COAH by the Coalition, is an internally consistent method of calculating every municipality's fair share, whether that share be large or small, by measuring the growth that actually is planned for and realized within the community. COAH should use growth share as the approach to calculating the municipal fair share housing obligation, in place of the formulaic methodology employed in the first and second rounds. Growth share is not intended to give municipalities a "sporting chance" to opt for the lower of two "fair share" numbers, where the municipality would opt for the COAH-calculated (formulaic) need only if that permitted the municipality to avoid providing affordable housing opportunities in proportion to its actual rate of development activity.*

### **A.2. Regional Contribution Agreement Bank**

*Issue:* Should municipalities be allowed to contract with HMFA, COAH, or some other governmental entity for an RCA, rather than negotiating with another municipality.

*Current COAH Rule:* Sending municipalities negotiate project-specific agreements with receiving municipalities. N.J.S.A. 52:27D-312; N.J.A.C. 5:93-6.

*COAH Recommendation:* Municipalities may negotiate directly with a municipality or contribute to a bank administered by a state agency; receiving municipalities apply to bank; funds must be used in region unless municipality demonstrates that can not be done; funds cannot be removed from bank once in. COAH question: what happens to interest on the funds?

#### **COALITION RECOMMENDATION**

*The Coalition strongly opposes this proposal. It is clearly inconsistent with the provisions of the Fair Housing Act, see N.J.S.A. 52:27D-312, which requires a direct contract with a municipality unless all RCA opportunities within the region have been exhausted. An RCA bank would reduce the direct nexus between the contribution of funds and the production of housing units, and increase the risk that funds contributed will sit in the state administering*

*entity without being used in timely fashion. It would also add an unnecessary layer of administrative cost. COAH, moreover, has not demonstrated that a lack of willing receiving municipalities is, or ever has been, a problem for prospective sending municipalities. In the absence of such a demonstration, there is no legal basis under the Fair Housing Act for creating an RCA bank as proposed by COAH.*

### **A.3. Use of Unexpended (“Stockpiled”) Development Fees**

*Issue:* Some municipalities have collected but not spent development fees.

*Current COAH Rule:* None

*COAH Recommendations:*

1. Create a pilot program in which unused funds could offset impact on local property taxes (difference between market & restricted value).
2. Redirect interest on unused fees to municipal general revenue.
3. Better educate municipalities about options for using funds

#### **COALITION RECOMMENDATION**

*The Coalition strongly opposes any use of Housing Trust Funds that does not directly lead to improved housing conditions for lower income households. Any use of funds, including interest, to supplement municipal general funds, whether as property tax offset or otherwise, is unwarranted as a matter of policy and is arguably invalid under Holmdel. COAH should document publicly the extent to which development fees collected by local government have not been spent, and the reasons for their remaining unspent.*

*To the extent that COAH establishes that some municipalities are experiencing significant problems in using development fees collected, COAH should use its existing authority under escrow agreements with fee-collecting municipalities to redirect the use of unexpended development fees to provide further subsidies to deepen the range of affordability, or other appropriate actions to increase lower income housing opportunity in those communities, unless the municipality provides a realistic, detailed plan to spend the unexpended fees. All interest on development fees, moreover, must be retained in the development fee pool.*

### **A.4. Bonus Credits**

*Issue:* Should COAH give “bonus” credits against the fair share obligation to encourage particular forms of compliance activity?

*Current COAH Rule:*

– Rental units: N.J.A.C. 5.15(d) gives “family” rental units two fair share credits for each unit produced; age-restricted rental units are given 1.33 fair share credits for each unit produced. Certain caps apply.

– Substantial compliance: N.J.A.C. 5:93-3.6 gives a 20% reduction in the 2d Round fair share obligation for municipalities that completed 90% or more of the units in the 1<sup>st</sup> Round plan; 10% for 80-89% completion; 5% for 70-79% completion.

*COAH Recommendation:* Revise the rental rule to eliminate the bonus credit for 1-bedroom units and age-restricted units, retain the bonus for 2-bedroom units, and give a new bonus of 2.5:1 for units with 3 or more bedrooms. Retain the “substantial compliance” bonus.

#### **COALITION RECOMMENDATION**

*Eliminate bonus credits, unless the lost units are recycled in the fair share methodology as part of the regional housing obligation. Affordable rental housing and provision of larger housing units are worthy goals, but COAH has ample authority to require these elements without resort to an unnecessary “bonus” that reduces the overall supply of affordable housing. See, e.g., N.J.A.C. 5:93-5.15(a). It is illogical, and possibly unconstitutional, to give a “compliance” bonus for complying with an obligation that is constitutionally required. Instead of granting bonus credits that reduce the fair share, COAH should work with its sister housing agencies and programs in HMFA and DCA to create effective incentives for producing new rental and family affordable housing.*

*In tandem with elimination of bonus credits, and the establishment of minimum requirements for provision of rental housing (see below), COAH should adopt minimum requirements for the share of units in a municipal fair share plan that should contain 2 or more bedrooms, in order to address the housing needs of lower income families (with a de minimis exception for communities where the total fair share obligation is below some minimum level).*

#### **A.5. Cap on Age-Restricted Affordable Units**

*Issue:* Should the current cap on age-restricted affordable units be changed?

*Current COAH Rule:* N.J.A.C. 5.14 imposes a cap of 25% of the new construction obligation under most circumstances.

