August 19, 2002

Maureen C. Fullaway, Executive Director
Council on Affordable Housing
101 South Broad Street
P.O. Box 813
Trenton, New Jersey 08625

RE: Petitions for Interim Substantive Certification of Allamuchy Township, Lawrence Township, Harding Township, Union Township (Hunterdon Co.), Manalapan Township, Glen Rock Borough, Cranbury Township, Bayonne City and Ridgefield Borough

Dear Ms. Fullaway:

Please accept for filing and consideration by the Council on Affordable Housing ("COAH") this letter brief in lieu of a more formal brief. It is filed in support of the motion of the Coalition for Affordable Housing and the Environment ("CAHE") for leave to intervene and oppose entry of interim substantive certification under the current interim certification rule for Allamuchy Township, Lawrence Township, Harding Township, Union Township (Hunterdon Co.), Manalapan Township, Glen Rock Borough, Cranbury Township, Bayonne City and Ridgefield Borough.

CAHE asks that this motion be heard on an emergent basis in light of the potential irreparable loss of affordable housing resources should certifications be granted under the current interim rule, and the need to avoid further delay in creating an interim certification methodology that complies with the constitutional mandates of Mount Laurel. Assuming COAH proceeds expeditiously by adopting a constitutionally permissible interim rule, CAHE further requests that the petitioning towns be granted temporary extended certification, which would protect them from builder’s remedy lawsuits, until those procedures are adopted.
INTRODUCTION

The nine municipalities listed above have petitioned COAH for interim certification, which would extend their expiring, “second round” substantive certifications until such time as COAH releases a “third round” methodology to calculate present and prospective housing need from 1999 forward. With extended second round certification, these municipalities will be in presumptive compliance, indefinitely, with their constitutional obligation under Mount Laurel to provide a realistic opportunity for their fair share of the regional need for low and moderate income housing. Like the 46 municipalities that have already been granted certification under the interim rule, these municipalities need show only a continuing commitment to implement their certified second round plans and to address third round obligations when COAH issues new rules.

The Coalition for Affordable Housing and the Environment (“CAHE”) strongly opposes these petitions because the interim certification procedural rule under which they are made, N.J.A.C. § 5:91-14.3, fails to require municipalities to address any fair share obligations accruing after 1999 until COAH issues third round rules, and is thus unconstitutional. While COAH, under its authority to implement the Fair Housing Act, N.J.S.A. § 52-27D-301 et seq. (“FHA”), may have the power, and, indeed, the responsibility to facilitate voluntary compliance with the FHA during an interim period, it cannot do so arbitrarily, with no basis in ensuring compliance with on-going affordable housing and sound planning obligations. Given that COAH is unlikely to adopt a final third round rule until late in 2004, the current interim rule will effectively permit a full six-year cycle to pass before municipalities must begin addressing present and prospective need arising after 1999. This creates the unacceptable likelihood that valuable, scarce land resources for affordable housing development will be irrevocably lost during this period and that environmental protection and sound planning principles will be distorted or ignored.

CAHE therefore requests that COAH move quickly to revise the current rule and cure this constitutional deficiency. At its September 4, 2002 meeting, COAH should authorize an expedited rule-making procedure to replace the current Subchapter 14 of Chapter 91, on Interim procedures, with a constitutionally acceptable rule consistent with the Mount Laurel doctrine’s core tenets of housing affordability, environmental protection, and sound planning. This rule should establish an obligation to create realistic opportunities for lower income housing over and above any continuing second round obligation, and a methodology for calculating that obligation. CAHE provides in this brief the details of how such expedited rulemaking could take place, and the proposed contents of a revised interim rule. With such rulemaking authorized, COAH should grant the nine petitioning municipalities a temporary extension of their substantive certification under the current interim procedures that would expire thirty days after the adoption of the revised interim rule. These municipalities would be able to petition for a further continuation under the new procedures.

STATEMENT OF INTEREST

Proposed intervenor CAHE, a statewide group of planning, environmental and housing organizations and advocates, works in support of increased affordable housing
opportunities, preservation of New Jersey’s natural resources, and revitalization of cities throughout the state. The Coalition regularly advocates on behalf of the public interest with respect to planning issues and housing policy in this state and has appeared as amicus curiae in Mount Laurel matters. See attached Certification of Paul Chrystie. Engaged in housing and environmental advocacy on a state-wide level, the Coalition has interests in each of the municipalities that have requested interim certification. The Coalition maintains that COAH cannot grant interim certifications without ensuring municipalities’ compliance with Mount Laurel and the Fair Housing Act, and that COAH must adopt a constitutional methodology for addressing the expiration of second-round certifications that ensures municipalities address their present and prospective fair share of affordable housing.

