FAIR SHARE
HOUSING CENTER

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December 21, 2015

Honorable William C. Meehan, J.S.C.
Superior Court of New Jersey
Bergen County Courthouse
10 Main Street, 3rd Floor
Hackensack, NJ 07601

Re: In the Matter of the Application of the Borough of East Rutherford,
Docket No. BER-L- 5925-15

Dear Judge Meehan:

In accordance with the case management order entered by Your Honor on October 29, 2015, Fair Share Housing Center (FSHC) files these comments regarding the plan summary prepared by the Borough of East Rutherford.

As a preliminary matter, it is important to note that our review of the plan prepared by the municipality is unavoidably limited because little information has been provided by the municipality. The plan summaries do not permit an in depth analysis of what the municipality has proposed. We reserve the right to supplement these objections and do not intend to waive any objections simply because they are not mentioned here. We rely on our October 30, 2015 submission to the court regarding compliance standards and fair share obligations that municipalities should be required to meet as part of this declaratory judgment proceeding and incorporate that filing herein by reference.

We object to East Rutherford's plan summary for the following reasons.

1. **The municipality's reliance on the unadopted methodology included in N.J.A.C. 5:99 constitutes bad faith.**

The Supreme Court required that "previous methodologies employed in the First and Second Round Rules should be used to establish present and prospective statewide and regional affordable housing need. The parties should demonstrate to the court computations of housing need and municipal obligations based on those methodologies." In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1, 30 (2015) (citing In re N.J.A.C. 5:96 and 5:97, 215 N.J. 578, 620 (2013)). The Court did not note or sanction any deviations from those methodologies, thus holding that parties should proceed by following those methodologies with currently relevant data. It is notable that the Court, right after this passage discussed how judges have "discretion" in a different area — compliance standards — and goes on to say that "courts should employ flexibility in assessing a town's compliance." Id. at 30, 33. The Court notably did not state any such "discretion" or "flexibility" as to the methodology, but rather ordered the use of "obligations based on those methodologies." Id. at 30.

In view of those instructions, East Rutherford's reliance on N.J.A.C. 5:99 for the purpose of calculating its Third Round fair share obligation constitutes bad faith. As a threshold matter, N.J.A.C. 5:99 is a legal nullity. It was not adopted because three members of the COAH board found that it did not comply with the Supreme Court's directive to adopt rules based on the Prior

Round methodology. Substantively, the proposed rule substantially deviated from the Prior Round rules with regard to all three of the steps required to assign fair share obligations: (1) calculating the regional need; (2) allocating that regional need; and (3) ensuring that need is met with a realistic opportunity for low- and moderate-income housing. Disregarding the Court's order, COAH proposed rules that:

- Calculated need at a level 70 percent below what the Prior Round methodology required – by manipulating population projections and, as in growth share, using existing exclusionary zoning practices as a limit on regional need;
- Allocated need in a significantly different way from the Prior Round methodology – as in growth share, reducing municipal obligations in places that discourage growth, and using a statewide, not regional, basis for much of the fair share calculation;
- Met the need without the Prior Round's presumptive densities and set-asides for inclusionary development, a change also made in growth share but specifically rejected by Judge Skillman's 2010 opinion, which was affirmed by the Supreme Court.

Regarding calculation, N.J.A.C. 5:99 manipulated the need downward without justification. In the Prior Round rules, COAH used the Department of Labor's official forecasts of population growth to determine the number of low- and moderate-income households needing homes in each housing region. 26 N.J.R. 2347. These data were calculated independently of the COAH process, and thus cannot be manipulated to reduce or increase affordable housing need. In contrast, in the proposed rules, COAH departed from these official State numbers, and assembled its own significantly lower population projections showing slower growth than the State itself projects. Through what it described as "using our procedures" to alter the Department of Labor data, COAH projected that New Jersey will grow by 133,394 fewer people from 2010 to 2025, or 20 percent slower than the official projections. See Proposed N.J.A.C. 5:99 Appendix A, 46 N.J.R. 952. COAH used this proprietary procedure's suggestion of lower rates of growth in New Jersey to reduce regional prospective need by 30,610 households.