*COAH Recommendation:* Raise cap to 30%

#### **COALITION RECOMMENDATION**

*Experience demonstrates that many municipalities will prefer age-restricted over family housing to the maximum extent permitted by COAH regulation. Housing for lower-income families with children is desperately needed and more difficult to produce. COAH should not exacerbate the problem by further restricting the supply of family units. The current cap at 25% of the new construction obligation should be retained. If COAH demonstrates that the existing cap is a significant policy issue for more than isolated municipalities, then the rule should be amended to provide specific standards for a waiver of the cap in such situations.*

#### **A.6. Minimum Amount of Regional Contribution Agreement**

*Issue:* What is the minimum dollar amount of an RCA that will qualify for crediting one unit against the sending municipality's fair share obligation?

*Current COAH Rule:* \$25,000 minimum per unit transferred: N.J.A.C. 5:93-6.5(c).

*COAH Task Force Recommendation:* Maintain \$25,000 per credit. "Revisit" the credit at a later date.

### **COALITION RECOMMENDATIONS**

*The RCA minimum should realistically reflect the cost of creating an affordable unit in the typical receiving municipality, which is generally an urban center. The current \$25,000 minimum is generally recognized to fall significantly short of that figure. The figure should be raised; moreover, it should be indexed so that it increases automatically with inflation, rather than requiring that every increase in the figure is dependent on a long drawn out rulemaking process. In the course of amending its regulations governing RCAs, COAH should also establish a cap on the number of RCA-based credits that can be granted for rehabilitation of already occupied units, as opposed to creation of units through substantial rehabilitation or new construction. Specifically, COAH should:*

- 1. Amend the rule to require a minimum cost per unit transferred of \$30,000, with annual increases based on the Consumer Price Index-Housing-Northeast, or some other appropriate index.*
- 2. Prepare and publish an analysis of the actual cost of developing a new unit of housing affordable to low and moderate income households in typical receiving (urban) municipalities.*

### **IMPORTANT COAH PROPOSALS REQUIRING MAJOR REVISIONS**

#### **B.1. Consistency with the *State Development and Redevelopment Plan* and Plan Endorsement**

*Issue:* What should be the relationship between the State Plan and COAH, both procedurally and substantively, in the siting of affordable housing developments?

*Current COAH Rule:* COAH has executed a Memorandum of Understanding (MOU) with the State Planning Commission (SPC) specifying means of coordination. COAH requires center designation for inclusionary sites in PA 4 and PA 5. SPC rules and guidelines require substantive certification (or Superior Court equivalent) for municipal plan endorsement. COAH's rules do not address a key policy of the *State Development and Redevelopment Plan* (SDRP), which states that "An absence of Centers identified to receive growth in a municipality will not absolve a municipality of its fair-share responsibility. Where Centers are not identified, the Council on Affordable Housing, working with the State Planning Commission and the municipality, may identify Centers or other appropriate ways for a municipality to accommodate its fair-share housing allocation and still meet the intent and purposes of the State Plan." SDRP, Mar. 1, 2001 Edition, "Affordable Housing in Centers" at page 222.

*COAH Recommendation:* Negotiate a new MOU with SPC. This negotiation is in progress but no details have been made public. Some COAH members are reported to be concerned about requiring substantive certification for municipal plan endorsement by SPC.

#### **COALITION RECOMMENDATIONS**

- 1. The Coalition supports the principle of cooperation with the State Planning Commission and the Office of State Planning on State Development and Redevelopment Plan issues, but cautions that a new MOU must be thoroughly discussed with COAH's constituencies before it is agreed to in final form. Provisions of the MOU that COAH intends to rely on for regulatory effect should be formally adopted by rule-making.*
- 2. Specifically incorporate the SDRP policy on the absence of Centers into COAH regulations.*

#### **B.2. Status of Zoned but Unbuilt Sites in Previously Certified Housing Plans**

*Issue:* Under what circumstances should sites found to create a “realistic opportunity” in prior COAH certified housing plans, but which have not yet been developed, be retained in the 3d round plan, either at the municipality’s request or over its objection.

*Current COAH Rule:* Where the municipality requests retention of a site in the new plan, N.J.A.C. 5:93-3.5 grants a reduction against the 12-year cumulative fair share, after review to insure that the site continues to present a “realistic opportunity.” N.J.A.C. 5:93-3.5(a). There is no provision respecting removal of sites.

*COAH Recommendation:* Where the municipality wishes to retain the site, it must explain why development has not occurred and demonstrate that the site could develop in a realistic time frame. Where the municipality wishes to delete a site, substantial documentation of a change in circumstance must be provided for removal to be “considered.” If the property owner objects to removal, s/he must provide evidence of why it should remain.

#### **COALITION RECOMMENDATION**

- 1. In both cases, the constitutionally-mandated inquiry is whether the site creates a “realistic opportunity.” COAH should incorporate in its rules consideration of the factors enumerated by the trial decision in Toll Bros., Inc. v. Twp. of West Windsor, 303 N.J. Super. 518 (1996)*
- 2. In the case of removal of a site, the dual burden of proof proposed by COAH is both confusing and unworkable. Unilateral municipal removal of a zoned site, over an owner’s objection, must be subject to a high standard of demonstration by the municipality that a realistic opportunity is no longer created at the site and can not be remedied, in order to encourage owners to come forward with affordable housing proposals and stay with them if review and approval takes a long time. Conversely, if there is no objection from the owner, and the municipality provides adequate means by which the full fair share obligation can be met, the municipality should not be constrained in its exercise of planning discretion.*

3. COAH should consider criteria for shifting undeveloped compliance sites in Planning Areas 4 and 5 not in Designated Centers or in Endorsed Plans to locations that are more consistent with SDRP policies, where little or no progress has been made towards development of the previously-approved site.

### **B.3. Affirmative Marketing of Affordable Housing**

*Issue:* How to insure maximum access to affordable housing opportunities for households currently under-represented in the COAH process.

*Current COAH Rule:* Modest requirements for advertising and publicizing the availability of affordable housing. N.J.A.C. 5:93-11.

