October 15, 2024

Members of the NJILGA

Re: NJILGA's Proposed Fair Housing Act Amendment

Dear Counsel:

The purpose of this letter is to inform you regarding proposals to amend the Fair Housing Act.

On October 2, 2024, I wrote to inform you that the Affordable Housing Committee formed by the New Jersey Institute of Local Government Attorneys (NJILGA) has prepared a proposed amendment to the Fair Housing Act that would establish more realistic fair share affordable housing obligations for New Jersey municipalities for the Round 4 cycle. By determining the obligation using certificates of occupancy for new dwelling units, the proposed amendment will substantially reduce the state-wide affordable housing obligation in a fair and accurate manner.

I have attached the proposed legislation for your review, which has been slightly revised from the version the Committee originally recommended in its September 13, 2024, report to the NJILGA trustees. The purpose of the revision is to clarify that only certificates of occupancy that have been issued for truly "new" residential units – i.e., new residential units that do not replace previously-existing residential units – should be considered when determining the prospective regional need.

NJILGA Trustees voted to support this legislative initiative, and, as with all legislation, I anticipate that further revisions and clarifications will be considered as it proceeds through the legislative process. It is possible that NJILGA itself might seek further changes in response to any questions or concerns that arise. The September 13, 2024, Committee Report is available upon request.

Before the end of this month, the Department of Community Affairs will inform all New Jersey municipalities of their respective Round 4 fair share obligations based on ten-year "household changes" in New Jersey's six affordable housing regions in accordance with *N.J.S.A.* 52:27D-304.2. When those obligations are released, NJILGA urges all affected municipalities to compare them to the obligations that would result from the attached proposed legislation and to take such actions as may be appropriate to promote the enactment of this critical and reasonable legislative change.

We wish to emphasize that these changes are intended to improve acceptance of affordable housing obligations by calculating an accurate need

based on ascertainable data. The Institute is not opposed to affordable housing. Thank you for your interest in sound government.

Very truly yours,
Michele R. Donato
Michele R. Donato
President, NJILGA

Enc.
cc: NJILGA Officers (by email transmission only)
NJILGA Trustees (by email transmission only)

P.L. 2024, CHAPTER _
1

ASSEMBLY HOUSING COMMITTEE

STATEMENT TO

ASSEMBLY, No. __

STATE OF NEW JERSEY

DATED: _____, 2024

The Assembly Housing Committee reports favorably Assembly Bill No. ___.

The New Jersey Constitution and the Fair Housing Act both require municipal affordable housing obligations to be "realistic." Specifically, the initial 1985 version of the FHA, and all subsequent amendments, requires the "prospective need" for each affordable housing region to be based upon "development and growth *reasonably likely to occur.*" Consistent with this requirement, the definition of "prospective need" in the initial FHA and all subsequent amendments is "a projection of housing needs based on development and growth which is *reasonably likely to occur* in a region or a municipality, as the case may be, as a result of actual determination of public and private entities."

The "prospective need" methodology that has been established for the fourth round and all future rounds of housing obligations in the 2024 amendment of the FHA will not result in *realistic* regional and municipal affordable housing obligations, but rather will result in *excessive and unrealistic* affordable housing obligations, because the new methodology is not based on objective housing market data that can be clearly understood and easily quantified. This bill amends the methodology so that it will be based on objective, readily obtainable, and highly relevant market data: the number of certificates of occupancy issued for new residential housing units in each of New Jersey's six affordable housing regions during the act's specified census-based periods. This new methodology, being thus firmly rooted in the realities of market demand and supply, will result in *realistic* regional and municipal fair share obligations throughout the State.

CHAPTER ____

AN ACT concerning affordable housing, including administration and municipal obligations, amending, supplementing, and repealing various parts of the statutory law, and making an appropriation.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 1 of P.L.2024, c.2 (C.52:27D-302) is amended to read as follows:

C.52:27D-302 Findings.

2. The Legislature finds that:

a. The Constitutional requirements of the Mount Laurel doctrine are not static. They have changed as the doctrine has evolved. In 1975, in South Burlington County NAACP v. Mount Laurel, 67 N.J.151 (1975 (commonly referred to as "Mount Laurel I"), the Supreme Court imposed the affordable housing obligation only upon "developing municipalities". In 1977, in Oakwood v. Madison 72 N.J. 481 (1977), the Supreme Court ruled that municipalities could satisfy their affordable housing obligations with good faith efforts. In 1983, in South Burlington County NAACP v. Mount Laurel, 92 N.J.158, 211 (1983) (commonly referred to as "Mount Laurel II"), the Supreme Court found good faith efforts to be insufficient and, instead required satisfaction of a bright line standard.

