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New Jersey State Legislature

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November 14, 2008

Brian Alpert, Senior Research Associate
Senate Republican Office
P.O. Box 099
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Dear Mr. Alpert:

You have asked us to review the information entitled, "Guide to Affordable Housing Resources in New Jersey," published by the Department of Community Affairs, and to provide you with an analysis of whether these particular financial resources are available for use by municipalities in addressing their respective fair share affordable housing obligations as calculated by the Council on Affordable Housing. Copies of both the resources guide and the fair share housing obligation chart are attached as enclosures.

We have determined, for the reasons stated hereinafter, that the resources identified by the Department of Community Affairs are resources which may be used to subsidize and produce affordable housing, but which may not be used to satisfy any particular municipality's fair share housing obligation, under the clear language of the "Fair Housing Act." Furthermore, even if these resources were to be made available to individual municipalities to produce housing units which may be credited against a municipality's fair share obligation, the total amount of these resources is seriously insufficient to meet the costs of producing the number of units required Statewide. Certain funding mechanisms, such as inclusionary developments for which the developer subsidizes the costs, will undoubtedly be relied upon by many municipalities to fund the costs of producing such housing, but will be unavailable to many others where vacant land is scarce. We cannot estimate the occurrence and availability of this resource. The use of regional contribution agreements, which were major funding resources of affordable housing, was eliminated as a mechanism by P.L.2008, c.46. Therefore, we conclude that the resources identified by the department will not be sufficient to fulfill the fair share housing obligations of

many municipalities as estimated in accordance with the requirements set forth in the rules of the Council on Affordable Housing (COAH).

First, a brief review of the "Fair Housing Act" will be useful to highlight what is and what is not required under that act. As you know, the "Fair Housing Act," P.L.1985, c.222 (C.52:27D-301 et al.), was enacted in response to increasing pressure from the public and the court to take over the role the court had been playing in determining whether a municipality was exercising its land use powers in an appropriate and constitutional manner. The New Jersey Supreme Court held in *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151 (1975), and in *Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp.*, 92 N.J. 158 (1983), that each municipality located in a growth area has a constitutional obligation to provide a realistic opportunity for its share of the region's need for housing affordable to low and moderate income households.

Although granted considerable deference by the court to create a methodology, the method of calculating the fair share housing obligations of each municipality selected by the council must not conflict with the methods specifically outlined in its enabling act, that is, the "Fair Housing Act." N.J.S.A.52:27D-307 requires that the council:

- a. Determine housing regions of the State;
- b. Estimate the present and prospective need for low and moderate income housing at the **State** and **regional** levels [emphasis added];

The statute further states that the council is to:

- c. Adopt criteria and guidelines for:
 - (1) Municipal determination of its present and prospective fair share of the housing need in a given region which shall be computed for a 10-year period.

Regarding COAH's obligation to determine regional and State levels of affordable housing need, the statute specifically provides in the next-to-last paragraph of subsection e. of the section:

.....

In carrying out the above duties, including, but not limited to, present and prospective need estimations the council shall give appropriate weight to pertinent research studies, government reports, decisions of other branches of government, implementation of the State Development and Redevelopment Plan prepared pursuant to sections 1 through 12 of P.L.1985, c.398

(C.52:18A-196 et seq.) and public comment. To assist the council, the State Planning Commission established under that act shall provide the council annually with economic growth, development and decline projections for each housing region for the next ten years. **The council shall develop procedures for periodically adjusting regional need based upon the low and moderate income housing that is provided in the region through any federal, State, municipal or private housing program.** [emphasis added]

The language in bold refers, in part, to low and moderate housing that is subsidized by State or federal programs. When this type of affordable housing is produced, or will be produced through earmarking of the resources, the council is instructed by this language to reduce the fair share housing obligation of the housing region in which it is built. Each municipality's fair share number, therefore, *should not include* units of housing slated to be produced by State or federal subsidies. Another way to state this is that the municipal fair share numbers should consist solely of each municipality's portion of the net regional affordable housing obligation need number, not the gross number prior to crediting for units produced by State or federal subsidies.

This language in and of itself bodes against a conclusion that the State and federal subsidy resources listed in the DCA guide will be available to fund production of housing units which may be eligible for credit against any particular municipality's fair share housing obligation. Rather, as stated above, this type of affordable housing is to be credited to the gross affordable housing need in the housing region. The "Fair Housing Act" contains other supportive language which also emphasizes the point that the contribution of a municipality towards the production of affordable housing should be in the form of a zoning contribution, not a financial contribution. See subsection d. of N.J.S.A.52:27D-311, which states clearly that "[n]othing in P.L.1985, c.222 (C.52:27D-301 et al.) shall require a municipality to raise or expend municipal revenues in order to provide low and moderate income housing."

COAH's regulations permit a municipality to address its fair share housing allocation in a variety of ways. Each fair share number consists of a rehabilitation share, a prior round unmet need share, and a prospective need share.¹ In accordance with the council's regulations, we have used the following costs for each method of meeting the fair share, as indicated.

Rehabilitation share -	\$ 10,000 per unit cost required
Market to affordable -	\$ 25,000 average cost rental or for sale
Units of new construction	\$161,095 average subsidy

¹ The regulations refer to this portion as the "growth share," although the Legislature chose not to incorporate this term, or the growth share concept, in its most recent in-depth amendments to the act through P.L.2008, c.46.

Our calculations do not take into account that some units will receive double or extra crediting; therefore a margin of error on these costs could be assumed of up to approximately 25 percent. In addition, we do not estimate the number of units which may be produced through inclusionary zoning techniques. We note that in municipalities which are growing and which contain ample vacant land, this technique could provide considerable financial resources towards affordable housing production. We estimate that this increases the total margin of error in the costs estimates below to 50 percent.