*COAH Recommendation:* Mandatory advertising in regional and local papers, including local paper in nearby urban aid municipality, on web sites, and through mail to non-profits

#### **COALITION RECOMMENDATION**

*The Coalition strongly supports the concept of expanding the scope of affirmative marketing. The COAH recommendation, however, will accomplish little or nothing to achieve this goal. COAH should require, in addition to advertising and mailing, direct contact between the entities responsible for marketing affordable housing units (developers, municipal housing boards, etc.) with organizations in nearby urban areas and organizations with substantial bases among populations not likely otherwise to seek housing opportunities in areas where units are being constructed; i.e. organizations based in African-American and Latino communities such as civic associations, civil rights organizations, churches, and CDCs. For developments greater than a specified minimum number of units, the developer should be required to enter into outreach or marketing agreements with such organizations or with marketing, communications or real estate firms with demonstrated expertise in reaching such populations. COAH should complete, publish on its Web site and make available lists of such organizations and firms. Qualifications and training for the "administrative agent" assigned the responsibilities specified at N.J.A.C. 5:80-26.14(a), including affirmative marketing, should be established by regulation.*

### **B.4. Loss of Affordability Controls After 30 Years**

*Issue:* Large numbers of affordable housing units built as a result of *Mount Laurel* and the Fair Housing Act are subject to time-limited affordability controls, generally not more than 30 years. With the first units already more than 15 years old (and mostly with 20 year controls as was initially required), the issue of maintaining an affordable housing stock in the future is a matter of urgency. This issue is similar, but broader, than the issue immediately above (credit for units whose restrictions expire during a fair share round).

*Current COAH Rule:* N.J.A.C. 5:93-9.2 through -9.10 and -9.17; N.J.A.C. 5:80-26.5, -26.10 and -26.11

*COAH Recommendation:* None

### COALITION RECOMMENDATION

*COAH must, as a fundamental matter of policy, address the issue of ensuring that an affordable housing stock exists in New Jersey's suburban communities on a long-term basis. To that end, COAH should:*

- 1. Encourage municipalities to establish quasi-permanent affordability controls; e.g., "rolling controls" (where the control period begins anew with each reconveyance), 99 year controls, etc.*
- 2. Require municipalities to include recapture provisions in controls, to prevent undue windfalls, and ensure that a source of funds for replacement units is created.*
- 3. Establish regulations dealing with recapture, to ensure, to the extent feasible, that the recapture funds will be adequate to create replacement units, and that appropriate mechanisms are established for their use, analogous to the use of development fee proceeds.*
- 4. Require municipalities in which a significant number of existing affordable units will be lost during any fair share round to incorporate plans for replacing those units into their fair share plan for that round.*
- 5. Reinstate and strengthen the long-term affordability controls of existing COAH rules, at N.J.A.C. 5:93-9.2 through -9.1, that COAH repealed, by the adoption of N.J.A.C. 5:93-9.17, for municipalities that petition for certification or amend a certified plan after October 1, 2001.*

#### **B.5. Retaining COAH Credit When Affordability Controls Expire**

*Issue:* The status of units that contribute to the municipality's cumulative 18-year obligation when the 3d round plan is certified, but where the controls on affordability will expire before the end of the six-year period of certification.

*Current COAH Rule:* None

*COAH Recommendation:* Retain credit if affordability controls expire during the 3d round on units built in the 1<sup>st</sup> and 2d round, on the theory that the 3d round fair share will be cumulative from 1987.

### COALITION RECOMMENDATION

*Unless a unit remains affordable throughout the period of substantive certification, it does not provide a "realistic opportunity" during that period, as required by the Constitution. COAH's rationale exalts form over substance by ignoring the reality of expiring controls. Instead of the proposed crediting, COAH should establish standards for recapture in the event of expiring controls to ensure that units are replaced. This issue is addressed in further detail above, in the wider context of expiring controls on affordable housing units.*

#### **B.6. Term of Substantive Certification**

*Issue:* As the fair share is based largely on census data, should the term for fair share calculation and the term of certification (or a judgment of repose) be extended to 10 years?

*Current COAH Rule:* 6 year term by statute; see N.J.A.C. 5:93-1.3

*COAH Recommendation:* Change to 10 year term. (After COAH's policy paper was issued, the Legislature adopted this change and it was signed into law by the Acting Governor.)

## COALITION RECOMMENDATION

*Legislative action has concluded debate on this issue. Amend COAH rules to conform to P.L. 2001, c.435, which extends the term to 10 years, and make clear that the extended term applies only beginning with third round obligations. Provide fully in third round rules for an effective mid-term review of the realistic opportunity created by the certified plan, giving opportunity for all interested parties to be heard, as required by the new statute.*

## **IMPORTANT ISSUES NOT ADDRESSED BY COAH**

### **C.1. Range of Affordability of Affordable Housing**

*Issue:* The target range of affordability needs to be lower in order to provide access to housing opportunities to the full range of low and moderate income households, especially households below 40% of median income.

*Current COAH Rule:* Home ownership housing must be affordable to a maximum of 70% of area median income and an average at 55% of area median income, with at least three different moderate income prices and two different low income prices. Rental housing must be affordable to a maximum of 60% of area median income and an average at 52% of area median income, with at least one rent for low income units and one rent for moderate income units for each bedroom type. See N.J.A.C. 5:93-7.4(d) & (e) and N.J.A.C. 5:80-26.3(c) and (d).