COAH then further reduced need by over 37,000 homes through the "buildable limit reduction," which did not exist in the Prior Round methodology. The proposed rules provide that a municipality's Third Round obligations "shall be adjusted to that which can be accommodated as determined by land capacity" as set forth in an appendix. Proposed N.J.A.C. 5:99-3.3, 46 N.J.R. 931. This is a permanent reduction that simply eliminates regional need. This buildable limit reduction replicated the features of growth share this Court specifically held the FHA "precludes COAH" from using: "1) the devising of residential and commercial affordable housing ratios for projected need that are not tied to a regional need for affordable housing, and 2) leav[ing] open-ended how or whether projected need for a housing region will be fulfilled. In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 613. Instead of addressing exclusionary zoning through specified fair share numbers that in total meet the regional need, the buildable limit reduction eliminated need based on existing exclusionary zoning.

Those changes and others cumulatively had a dramatic impact. In the Prior Round rules, from 1987-1999, COAH projected a total statewide prospective need of 68,422 homes, or 5,702 per year over 12 years. From 1999-2024, COAH now proposes a total statewide prospective need of 43,075 homes, or 1,723 per year over 25 years.[1] COAH thus projected significantly less

[1] Municipal obligations for 1987-99 are 85,964, see http://www.nj.gov/dca/services/lps/hss/statsandregs/obligations.pdf (last accessed November 13, 2015).

need for low- and moderate-income housing over 25 years than over the prior period that was half as long, by reducing the annual number of homes required by 70 percent.

Proposed N.J.A.C. 5:99 also substantially deviated from the First and Second Round rules in how obligations were allocated: first by allocating need based on a municipality's own decisions about growth, and not regional factors; and second by allocating need in significant part on a statewide, not regional, basis. Both of these deviations from the Prior Round methodology replicate flaws in the 2008 rules that were invalidated by the Appellate Division and Supreme Court. Instead of allocating need solely based on employment, existing income levels in a municipality, and growth capacity, the Prior Round factors the Court cited, COAH proposed using a municipality's own decision-making on "residential growth" to allocate need. Proposed N.J.A.C. 5:99, App. A, 46 N.J.R. 982. The rules assume that communities that have been "taking housing . . . will probably do so in the future." Id. at 951. Thus, communities that have allowed residential growth in recent years and complied with their Mount Laurel obligations have a higher need, while communities with exclusionary practices have a lower need. As the Supreme Court has found, the FHA prohibits increasing or reducing need based on municipal decisions on growth. In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 605. Including a community's own choices on residential growth as a factor in allocating fair share substantially deviates from the Prior Round rules in violation of this Court's order.

The proposed rules also allocated much of the need on a statewide, not regional, basis. The Court specifically invalidated statewide allocations, holding that "[t]he FHA is replete with references tying affordable housing obligations to a region, not obligations formed on a statewide basis." Id. at 613. The Prior Round, consistent with the FHA, allocated all need on a regional basis. N.J.A.C. 5:93 App. A. ("All allocations. . . reflect the fraction reflecting the community's share of the regional total."). In contrast, in the proposed rules, the portion of need associated with urban municipalities was allocated on a statewide, rather than regional, basis. "Urban aid cities do not receive projected need and this need is distributed to all communities in the state according to a combined allocation factor that uses the four allocation factors (land capacity, relative income, nonresidential job growth/residential unit growth on a statewide basis.)" Proposed N.J.A.C. 5:99, App. A, 46 N.J.R. 986 (emphasis added). This novel formula, not found in the Prior Round rules, redistributed need associated with Newark and Camden, for example, to Cape May and Toms River. Through this statewide redistribution, COAH reduced fair share numbers substantially in regions with large urban centers. In doing so, COAH violated the clear terms of the Court's decision which found that "obligations formed on a statewide basis" were simply incompatible with the FHA. In re N.J.A.C. 5:96 and 5:97, supra, 215 N.J. at 613.

As to how the proposed rules sought to meet the fair share obligations, COAH deviated from the Prior Round rules in the same way as the growth share rules invalidated by the Appellate Division and Supreme Court. The proposed rules, like the growth share rules, deviated substantially from the clear rules on densities and set-asides at the heart of the Prior Round Rules' provision of a realistic opportunity. N.J.A.C. 5:93-5.6 (providing presumptive densities with set-asides of 15 to 20 percent). Instead of adopting these densities and set-asides, the proposed rules provided no fixed densities at all and a presumptive set-aside of only

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subtracting 17,542 homes that are attributable to Reallocated Present Need, 26 N.J.R. 2346, to reach a Prospective Need of 68,422. Municipal obligations for 1999-2024 are 41,280 for 1999-2014 minus a buildable limit reduction of 28,993 equals 12,287, 46 N.J.R. 1012-13, plus 39,361 minus buildable limit and other reductions of 8,572 equals 30,788, 46 N.J.R. 987; 12,287 plus 30,788 equals 43,075.