b. By requiring a bright line standard, most notably with respect to the fair share determination, the Court in Mount Laurel II hoped to achieve modest changes as to how municipalities planned and zoned: "We reassure all concerned that *Mount Laurel* is not designed to sweep away all land use restrictions or leave our open spaces and natural resources prey to speculators. . . . But there will be *some* change, as there must be if the constitutional rights of our lower income citizens are ever to be protected. That change will be much less painful for us than the status quo has been for them. Mount Laurel II, 92 N.J. at 219-220.

c. Mount Laurel II, however, culminated in standards that resulted in far more than "some change". Indeed, the standards the Supreme Court established in Mount Laurel II precipitated a flood of builder's remedy lawsuits that severely eroded the home rule power of municipalities, led to the assignment of extremely high fair share obligations and proved to be very costly to municipalities. The burdens unleashed by Mount Laurel II proved to be so great as to create a powerful movement for a constitutional amendment to remove the courts altogether from imposing Mount Laurel obligations on municipalities.

d. The pressures created by the implementation of Mount Laurel II culminated in the enactment of the New Jersey Fair Housing Act ("FHA") in 1985 through which the Legislature sought to suppress the builder's remedy to the maximum extent possible (N.J.S.A. 52:27D-303, 309, 316, 328); to establish "reasonable fair share guidelines" (N.J.S.A. 52:27D-302 (d)); and to reduce the costs to municipalities of litigating Mount Laurel issues and complying with the Mount Laurel doctrine (N.J.S.A. 52:27D-311 (d)).

e. In calling for the creation of "reasonable" fair share standards, the Legislature recognized "*that the sum of the parts need not equal the whole."* Transcript of September 17, 1984 hearing at page 7. In other words, in enacting the FHA in 1985 and earning the praise of the Supreme Court in so doing, the Legislature was saying the Constitution does not require the obligations of each municipality must add up to the entire obligation.

f. The FHA created the New Jersey Council on Affordable Housing, commonly referred to

as COAH; gave COAH "primary jurisdiction"; and charged COAH with the responsibility of adopting regulations to implement the policies it established. N.J.S.A. 52:27D-304 (a) and 307.

g. In Hill Development Co. v. Bernards Tp. In Somerset County, 103 N.J 1, 63 (1986) (commonly referred to as "Mount Laurel III"), the Supreme Court enthusiastically declared the FHA constitutional and pledged to defer to COAH "wherever possible".

h. COAH adopted regulations to implement the FHA in 1986 for the period commonly referred to as "Round 1" and it adopted regulations in 1994 for the period commonly referred to as "Round 2". The regulations for both rounds largely survived challenge. However, when COAH adopted regulations for Round 3 in 2004 and again in 2008, the Appellate Division invalidated the regulations both times primarily because the regulations required the fair share to be determined through a "growth share" approach and because the Court concluded that the FHA, as written at the time, did not authorize a growth share approach. The Supreme Court agreed, affirming the Appellate Division's decision in In re Adoption of N.J.A.C. 5:96, 215 N.J. 578 (2013). COAH then proposed regulations for Round 3 a third time consistent with the Supreme Court's requirement that it abandon a growth share approach, but ultimately failed to adopt those regulations.

i. Since the FHA permitted COAH to certify the Housing Element and Fair Share Plans of municipalities only if the plans complied with its rules and since those rules were under continuous and vigorous attack, this severely limited the ability of COAH to process applications by municipalities for approval of their Housing Element and Fair Share Plans.

j. COAH's failure to adopt regulations satisfactory to the Supreme Court culminated in In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1 (2015), commonly referred to as Mount Laurel IV, wherein the Court transferred the tasks from COAH back to the courts of (i) establishing standards consistent with the FHA and (ii) processing applications for approvals of Housing Element and Fair Share Plans back.

k. Although the Court sent the task of implementing the doctrine back to the courts in Mount Laurel IV, the Court concluded its opinion by asserting that it preferred the administrative solution established by the FHA to a litigated solution for implementing the doctrine. Consequently, the Court concluded its opinion by expressing its hope that COAH would be resuscitated and that a resuscitated state agency would resume its role in implementing the doctrine. Mount Laurel IV, 221 N.J. at 34.

l. The imposition of a constitutional obligation on municipalities to create a realistic opportunity to satisfy their fair share obligations presumed that the obligations imposed were indeed realistic and grounded in reality. Indeed, the Legislature in both the initial 1985 version and with the 2024 amendments required the prospective need calculation to be based upon "development and growth which is reasonably likely to occur"- not an obligation untethered from reality. N.J.S.A. 52:27D-304 (j).