*COAH Recommendation:* Not addressed

## COALITION RECOMMENDATIONS

*This is a critical issue in two respects. First, it is essential to do more to reach the nearly half of all lower income households that are effectively excluded from any benefit under current COAH regulations; and second, it is important to clarify the extent to which so doing is the responsibility of a private developer building under an inclusionary zoning ordinance, and the extent to which additional subsidies are required. Specifically, COAH should:*

- 1. Lower the maximum average range of affordability to 50% of area median income for both homeownership and rental affordable units.*
- 2. Require that a minimum percentage of designated affordable units in any development with 20 or more affordable units be affordable to households below 40% and below 30% of area median income respectively.*
- 3. Urge DCA and HMFA to amend rules that block access to Balanced Housing Neighborhood Preservation and Low Income Housing Tax Credits subsidies to inclusionary developments and lower income housing developments, where those subsidies can be used to deepen the range of affordability below what is otherwise feasible. See N.J.A.C. 5:43-1.4(c), which makes a project that has received a density bonus or is identified with an inclusionary development ineligible for Balanced Housing*

*funding. See N.J.A.C. 5:80-33.10(b), which limits volume cap Low Income Housing Tax Credits for projects that receive a density bonus subsidy. See N.J.A.C. 5:80-33.13(a), which makes a project that has received a density bonus subsidy ineligible for competitive (ceiling) Low Income Housing Tax Credits. Whether a density bonus was granted for a project should be a factor in considering awarding these subsidies, but should not be used to determine eligibility to even apply for these subsidies. Whether to grant such subsidies should depend upon the economic feasibility of the project and the proposed depth of the range of affordability.*

4. *Require municipalities with unexpended development fees to use development fees to make existing affordable units affordable to households at a deeper range of affordability and enforce vigorously the existing rule requiring 30% of development fees, except those that finance a RCA, rehabilitation program, or new construction, to be devoted to affordability assistance, N.J.A.C. 5:93-8.16(c).*

## **C.2. Minimum Set-Aside of Affordable Units in Inclusionary Developments and Minimum Density of Inclusionary Developments**

*Issue:* The Supreme Court established in *Mount Laurel II* a 20% set-aside as the reasonable minimum of affordable units in an inclusionary development, but the minimum has become the de facto maximum due to COAH rules.

*Current COAH Rule:* 20% set-aside in built-up communities that receive a vacant land adjustment, at a gross density of 6 units/acre, and 15% set-aside in other communities at a gross density of 4 units/acre. N.J.A.C. 5:93-5.6(b) Maximum 15% set-aside and minimum gross density of 10 units/acre for rental inclusionary development. N.J.A.C. 5:93-5.15(b)5.

*COAH Recommendation:* Not addressed, other than to maintain the density minimums

### **COALITION RECOMMENDATIONS**

*COAH's regulations fail to recognize the wide variation of appropriate densities among municipalities, as well as within municipalities. The density concept of COAH rules, moreover, is based on a fundamentally flawed economic theory; namely, that there is a direct – and consistent – correlation between the density permitted and the extent to which lower income units can be provided. COAH should:*

1. *Require that the minimum set-aside for both homeownership and rental units be at least 20%, as established by Supreme Court in Mount Laurel II in 1983, with no exceptions other than the general power provided by N.J.A.C. 5:93-15.1 for COAH to grant waivers in exceptional cases. Permit higher set-asides either by mutual agreement by a municipality and property owner, or by a municipality based on economic analysis showing that the higher set-aside is feasible.*
2. *Require the gross density for inclusionary developments to be based on: site suitability, sound planning, and the need to generate affordable units to satisfy the municipality's fair share housing obligation, with a presumptive minimum gross density of 4 units per acre,*

*and no presumptive maximum gross density, recognizing the variation in density patterns around the state. There is no economic justification for the existing rule, which assumes that lower densities necessarily dictate lower set-asides.*

### **C.3. Rental Obligation and Rental Housing Production**

Issue: Should housing plans be required to create a specified amount of rental housing, to create some variety and choice of housing options, and if so, what should the amount be and how should the required rental affordable housing be produced?

*Current COAH Rule:* 25% Rental obligation; N.J.A.C. 5.15(a), which is an increase for the 20% obligation established in the first round

*COAH Recommendation:* No change

#### **COALITION RECOMMENDATION**

1. *Increase the rental obligation to 33% of the municipality's new construction obligation. This percentage roughly parallels the percentage of rental units in the total New Jersey housing stock. While this is still arguably low compared to the percentage of rental occupancy in the lower income population, and the percentage of rental units needed to address lower income housing needs successfully, at least it is a reasonable starting point. The rules should allow a de minimis exemption from this requirement where less than 10 rental affordable units would be required in a municipality's housing plan.*
2. *Require mandatory rental lower income housing zones, with a 20% set-aside, if the municipality does not have firm commitments for the construction of the required rental affordable housing by other means, such as municipally-sponsored or nonprofit construction, within two years of certification.*

### **C.4. Definition of Developments that meet *Mount Laurel* Objectives**

*Issue:* Developments that serve *Mount Laurel* purposes can include those that provide 100% lower-income housing, those that mix lower-income and market-rate housing, and those that provide significant funding to a housing trust fund in lieu of on-site construction of affordable housing. Such developments may be entitled to preferential treatment, for instance, by being given priority access to infrastructure improvement. Confusion exists between different definitions in COAH, DCA-Balanced Housing and HMFA rules. *Bi-County v. High Bridge*, pending on appeal to the Supreme Court, raises this issue in the context of housing trust fund payments.

*Current COAH Rule:* N.J.A.C. 5:93-1.3 defines "Inclusionary development" as a development containing low and moderate income units. COAH rules lack an accurate, clear definition for residential developments that are 100% affordable, such as municipally and non-profit sponsored housing, group homes, affordable accessory apartments, etc.