10 percent. Proposed N.J.A.C. 5:99-7.2(a), 46 N.J.R. 935. The proposed rules also included a novel requirement that every single development be evaluated through a complex economic feasibility study on a case-by-case basis based on nebulous factors such as "capital markets" and the "character of the community." Proposed N.J.A.C. 5:99-7.2(b), 46 N.J.R. 935.

Proposed N.J.A.C. 5:99 has no role in this matter because it was never adopted and because it is not consistent with the Prior Round methodology. East Rutherford should be prohibited from relying on N.J.A.C. 5:99. The municipality should lose its immunity from builder's remedy litigation if it continues to rely on the fair share calculations included in those unadopted rules.

2. **The presence of East Rutherford in the Meadowlands region requires the municipality's fair share obligations to be coordinated through regional planning in accordance with the Mount Laurel doctrine.**

The Borough must consider lands that are both inside and outside of the Meadowlands District in determining its affordable housing obligations. The Borough cannot simply rely on its presence in the Meadowlands region to claim that no growth is possible, but must work with the regional planning authority and the land it controls in the municipality to meet its obligations. See In re Adoption of N.J.A.C. 19:3, 19:4, 19:5 and 19:6 by the N.J. Meadowlands Comm'n, 393 N.J. Super. 173, 182 (App. Div. 2007), certif. denied, 194 N.J. 267-68 (2008)(Mount Laurel applies to state agency "with complete control over the planning and zoning of a vast amount of land"). There is no indication from the plan summary submitted by East Rutherford that the regional planning authority has been involved in planning for the likely significantly higher obligation that East Rutherford will be required to meet. Future submissions should include input from the regional planning authority concerning the land it controls in the municipality.

3. **There are multiple problems with compliance mechanisms in the municipality's plan summary.**

It is not possible to prepare a comprehensive response regarding compliance mechanisms because so little detail is provided regarding what the municipality has done and what it proposes to do. For now we note the following apparent deficiencies:

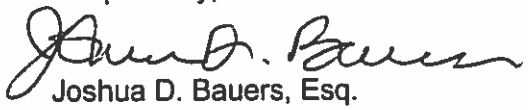
- The Borough does not acknowledge its Rehabilitation Share obligation. FSHC's expert has calculated East Rutherford's Rehabilitation Share at 130 housing units, but the Borough apparently calculates their obligation here to be 3 housing units. Regardless of what the obligation is ultimately determined to be, the Borough has not completed any housing units to address its Rehabilitation Share obligation. Future submissions should include a plan to address this part of the obligation.
- The Borough should explain in more detail the approvals for the "Group at 3" project. It is clear that 32 units have already been approved. However, it is unclear how many more units the Borough plans to rely on toward its Third Round obligation. If there is a mandatory set-aside for this project, it should be identified.
- The Borough does not identify the breakdown of any housing units it has proposed as either low-income, moderate income, or very low-income. Future submissions should explain how the housing will be divided up and should ensure that it is divided up in accordance with the COAH regulations.

- The Borough's plan summary meets the very low obligation that it was assigned in the unadopted rules, but the Borough's obligation is likely to be much higher. FSHC's expert, using the Prior Round methodology, has provided the court and the various municipalities with a clear, cogent, and meticulous report explaining the assignment of obligations for the Third Round. Through this report, which diligently tracks the Prior Round methodology, Dr. Kinsey determined that East Rutherford has an obligation of 857 housing units. The Borough should begin planning for what is likely to a much larger obligation. Further, if the Borough believes it does not have sufficient land to meet such an obligation, it should conduct a vacant land analysis immediately.

Finally, if Your Honor should find an extension is warranted to allow the municipality to further amend and elaborate upon the plan submission, FSHC urges Your Honor to extend immunity only for an additional 30 days.

Thank you for your attention to this matter.

Respectfully,



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