m. The interests of our state generally and of LMI households in particular is not advanced by

imposing unrealistic fair share obligations and then forcing municipalities to suffer the loss of their home rule powers if they fail to comply with unrealistic obligations. Rather, the obligations must be rooted in reality to be achievable and to constitute sound public policy.

n. Establishing standards rooted in reality merely requires fidelity to the principle embodies in the FHA and that remains in the amended version: that principle is that the prospective need should be based upon development and growth *reasonably likely to occur*.

o. In the decision entitled, In re Application of Municipality of Princeton (Trial Court March 8, 2018 (unpublished) upon which the FHA amendments relied, Judge Jacobson admitted into evidence an expert report that provided an objective basis for estimating the number of affordable units that could be reasonably created through development and growth that is reasonably likely to occur. It is therefore possible to determine the number of affordable units that are realistic based upon the development and growth reasonably likely to occur.

p. In Mount Laurel II, the Supreme Court suggested that developers who previously wanted to build inclusionary projects found it "governmentally impossible". Mount Laurel II, 92 N.J. at 211. In stark contrast, there is a glut of inclusionary zoning provided in the 354 municipalities that complied in Round 3. Since the realities of today are extremely different than the realities of 1983 over 40 years ago when the Supreme Court decided Mount Laurel II, the time has come for the doctrine to continue to evolve so that it is based on the realities of today and not the realities of 1983.

q. In Mount Laurel II, the Supreme Court stated, "The lessons of history are clear, even if rarely learned." Mount Laurel II, 92 N.J. at 236. Now is the time to learn from over four decades of the implementation of the doctrine. We can and should design the doctrine to benefit from what we have learned in the past to make it more effective and to prevent it from becoming so onerous that it crumbles under its own weight.

r. Towards that end, in addition to rooting the prospective need calculation in the reality of the marketplace using a certificate of occupancy-based method for determining the prospective need of the region, we can cure the limitations on accessory apartments that have rendered that technique so ineffective; credit naturally affordable housing such as mobile homes and make mobile homes an effective way to address obligations in the future; and through other measures.

2. Section 6 of P.L.2024, c.2 (C.52:27D-304) is amended to read as follows:

C.52:27D-304.2 Municipal present need, 10-year round, determination of affordable housing obligations.

3. a. Municipal present need for each 10-year round of affordable housing obligations shall be determined by estimating the deficient housing units occupied by low- and moderate- income households in the region, following a methodology similar to the methodology used to determine third round municipal present need, through the use of most recent datasets made available through the federal decennial census and the American Community Survey, including the Comprehensive Housing Affordability Strategy dataset thereof.

b. For the purpose of determining regional need for the 10-year round of low- and moderate-income housing obligations, running from July 1, 2025 through June 30, 2035, and each 10-year round thereafter:

(1) The regions of the State shall be comprised as follows:

(a) Region 1 shall consist of the counties of Bergen, Hudson, Passaic, and Sussex;

(b) Region 2 shall consist of the counties of Essex, Morris, Union, and Warren;

(c) Region 3 shall consist of the counties of Hunterdon, Middlesex, and Somerset;

(d) Region 4 shall consist of the counties of Mercer, Monmouth, and Ocean;

(e) Region 5 shall consist of the counties of Burlington, Camden, and Gloucester; and

(f) Region 6 shall consist of the counties of Atlantic, Cape May, Cumberland, and Salem.

(2) The department shall calculate the prospective need for a region's 10-year round of low- and moderate-income housing obligations based on development and growth which is reasonably likely to occur in the region as provided in this subsection. The department shall ascertain the number of certificates of occupancy issued for new residential units in the region (excluding new residential units that replace demolished residential units) between the most recent federal decennial census and the second-most recent federal decennial census, and divide that number by 5, the quotient of which division shall constitute the number of low- and moderate-income homes that can realistically be provided through inclusionary zoning in the region for the 10-year round.

(3) "Certificate of occupancy" means the certificate provided for in section 15 of P.L.1975, c. 217 (C.52:27D-133), indicating that the construction authorized by the construction permit has been completed in accordance with the construction permit, the State Uniform Construction Code, and any ordinance implementing said code for new residential units, excluding new residential units that replace demolished residential units.

(4) All resolutions committing to a fair share by January 31, 2025 pursuant to C.52:27D-304.1.f.(1)(b) (L.2024, c. 2, § 3) are hereby automatically adjusted to the fair share established by the Department pursuant to the new standards set forth herein for determining the prospective regional need. In addition, municipalities shall have 90 days from receipt of revised fair share obligations from the Department to provide amended Housing Element and Fair Share Plans addressing the new number.

4. This act shall take effect immediately and shall apply to each new round of affordable housing obligations that begins following enactment.

Approved _____, 2024.