*COAH Recommendation:* Not addressed

### COALITION RECOMMENDATIONS

1. Amend N.J.A.C. 5:93-1.3 to define "lower-income development" as one that makes 100% of its units affordable to low and moderate-income households. The terms "affordable development" or "affordable housing development" have acquired so many imprecise meanings that their use is confusing as a formal definition.
2. Define "inclusionary development" as either: (a) a development that combines a substantial proportion of income-restricted affordable housing together with market-rate housing; or (b) a market-rate development that generates funds that are the functional equivalent of the cost of on-site construction of affordable housing to be used for an approved affordable housing purpose.

*The first part of this definition would be consistent with the proposed DCA-Balanced Housing Neighborhood Preservation rules which refer to the "affordable portion of any inclusionary housing project" proposed N.J.A.C. 5:43-1.4(c) 33 N.J.R. 3265 The second part of the definition builds upon existing COAH rules on development fees. Amend N.J.A.C. 5:93-1.3 accordingly.*

#### C.5. Use of RCA Funds

*Issue:* A disproportionate amount of funds provided to receiving municipalities through RCAs is used for moderate rehabilitation of existing occupied housing that fails to increase the affordable housing stock in those communities.

*Current COAH Rule:* N.J.A.C. 5:93-6.2

*COAH Recommendation:* none

#### COALITION RECOMMENDATION

*COAH should require any RCA over a modest threshold, such as 20 units, be used by the receiving municipality primarily (at least 50% of the units transferred) to subsidize the cost of creating new affordable housing through new construction or substantial rehabilitation, in order to minimize the possible net decrease in housing resulting from use of the RCA funds to only rehabilitate units. Credits to the sending municipality should be based, as currently, on transferring the negotiated amount of funding per unit, at or above the COAH-prescribed minimum. Construction of new affordable housing by the receiving municipality may require more than the amount of funding transferred per credit, which may require flexibility in the project plan for the overall RCA to assure that an economically feasible combination of new construction and rehabilitation is financed by the RCA. Amend N.J.A.C. 5:93-6.2 accordingly.*

#### C.6. Flow Charts for COAH Filing, Petition, Review, Information Request, and Mediation Procedures

*Issue:* The complexity of the COAH process.

*Current COAH Rule:* none

*COAH Recommendation:* none

#### **COALITION RECOMMENDATION**

*Reinstate, update, and publish the flow charts for COAH procedures as appendices to the rules (repealed in 1998) to explain clearly the sometimes convoluted COAH processes.*

#### **C.7. Delays in COAH Mediation**

*Issue:* How can delays in the COAH mediation process be reduced?

*Current COAH Rule:* N.J.A.C. 5:91-7.

*COAH Recommendation:* none

#### **COALITION RECOMMENDATIONS**

*A timely, expeditious, mediation process is essential if the COAH process is to be effective. To that end, COAH should:*

- 1. Require the first mediation session to be scheduled within 30 days after the end of the 45 day objector period after publication of notice of a petition.*
- 2. Require any COAH staff compliance analysis or request for additional information to be released to the parties before the first mediation session.*
- 3. Require mediation to be concluded within 90 days of the first mediation session, even if issues are unresolved, unless all parties to the mediation agree to an extension. The potential value of a mediated agreement must be balanced against the costs of delay when mediation drags on fruitlessly.*
- 4. Decouple issues raised in mediation, provided all parties to the mediation agree, so that conditional certification may be granted for resolved issues and partial implementation of a housing element and fair share plan may begin.*

#### **C.8. Credits Against Realistic Development Potential**

*Issue:* Should credits and reductions for post-1980 affordable housing be granted against a municipality's pre-credited need or, if the municipality seeks a vacant land adjustment, against its realistic development potential?

*Current COAH Rule:* none, but current COAH practice relies on an informal written COAH "question & answer," not a rule, to authorize credits against the RDP.

*COAH Recommendation:* none

### COALITION RECOMMENDATION

*This illogical practice is contrary to the letter of the Fair Housing Act that specifically requires that the municipal fair share be determined after crediting each current unit of low and moderate income housing. N.J.S.A. 52:27D-307(c)(1). Amend the rules on RDP (N.J.A.C. 5:93-4.2) to make explicit that credits, if any, shall be used to reduce the pre-credited need, and hence the unmet need if a municipality is entitled to a vacant land adjustment based on its RDP.*

#### **C.9. Access to NJDEP-Approved Wastewater Infrastructure**

*Issue:* Under what conditions, if any, should COAH be able to certify a site for inclusionary development that lacks access to NJDEP-approved wastewater infrastructure?

*Current COAH rule:* Under rules amended in 1999, COAH may certify a municipal housing element and fair share plan that relies on an inclusionary development site that lacked NJDEP-approved access to sewer infrastructure, provided only that: (a) the site was proposed for wastewater service in an amendment to an areawide water quality management plan pending before NJDEP and (b) the amendment was submitted to NJDEP before COAH granted final substantive certification. COAH rules allow two years for the municipality to obtain this essential NJDEP approval. If NJDEP denied this approval or made no determination by the end of the two year period, then under the rules COAH will “revisit the site and housing plan” to determine if a realistic opportunity is provided. The rules also direct COAH to give priority to sites where infrastructure is “currently or imminently” available. See the definition of “developable site” at N.J.A.C. 5:93-1.3 and the siting criteria for inclusionary development at N.J.A.C. 5:93-5.3(b).