STATEMENT OF FACTS

Procedural History and Current Interim Certification Rules

On July 16, 2002, Allamuchy Township, Lawrence Township, Harding Township, Union Township (Hunterdon Co.), Manalapan Township, Glen Rock Borough, Cranbury Township, Bayonne City and Ridgefield Borough each petitioned COAH to extend their second round substantive certifications under the interim procedures prescribed in N.J.A.C. § 5:91-14.3. On that date, the New Jersey Builders Association (“NJBA”) moved to intervene in the proceedings, objecting to any grant of interim certification by COAH as being without constitutional or statutory authority. Argument on NJBA’s motion was set for September 4, 2002.

The interim procedural rules found in Subchapter 14 of N.J.A.C. § 5:91 were adopted in October, 1999, see 31 N.J.R. 3290(a), to address the expected gap between the expiration of the second round cycle and the adoption of COAH’s third round methodology and rules. The delay derives, at least in part, from COAH’s desire to use 2000 Census data in the third round rule calculations. The interim rules provide for the extension of any expiring second round certifications, and thus protection from suit, for up to one year beyond the adoption of third round rules. With no set expiration date, this protection extends indefinitely. Moreover, the municipalities granted this extension are not required to meet any additional fair share obligations for the post-second round period. Instead, a municipality must only pass a resolution which requests the extension, commits to continue implementation of their second round plan, and further commits to address a third round obligation with a new housing element and fair share plan. This is

1 Subsection 14 also provides for an extension of the opportunity for municipalities which have not applied for second round substantive certification to do so. While these sections, N.J.A.C. § 5:91-14.1 and 14.2, are not at issue in the petitions currently before COAH, and CAHE takes no position here as to COAH’s authority to extend the deadline for second round filings, it does object herein to those sections of 14.1 and 14.2 which purport to extend these new second round certifications to one year beyond the effective date of the adoption of the third round methodology and rules.

2 The final elements of the 2000 census data necessary to develop the third round methodology, the SF3 data, was released on August 6, 2002.

3 The extensions are offered to municipalities with substantive certifications expiring prior to or within one year after the adoption of the third round methodology and rules.
essentially an agreement to do what the municipalities were already obligated to do: address their fair share obligations from 1987 to 1999.

The Extended Duration of the Interim Period

Based on COAH’s own estimates, it now appears that this indefinite moratorium on post-1999 Mount Laurel compliance will be in effect for, at a minimum, six years—the full duration of the previous fair share rounds.

Three years have already passed. COAH currently predicts that it will take “in excess of a year” to formalize the third round methodology and publish regulations, see, July 29, 2002 Certification by Maureen Fullaway, Executive Director of COAH, filed in In Re the New Jersey Council on Affordable Housing’s Third-Round Methodology, No. A-5304-0IT (attached as Exhibit A to this letter brief), ¶11. Given COAH’s prior experience in addressing the “substantial public commentary” that will follow, id., COAH can be expected to take at least an additional year to adopt final rules. Thus, if the third round rules are proposed in the fall of 2003 and adopted – under a best case scenario – in late in 2004, then municipalities with interim certifications will not have to begin addressing their third round obligations until late in 2005.

Prior Gaps in Mount Laurel Compliance

While there have been two previous periods in which enforcement of fair share obligations were suspended, both were justified due to particularities stemming from the adoption of the Fair Housing Act’s administrative structure, and neither remotely approached the most optimistic estimates for the duration of the current moratorium.

The first occurred when jurisdiction over Mount Laurel enforcement was originally transferred from the courts to COAH under the FHA. Under the terms of the statute, a moratorium on builders’ remedies was imposed from the effective date of the act, July 2, 1985, until five months after COAH adopted guidelines for the first fair share period, N.J.S.A. § 52:27D-328, which was also the deadline for submission of the first housing element and fair share housing ordinance. N.J.S.A. § 52:27D-309. All told, the total contemplated moratorium, pending new enforcement measures, was eighteen months, from July 2, 1985, until January 1, 1987, which is almost exactly how long it did take. As the Supreme Court subsequently noted, both the creation of the moratorium and its duration were justified by the establishment of the new administrative apparatus and the amount of work that had to be done, all for the first time: to set up the Council, to develop its rules and procedures, and to determine housing regions and present and prospective need. Hills Development Company v. Bernards Township, 103 N.J. 1, 36-37 (1986).