The total State rehabilitation need is 51,904 units	Costs	\$ 519,040,000
Total possible "Market to Affordable Units 18,987	Costs	\$ 474,675,000
Total remaining new construction units 170,885 (no inclusionary technique assumed)	Costs	\$27,528,719,075
Total for all units contained in fair share allocations	Costs	\$28,522,434,075

A review of the documents entitled "Consolidated Plan FY 2008 Action Plan" (Action Plan) and "A Guide to Affordable Housing Funding Sources October 2008" (Guide), indicates that eligible uses of a variety of the funding programs described as "production" include non-production uses, such as public facilities and services, support services, closing costs, down payment assistance, etc., thereby reducing the funding amounts actually available to produce low and moderate income affordable housing. A spreadsheet is enclosed which describes eligible uses of each program, noting discrepancies where possible. Several examples are highlighted here. As many of these numbers are municipality specific, indeterminate, or unidentifiable, we have not summed up the resources.

One of the largest programs, the Community Development Block Grant Program (CDBG), includes numerous eligible uses that do not produce actual units of affordable housing. Eligible uses include public facilities and improvements (including decorative pavements, fountains, works of art), and includes public services (including employment, crime prevention, child care, health) (see, C.F.R. 570.201). Appendix A of the Guide lists \$91,355,754 as an anticipated yearly potential for this program. That allocation goes to only 39 metro cities and 14 urban counties, resulting in a Statewide allocation of \$7,170,552. Concerning the HOPWA FY 2008 allocation, the Guide notes a Statewide allocation of \$12,098,823. A more accurate assessment appears in the Action Plan which lists the Statewide allocation as \$1,079,000. That is the actual amount remaining for all other municipalities after the bulk of the allocations have been made to five large cities. (Please see enclosed HUD fax dated 11/7/08.)

Grant funds under the Capital Magnet Fund, initiated under The Housing and Economic Recovery Act of 2008, P.L.110-289, may also be used for economic development or community

service facilities in conjunction with affordable housing to help stabilize a low-income or rural area. It should also be noted that to satisfy the match requirements of the HOME, Emergency Shelter Grant, and Community Development Block Grant programs, the State will use State funds from the Neighborhood Preservation Balanced Housing Program and the Neighborhood Preservation Program. (Please refer to page 27 of the Action Plan.)

With regard to the allocation for Neighborhood Stabilization Program Grants, Appendix A of the Guide indicates that the Statewide allocation is \$63,995,490. The correct allocation is \$51,470,620, with the balance earmarked for three cities and two counties (Federal Register, Vol.73, No.194, October 6, 2008). In addition, eligible uses for these funds include homebuyer loans and other uses that do not add to new affordable housing stock.

Concerning the Neighborhood Revitalization Tax Credit Program: The Guide lists \$5,205,600 as the yearly potential, while the Action Plan lists \$2,200,000 as the estimated 2008 activity level.

In response to comments, the Action Plan notes on page 92 that Choice funding increased only slightly from 2007 to 2008 but produced only half as many units because the per unit subsidy amount was increased to encourage middle income and emerging market units.

The Guide states a yearly potential for the New Jersey Affordable Housing Trust fund of \$143,455,375 (10 year potential \$1,434,553,750). This figure appears to be based on the Legislative Fiscal Estimate to A.500, P.L.2008, c.46, approved July 17, 2008, (copy enclosed). It should be noted that the Fiscal Estimate cautions that the OLS estimates an indeterminate increase in State revenue and an indeterminate increase in State revenue due to the unpredictable nature of the basis for the fee; i.e., the extent and location of new construction subject to the fee.

Development fee trust funds received through local development fee ordinances are municipality specific and difficult to quantify. The fees would be paid to the State by developers in municipalities currently not under COAH jurisdiction; otherwise they would be paid directly to the municipality where the construction occurs. In addition, the only funds which may be used by all municipalities will be deposited into the Affordable Housing Trust Fund, and then prioritized for use by COAH certified municipalities. Approximately 274 municipalities are certified to collect development fees for deposit into the Affordable Housing Trust Fund.

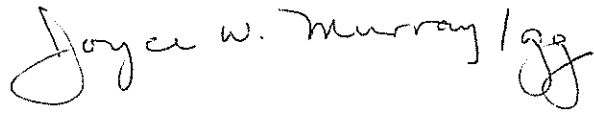
By Press Release dated October 28, 2008, Department of Community Affairs (DCA) Commissioner Joseph Doria indicated that the Affordable Housing Funding Source Guide (October 2008) (Guide) lists various funding programs with the potential to provide over \$848 million in funds for the production of affordable housing. This figure appears to correlate to the Total Yearly Potential listed in Appendix A of the Guide as the total allocated to production programs, or \$848,815,191, which, as noted also includes nonproduction activities.

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Utilizing the DCA's number for total proposed available resources, which allows, in the broadest sense, all funds to be used for housing production, we do not reach a total yearly potential of more than \$849,000,000 (rounded). Subtracting that number from the yearly costs total for all units contained in the fair share allocation of \$2,852,243,407 (one-tenth of the total amount shown on page 4), this leaves a \$2,003,243,407 deficit in annual resources for fair share housing obligations if municipalities choose not to raise their own revenues to meet fair share housing allocations, and if inclusionary zoning is not the primary method employed by a municipality in the production of affordable housing.

We hope you find this information useful. If you have any additional questions or comments about our research or calculations, please do not hesitate to contact either of us.

Sincerely,

Handwritten signature of Joyce W. Murray in cursive script.

Joyce W. Murray
Lead Counsel

Handwritten signature of Gail Gutmann in cursive script.

Gail Gutmann
Special Assistant

Enclosures