*COAH Recommendation:* Not addressed

### COALITION RECOMMENDATION

*The current COAH rules invite unconstitutional municipal delay in complying with fair share housing obligations. Access to approved sewer service is essential for the actual construction of inclusionary developments and lower income housing developments. Without access to approved wastewater conveyance and treatment systems with adequate capacity, developers simply cannot build low and moderate income housing. There is no likelihood that low and moderate income housing will actually be constructed if a site proposed for inclusionary development is not approved by NJDEP for appropriate wastewater service. The critical approval for a site’s wastewater infrastructure is inclusion of a site in the wastewater management plan approved by NJDEP as an amendment to the applicable areawide water quality management plan. COAH rules should encourage timely, coordinated, and simultaneous housing and wastewater management planning by municipalities, instead of the current invitation to sequential years of delay inherent in the COAH rules. To remedy this situation, COAH should amend its rules to:*

- 1. Require that any housing element and fair share plan filed with COAH or petition for substantive certification, whichever action occurs first, include any required areawide*

*water quality management plan amendment application (in the form of a wastewater management plan or plan amendment) filed with NJDEP at the time of the initial filing or petition with COAH,*

2. *Grant the municipality conditional substantive certification, if its housing plan met all applicable COAH standards, including conformance with the State Development and Redevelopment Plan for all inclusionary and lower income housing development sites, except for NJDEP-approved access to sewer infrastructure for an inclusionary and/or lower income housing development site(s) (i.e., that the site was “developable”), provided: (i) the municipality had diligently pursued the required areawide water quality management plan amendment and (ii) the municipality demonstrated that there were no other available, suitable, and approvable sites with existing access to NJDEP-approved infrastructure,*
3. *Allow the municipality two years from the date of either its initial filing or petitioning COAH, whichever came first, to obtain the necessary NJDEP consistency determination or approval of an amendment to the applicable areawide water quality management plan required to demonstrate that the proposed inclusionary and/or lower income housing development site(s) had access to NJDEP-approved sewer infrastructure (i.e., that the site was “developable”) and that a “realistic opportunity” had in fact been created, and*
4. *Grant the municipality final substantive certification once the municipality demonstrated, within the two year period from the initial filing or petition, that all inclusionary and/or lower income housing development sites had NJDEP-approved access to sewer infrastructure, or revoke any conditional substantive certification that may have been granted to the municipality, if the municipality failed to demonstrate within the two year period from the initial filing or petition that a “realistic opportunity” had in fact been created.*

## **OTHER COAH RECOMMENDATIONS**

### **D.1. Alternative Living Arrangements (boarding homes, group homes, transitional facilities for the homeless, congregate living arrangements, etc.)**

*Issue:* How should alternative living arrangements be considered in the COAH rules, i.e., as inclusionary developments or as special needs housing.

*Current COAH Rule:* N.J.A.C. 5:93-5.8.

*COAH Recommendation:* Specify that alternative living arrangements are not considered inclusionary developments in PA 4 & 5 and should not be subject to center designation or plan endorsement requirements. Exempt from bedroom mix. Place on building schedule to encourage completion. Require funding sources to be identified to COAH up front.

### COALITION RECOMMENDATION

1. *Alternative living arrangements should not be regarded as a primary means of complying with a municipality's Mount Laurel obligation. The U.S. Census data on which the housing need calculation is derived excludes many residents of "group quarters" from its definition of "household." N.J.A.C. 5:93-1.3 should be amended to clarify that an "alternative living arrangement" may be included in a compliance plan only if its category of residents is one counted by the Census as part of those households in need of low and moderate income housing. Alternatively, amend the procedure for calculating housing need to include residents of group quarters in the lower income household population.*
2. *Where "alternative living arrangements" are an appropriate component of a compliance plan, it is appropriate to exempt them from COAH's bedroom mix requirements, as proposed. The extent to which these facilities should be required to comply with siting and State Development and Redevelopment Plan conformance requirements applicable to inclusionary developments and affordable housing developments depends on their characteristics. For instance, a small facility that operates in the same manner as a single-family detached house should be treated differently from a large, multi-bedroom facility.*

#### D.2. Accessory Apartments

*Issue:* How should the rule on accessory apartments be modified, in light of the small number of accessory affordable apartments actually produced in the first two rounds?

*Current COAH Rule:* N.J.A.C. 5:93-5.9

*COAH Recommendation:* Increase conversion subsidy to \$12,000 in sewerred areas, \$2,000 in non-sewerred; require homeowner income of 100% of median or less to qualify for subsidy; require third party administrator to run program; cap at 6 apartments per municipality, or 10 apartments if applicants are pre-qualified

### COALITION RECOMMENDATION

*There are a variety of reasons why accessory apartments have not been, and are unlikely to be in the future, a meaningful strategy by which municipalities can address their fair share obligations. The Coalition does not oppose COAH's tinkering with the requirements for accessory apartments, as long as COAH maintains tight caps on the extent to which this minor compliance option is available to municipalities.*

#### D.3. Assisted Living Residences

*Issue:* How should assisted living residences with affordable units be treated in certified housing plans?

*Current COAH Rule:* N.J.A.C. 5:93-1,3 and -5.16 (pending, 33 N.J.R. 3601)

*COAH Recommendation:* New rule likely to be adopted by COAH in Winter-Spring 2002.