The second gap also arose to address particularities arising from the mechanics of initial implementation of the Fair Housing Act. On November 4, 1991, COAH adopted

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4 The second round rule adoption provides some guidance as to the expected length of the comment period for the third: the second round methodology was proposed on March 15, 1993, and the rules were eventually adopted on June 6, 1994, a total of one year and three months.

5 COAH had seven months after confirmation of the last member appointed to the council, or until January 1, 1986, whichever came first, to adopt guidelines and criteria. N.J.S.A. § 52:27D-307.
an interim certification rule to assure that all expiring pre-FHA judgments of repose and first round certifications would remain in effect until the second round methodology and rules were released. The rule was necessary largely because all pre-FHA judgments of repose were set to expire six years from the effective date of the act, in July, 1991, two years before the next round for substantive certification would begin. The rule provided for a specific expiration date for interim certifications, July 1, 1993, which was the estimated release date for the second round methodology and rules. With the earliest judgments of repose expiring on July 2, 1991, the maximum duration covered by the interim certifications was two years.

The Impact of Delay on Opportunities for Affordable Housing Development

As COAH is aware, the state of New Jersey continues to experience substantial development pressures that have obvious ramifications for affordable housing creation. During the period between 1999 and 2001, building permits were issued for 106,691 dwelling units, 19 million square feet of retail development, and 46 million square feet of office development. See Exhibit B, Certification of David N. Kinsey in In Re the New Jersey Council on Affordable Housing’s Third-Round Methodology, No. A-5304-01T, ¶ 24. Such development occurred in towns that have received extended substantive certification from COAH. See id (providing figures for Bridgewater, Gloucester, Piscataway, and Wayne). Over the six-year period for which the interim certification is expected to provide a suspension of a municipality’s fair share obligation, the development pressures will continue. The consequences for affordable housing development consistent with principles of sound planning and environmental protection are potentially disastrous.

ARGUMENT

POINT I

COAH’S GRANTING OF EXTENDED SUBSTANTIVE CERTIFICATION WITHOUT REQUIRING MUNICIPALITIES TO ADDRESS THEIR PRESENT AND PROSPECTIVE FAIR SHARE OF AFFORDABLE HOUSING CREATES AN UNCONSTITUTIONAL MORATORIUM ON ENFORCEMENT OF MUNICIPAL MOUNT LAUREL OBLIGATIONS

The substantive certification process is the link between COAH and the constitutional mandates of the Supreme Court’s Mount Laurel decisions. Under Mount Laurel, a municipality can satisfy its constitutional obligations “by affirmatively affording a realistic opportunity for the construction of its fair share of the present and prospective regional need for low and moderate income housing.” Southern Burlington County N.A.A.C.P. v. Mount Laurel Twp., 456 A.2d 390, 413 (N.J. 1983) (“Mount Laurel II”). When the Legislature enacted the FHA, it replaced litigation with substantive certification as the primary means to regulate Mount Laurel compliance, with the hope

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6 Some first round certifications were also set to expire several months before the new round rules were scheduled to be released.
that the COAH process would strengthen municipal acceptance of inclusionary zoning. *Toll Bros., Inc. v. Township of West Windsor*, No. A-103/104-00, 2002 WL 1766585 *23 (N.J. 2002), citing *Hills Development Company v. Bernards Township*, 103 N.J. 1 (1986). Through substantive certification, COAH evaluates and confirms that a municipality’s voluntary plan to satisfy its obligation passes constitutional muster. The FHA thus provides that COAH shall grant substantive certification when the municipality’s fair share plan “is consistent with achievement of low and moderate income housing needs of the region” and “make[s] the achievement of the municipality’s fair share of low and moderate income housing realistically possible.” N.J.S.A. § 52:27D-314. Substantively certified municipalities gain a very strong presumption of constitutionality, that, as a practical matter, immunizes them from *Mount Laurel* inclusionary zoning suits.