### COALITION RECOMMENDATION

*COAH should amend its pending rule amendment as follows (see comments previously submitted by the Housing and Community Development Network of New Jersey and others on the pending rule):*

1. *Expand the proposed definition of "Medicaid waiver" to clarify that "The New Jersey Department of Health and Senior Services allocates Medicaid waivers to specific licensed assisted living residences."*
2. *Delete the option of making all of the affordable units affordable to households at 60 percent of median income, as that proposal is contrary to Mount Laurel II, where the Supreme Court made clear that the housing needs of low and moderate income households "are two fairly distinct lower income housing needs, [and] an effort must be made to meet both." 92 N.J. 158, 257 (1983) Targeting affordable assisted living units only at 60% median income ignores the needs of low income households below 50% of median. In addition, a recently state law makes clear that assisted living residences are to address low as well as moderate income persons, by indicating that a requirement to reserve 10% of beds for Medicaid eligible persons "shall be recognized to fulfill all or a portion, as applicable of **low** and moderate income ... requirements contained in municipal ordinances."(C.26:2H-12.18) (emphasis added).*
3. *Require that the entire fee for rent, food and services to be established at significantly below 50% of median income, to remain true to COAH's mission of serving low as well as moderate income households.*
4. *Supplement proposed N.J.A.C. 5:93-5.16(d) now to provide the form of the deed restriction acceptable to HMFA as an appendix, as was done for conventional affordable housing for the recently adopted Uniform Housing Affordability Controls (see 33 N.J.R. 239), in order to avoid delay in establishing and enforcing affordability controls for an inclusionary assisted living residence.*
5. *Do not adopt proposed N.J.A.C. 5:93-5.16(f), and do not offer municipalities rental bonuses for affordable units in an assisted living residence, as no bonus or incentive is necessary to encourage a developer to provide units in an assisted living residence as rental units. Rather, assisted living residences are typically operated with a rental occupancy structure.*
6. *Amend proposed N.J.A.C. 5:93-5.16 to provide a minimum mandatory set-aside of affordable units in an assisted living residence, such as 20%. It is particularly important for COAH to establish a minimum set-aside greater than 10% in order for units to qualify for COAH credit, as recently enacted state law already requires that all newly licensed assisted living residences must reserve 10% of their beds for Medicaid eligible persons. P.L. 2001, c. 234, effective August 31, 2001. The economic impact statement with the*

*rule proposal indicates that COAH is silent on the set-aside issue “because municipalities and providers will negotiate the set aside based on the economics of assisted living residences.” To avoid the spectacle of haggling on the set-aside before a planning board or board of adjustment, and to enable COAH to review and certify inclusionary zoning ordinances that create realistic, predictable opportunities for affordable units in assisted living residences, COAH should establish a realistic minimum set-aside in this rule.*

#### **D.4. Credits for units built between 1980-1986**

*Issue:* How should credit be given for housing produced after 1980, the Census data-measuring point for 1<sup>st</sup> round obligations, and 1986, when COAH’s rules were implemented? Some units built during this period are in fact affordable despite not being subject to legally-enforceable controls on affordability. (“credits without controls”)

*Current COAH Rules:* N.J.A.C. 5:93-2.15; 3.2(b).

*COAH Recommendation:* No change from present, statutory requirement

#### **COALITION RECOMMENDATION**

*Accept the COAH recommendation.*

#### **D.5. Community Capacity for Inclusionary Development: 20% Cap on Existing Housing Stock**

*Issue:* Should COAH maintain a cap on new inclusionary development measured as a percentage of the existing housing stock?

*Current COAH Rule:* N.J.A.C. 5:93-2.16

*COAH Recommendation:* No change

#### **COALITION RECOMMENDATION**

*Accept the COAH recommendation*

#### **D.6. Rental Rehabilitation Affordability Controls**

*Issue:* Should the rule requiring 10 year affordability controls of rental rehabilitation projects be changed?

*Current COAH Rule:* N.J.A.C. 5:93-5.2(f)

*COAH Recommendation:* No change, 10 year controls

#### **COALITION RECOMMENDATION**

*Accept the COAH recommendation*

#### **D.7. Foreclosure**

*Issue:* Should foreclosure extinguish affordability controls?

*Current COAH Rule:* N.J.A.C. 5:93-9.17 and N.J.A.C. 5:80-26

*COAH Recommendation:* Retain the existing controls under the uniform Housing Affordability Controls, which took effect in 2001, under which foreclosure does not extinguish affordability controls.

#### **COALITION RECOMMENDATION**

*Accept the COAH recommendation*

#### **D.8. ECHO (elder cottage housing opportunities) Housing**

*Issue:* Should the ECHO option be retained, as COAH reports that only five ECHO units have been created, statewide?

*Current COAH Rule:* N.J.A.C. 5:93-5.12

*COAH Recommendation:* No change

#### **COALITION RECOMMENDATION**

*Accept the COAH recommendation*

#### **D.9. Affordable Apartments over First Floor Commercial Uses**

*Issue:* Should credit be granted for affordable apartments over first floor commercial space as a pilot program?

*Current COAH Rule:* None

*COAH Recommendation:* Create a pilot program. May need zoning changes for municipalities to enact; \$25, 000 contribution from municipality toward conversion/construction; cap on total allowed likely and exempt from bedroom mix.

#### **COALITION RECOMMENDATION**

*This is an example of over-regulation by COAH. Housing above first floor commercial space is an established option, which is returning to favor in many communities as a result of downtown revitalization efforts, a special HMFA financing program, and "new urbanism" planning strategies. If these units otherwise meet "realistic opportunity" criteria, COAH should simply approve them. There is no need for a "pilot program."*

*More broadly, COAH's regulations should be structured so that there is no inference that any innovative housing type is prohibited solely because it is not explicitly permitted. Innovative solutions to the problem of affordable housing should be encouraged so long as they meet the substantive requirements of COAH rules, the Fair Housing Act, and the Mount Laurel doctrine.*

#### **D.10. Municipally Sponsored Subsidized Home Ownership Programs**

*Issue:* Should the rules on write down/buy down programs be changed?