In order to fully effectuate both its statutory purpose and the constitutional mandate of *Mount Laurel*, COAH cannot grant substantive certification arbitrarily. N.J.S.A. § 52:27D-307; *Toll Bros.*, No. A-103/104-00, 2002 WL 1766585 at *22. Substantive certification must be predicated, first, on COAH’s determination of the present and prospective regional housing needs and issuance of reasonable fair share housing guidelines and standards. Second, to gain certification, a municipality must demonstrate, through its housing element and fair share plan, that it will meet its fair share obligations. *Fair Share Housing Center, Inc., et al. v. Township of Cherry Hill*, No. A-66-01, 2002 WL 1787926, *11; Hills*, 103 N.J. at 32. Without these two predicates, the certification cannot satisfy constitutional standards.

While COAH may have the authority to adopt an interim rule to address the expected delay, the current interim procedures to extend second round substantive certifications fail to supply the predicates required by both the FHA and *Mount Laurel*. With the expiration of the second round fair share rules over three years ago, and the absence of any guidelines or methodology to address post-1999 obligations, COAH has had no basis to determine whether or not municipalities are constitutionally compliant. Municipalities applying for interim certification do not, and cannot, demonstrate that a constitutional plan is place. Indeed, extended substantive certification is virtually automatic, a far cry from the “extensive and probing” COAH review mandated by the FHA. *Toll Bros.*, No. A-103/104-00, 2002 WL 1766585 at *22.

The fact that COAH requires municipalities to show a continuing commitment to implement their already approved second round plans is constitutionally irrelevant. In its recent decision in *Fair Share Housing Center, Inc. v. Cherry Hill*, the Supreme Court made clear that Cherry Hill’s compliance with a first round plan must be understood as entirely distinct from compliance with its second or third round obligations. Citing COAH’s own interpretation of its rules, the Court held that considerations bearing on the calculation of first round fair share responsibilities “cannot possibly be construed as a determination that the Township has satisfied a round two obligation that COAH had not yet calculated,” even though the first round judgment of repose extended into the second round period. *Fair Share Housing Center*, No. A-66-01, 2002 WL 1787926 at *12. So it is here with regard to whether second round compliance may satisfy third round obligations. It may not. COAH’s interim rule fails to provide a mechanism for ensuring ongoing compliance and thus fails to pass constitutional scrutiny.
POINT II

COAH'S INTERIM SUBSTANTIVE CERTIFICATION PROCEDURES CREATE A CONSTITUTIONALLY IMPERMISSIBLE DELAY BY PERMITTING THE DEPLETION OF SCARCE RESOURCES NEEDED FOR AFFORDABLE HOUSING DEVELOPMENT

COAH’s evident intent that the third round numbers, whenever they are adopted, will relate back to June 6, 1999, see Exhibit A, ¶ 13, and incorporate all subsequent affordable housing needs, is insufficient to rectify the interim rules’ constitutional deficiencies. As a practical consequence of a moratorium period lasting at least six years, scarce land resources for affordable housing will be irretrievably lost. This is impermissible.

The Supreme Court has repeatedly emphasized that the fair share obligation must be addressed in terms that acknowledge the practical dimensions of the provision of affordable housing. In addressing the issue of acceptable delay in the enforcement of Mount Laurel obligations, the Supreme Court in Hills, while accepting as expected and reasonable the 1½ year start-up time granted COAH by the FHA, treated the issue differently when considering whether to transfer existing litigation to COAH’s jurisdiction. Under the FHA, the Court held, “transfer must be granted unless it would result in manifest injustice to any party to the litigation,” id. at 48, with “manifest injustice . . . confined to the very narrowest, most extreme situation.” Id. at 51. Eliminating from that category all foreseen consequences of transfer, the Court found one possible consequence of transfer that would be “constitutionally impermissible. We refer to a transfer that does not simply delay the creation of a reasonable likelihood of lower income housing but renders it practically impossible.” Id. at 55-56. By “practically impossible,” the court referred to situations in which delay could lead to the exhaustion of scarce resources, such as land and sewerage capacity, such that “the municipality as a practical matter will not be able to satisfy its Mount Laurel obligation.” Id. at 61.

In its recent decision in Fair Share Housing Center, the Court reiterated this point, quoting its earlier decision in Holmdel Builders Assoc. v. Township of Holmdel, 121 N.J. 550 (1990):

Land must be viewed as an essential but exhaustible resource; any land that is developed for any purpose reduces the supply of land capable of being used to build affordable housing. The scarcity of land as a resource bears on the opportunity and means to provide affordable housing. This Court has implicitly recognized [in Mount Laurel II, supra 92 N.J. at 210 n.5] that unrestrained nonresidential development can itself deepen the shortage of affordable housing.

Fair Share Housing Center, 2002 WL 1787926 at *9 (quoting Holmdel, 121 N.J. at 562-63)(emphasis in the original).
There can be no doubt that the moratorium provided by COAH's interim procedures will result in the depletion of land resources critical to providing a realistic opportunity for the creation of affordable housing. As noted above, considerable development has already occurred since 1999, with building permits having been issued for 106,691 dwelling units, 19 million square feet of retail development, and 46 million square feet of office development. Such growth will continue, further limiting the opportunities for affordable housing development. Moreover, the current moratorium creates, however inadvertently, a circumstance in which depleting land resources through development, regardless of how poorly planned or environmentally-insensitive, can be perceived as fiscally and socially advantageous to a municipality. It creates an opportunity, and an incentive, for towns wishing to avoid the burdens of a significant third round obligation to build themselves out with market-rate developments and then plead inability to fulfill their obligations due to lack of available land. Such a perverse incentive runs contrary to the smart growth principles espoused in the State Development and Redevelopment Plan, as well as to smart growth ideals in general.

For all these reasons, the current interim procedures are unconstitutional. COAH should not grant extended substantive certification to the petitioning municipalities unless and until a constitutionally sound rule has been adopted.

POINT III

COAH SHOULD AUTHORIZE AN EXPEDITED RULE-MAKING PROCEDURE TO REPLACE THE EXISTING INTERIM CERTIFICATION PROCEDURES WITH CONSTITUTIONALLY ACCEPTABLE RULES

The remedy for unconstitutional delay is prompt action. At its September 4 meeting, COAH should authorize an expedited rule-making procedure to replace the current Subchapter 14 of Chapter 91 on Interim Procedures with a constitutionally acceptable one. This expedited rule-making should be completed within 90 days, and it should contain both procedural guidelines and substantive standards for determining a municipality’s interim obligation under the Mount Laurel doctrine. Within constitutional limits, the discretion to fashion a particular rule rests with COAH. In light of the extraordinary delay that has already occurred, however, we sketch here the contours of a rule that would cure the damage done to the extent that “cure” is possible. It is highly desirable that the Council consult actively with all interested parties as the interim rule is being developed, so that consensus can be achieved and further proceedings obviated.

The following proposal includes three central elements. At the heart of the proposal is the expeditious establishment of a new interim rule which establishes an obligation to create lower income housing over and above any continuing second round obligation (see step 3 below). This obligation would not bind COAH in any way with regard to its ultimate third round calculations and can be determined based upon readily and currently available data. CAHE believes that the growth share proposal it has previously provided to COAH can be meaningfully adapted for the new construction component of the calculation.

The second element of the proposed rule involves the procedural mechanisms necessary to ensure that municipalities that commit to participate and take the appropriate
steps to do so are provided with ongoing protections against builder’s remedy lawsuits throughout the process. This can be done by granting such municipalities temporary certification until the new interim rule is adopted, and then providing interim certification once its terms are met. The final element involves the adoption of, and adherence to, strict timetables for the revised interim rule and the final third round rule.

To facilitate the adoption of this revised rule, we present below a more detailed presentation of the elements that should be included.

1. **Notice of Intent to Participate.** Within 30 days after the revised Subchapter 14 becomes effective, a municipality that was previously awarded interim or extended certification, or a municipality newly seeking an interim or extended certification, should be required to file a Notice of Intent to Participate in the COAH 3d round process. This notice format follows the procedure specified by the Legislature in 1985 to avoid a hiatus while COAH was organizing itself and adopting its initial rules. See N.J.S.A. § 52:27D-309.

2. **Expiration of interim and extended certifications.** Any interim and extended certification previously granted will expire at the end of the 30-day period described in ¶1 unless a Notice of Intent to Participate has been filed. The requirement to exhaust administrative procedures pursuant to N.J.S.A. § 52:27D-318 shall apply only to litigation involving municipalities that have filed a Notice of Intent, i.e., municipalities not filing are subject to litigation in Superior Court and to builder’s remedy lawsuits.

3. **Interim obligation.** The revised rule must establish an obligation to create realistic opportunities for lower income housing over and above any continuing second round obligation, and a methodology for calculating that obligation.