*Current COAH Rule:* N.J.A.C. 5:93-5.10 and -5.11

*COAH Recommendation:* Consolidate various existing programs into one; minimum \$20,000 per unit; 10 unit maximum if scattered site units, reviewable after two years; municipality must have experienced program administrator; if affordable units in development proposed to be greater than 30%, market analysis of impact on market-rate units required

#### **COALITION RECOMMENDATION**

*COAH should refrain from over-regulation of this option as well. The maximum number of units should be flexible based on track record of municipality and other entities involved; i.e., nonprofits, administrative entity. Market analysis requirement should be clarified to state that a market justification is required, not a full-blown market analysis, except in extreme cases (particularly high affordable percentage or particularly large development in community context), where COAH may require a market analysis.*

#### **D.11. Spending Plans and Affordability Assistance**

*Issue:* Should spending plans for development fees be required to devote a specific percentage of collected fees to affordability assistance or should municipalities be allowed to use the fees flexibly for a variety of eligible activities, including preventing foreclosure?

*Current COAH Rule:* N.J.A.C. 5:93-8.16 specifies eligible housing activities that may be funded, and requires that 30% of collected fees be devoted to render units more affordable.

*COAH Recommendation:* Allow affordability assistance as permitted activity without percentage (currently 30%); include foreclosure prevention as permitted use of collected fees.

#### **Coalition Recommendation**

*The Coalition supports the increased flexibility in the use of collected fees.*

#### **D. 12. Experienced Administrative Entity for Housing Rehabilitation Programs and Housing Affordability Controls Programs**

*Issue:* Should COAH attempt to upgrade the quality of administrative support for housing rehabilitation and affordability control programs through regulation?

*Current COAH Rule:* None.

*COAH Recommendation:* Develop standards (none specified by the Task Force).

#### **COALITION RECOMMENDATION**

*The Coalition supports the concept of enhanced administration, but the standards appropriate for rehabilitation program administrators should be different than those for the "administrative agent" responsible under N.J.A.C. 5:80-26.14 for housing affordability controls. COAH and HMFA should also establish standards for each. COAH should also ensure that training is available for these two functions and identify agencies, entities, and individuals that it finds to be sufficiently experienced. The issue of the cost of training must be addressed.*

#### **D.13. Municipally Sponsored New Construction and Gut Rehabilitation**

*Issue:* Are the current rules for municipally-sponsored projects satisfactory?

*Current COAH Rule:* N.J.A.C. 5:93-5.5

*COAH Recommendation:* No changes

#### **COALITION RECOMMENDATION**

*The Coalition supports retention of the current rules, with an amendment to N.J.A.C. 5:93-5.5(a)1. that provides that a municipal governing body resolution committing the municipality to acquire a site, by condemnation if necessary, shall suffice to demonstrate site control.*

#### **D. 14. Credit for Rehabilitation in Third Round of Units Built in First Round**

*Issue:* Should affordable housing units that were built in the 1980s and now require rehabilitation be credited towards the municipality's 3d round obligation.

*Current COAH Rule:* None

*COAH Recommendation:* Permit credit in 3<sup>rd</sup> round for rehab of 1<sup>st</sup> round units if they meet rehab criteria.

#### **COALITION RECOMMENDATION**

*By highlighting 1<sup>st</sup> round units, this proposed new rule implies that a unit that was not built during the 1<sup>st</sup> round is somehow not eligible for crediting against the municipal obligation. Any unit that meets COAH's rehabilitation criteria should be eligible, regardless of whether or not the unit was built in the 1<sup>st</sup> round. If COAH's objective is to clarify that 1<sup>st</sup> round units*

*are not themselves ineligible, this can be handled with a slight revision of the existing rehab rule, N.J.A.C. 5:93-5.2.*

### **Coalition for Affordable Housing and the Environment**

The Coalition for Affordable Housing and the Environment, a statewide group of planning, environmental and housing organizations and advocates who recognize the interdependency of urban, suburban and rural communities, is working to build unique partnerships for a just and sustainable New Jersey. The Coalition's goals are to increase affordable housing opportunities, to preserve New Jersey's natural resources, and to rebuild cities throughout the state. To achieve these goals, the Coalition advocates:

- Improving Growth Management. Adoption of smart growth principles would assist in the redevelopment of urban and older suburban communities, protection of open space and natural resources, provision of affordable housing, reduction of auto dependency, and stabilization of property taxes.
- Redirecting State Spending. The state must use its spending powers, especially those related to transportation, environmental infrastructure, open space and business incentive funding, to better promote redevelopment in cities and older suburbs and to direct growth away from New Jersey's remaining open spaces.
- Reforming New Jersey's Tax Structure. New Jersey's over reliance on the property tax thwarts urban revitalization efforts, undermines production of affordable housing and promotes sprawl, and achieving the Coalition's goals will remain difficult until the state addresses real property tax reform.

The Coalition's members are:

Association of New Jersey Environmental Commissions; Camden County Council on Economic Opportunity; Camden Lutheran Housing; Center for Non-Profit Corporations; Clean Ocean Action; Corinthian Housing Development Corporation; Episcopal Community Development, Inc.; Grassroots Environmental Organization; Heart of Camden, Inc.; Housing and Community Development Network of New Jersey; Housing Partnership of Morris County; Ironbound Community Corporation; Isles, Inc., Trenton; La Casa de Don Pedro, Newark; Morris 2000; Lawrence Non-Profit Housing, Inc.; New Community Corporation; Newark Community Development Network; New Jersey Audubon Society; New Jersey Conservation Foundation; New Jersey Environmental Federation; New Jersey Environmental Lobby; New Jersey Future; Partners for Environmental Quality; Preservation New Jersey; Regional Plan Association; Regional Planning Partnership; Sierra Club, New Jersey Chapter; St. James CDC, Newark; Tri-County Community Action Agency; Trust for Public Land; Urban League of Hudson County; Candace Ashmun; Henry Coleman; David Higham; David Kinsey; Alan Mallach; John Payne; Richard Sullivan; Baye Wilson

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