   Properly speaking, the constitutional fair share obligation of municipalities will not be established for the third round until COAH has completed the collection and analysis of data, and has resolved any methodological or policy issues, as described in Executive Director Fullaway’s July 29, 2002 Certification. See Exhibit A. However, as discussed above, it is constitutionally unacceptable to permit years to pass without requiring that municipalities take some positive steps to create realistic housing opportunities. We therefore propose that COAH calculate an “interim obligation,” rather than the “fair share,” to underscore that compliance with these interim rules does not bind the Council in any way with respect to its ultimate third round determinations, or entitle the municipality to claim that satisfaction of its interim obligation relieves it of any further fair share obligations for the period reaching back to 1999, once the full methodology has been determined.

   The **interim obligation** should have two components:

   a. A **rehabilitation** component. Pending an actual count from the 2000 Census, the most equitable way to estimate an interim rehab component is to extend *pro rata* the rehab component assigned to the municipality in the second round, unless the municipality demonstrates convincingly that a different calculation is more accurate.

   b. A **new construction** component. Whatever methodology is
eventually chosen for the third round, it will inevitably depend heavily on measures of development activity and employment opportunities, as did the methodology used in the prior rounds. Therefore, a simple and accurate way to estimate the interim obligation of a municipality is by adapting the growth share proposal that has been presented to the Council previously. Building permit data for residential and non-residential development is fully available on a municipality-by-municipality basis through 2001, and with a 6-month lag time for the current year. Thus, an interim methodology based on the growth share principle can use “real time” data with very little need for estimation.

4. The period of the interim obligation. Ms. Fullaway’s Certification, Exhibit A, estimates that it will take at least a year from end of summer, 2002, to complete work on the 3d Round methodology. Past rule-making proceedings have invariably taken longer than originally promised. Therefore, it is appropriate to establish an interim and extended certification process that runs from June, 1999, the expiration date of the second round calculations, to December 31, 2003, a short time after the most optimistic estimate of when a final third round methodology will be available. This means that the period of interim certification will be approximately 5½ years, or the equivalent of ¾ of the full six-year second round. Should COAH be able to bring its work to a conclusion more quickly, no harm will be done by having a slightly over-long interim estimate, since the interim obligation will then be blended into the full 3d Round period that extends until 2010.

On a pro rata basis, the municipality’s rehabilitation component therefore would be approximately ¾ of its second round rehab obligation; its new construction component would be based on actual building permit data through the end of 2002 (or the most recent data available), with a pro rata extension for 2003. Since development activity may vary significantly from one year to another in any given municipality, the interim rule should permit COAH to establish a higher or lower estimate than the pro rata number where there is a reasonable basis to do so.

5. Re-petition for interim or extended certification. Within 90 days after the revised Subchapter 14 becomes effective, a municipality seeking interim or extended certification should be required to present an Interim Housing Element and Fair Share Plan that addresses its third round interim obligation, and a new petition for interim or extended certification. COAH should generally adhere to the criteria and follow the procedures used in the second round to prepare and evaluate the municipality’s Interim Housing Element and Fair Share Plan. Note that this 90-day period begins when the revised Subchapter 14 becomes effective, not when the municipality files its Notice of Intent to Participate. Focused municipal action will be required to complete the necessary Planning Board and Governing Body steps within 90 days. However, it is no surprise to municipalities that they will have an interim obligation, and if COAH commits itself now to the general approach we are suggesting, local decision-makers will be able to start planning as early as September 2002. More than three years have already passed without even the semblance of third round compliance activity. Just as COAH must act promptly to create an interim methodology, municipalities must act promptly to comply with it.
6. **Timetable for completion of the final third round methodology.** The interim methodology proposed here is necessarily a stopgap, albeit one that is constitutionally imperative. However, putting in place this interim methodology cannot serve as an excuse to delay completion of the final third round rules. We note that the final Census data COAH states that it requires, the Summary File 3 (SF 3, a one-in-six households sample) for New Jersey, was released on Tuesday, August 6. Everything from here forward therefore would seem to be within the Council’s control. At the same time the Council initiates expedited rule-making for interim or extended certification, it should publicly commit itself to a realistic timetable for completion of the remaining steps in preparing, drafting, proposing, considering public comment on, and adopting the Council’s third round methodology and implementing regulations. As the Council initiated this process more than four years ago, in mid 1998, according to the Fullaway Certification, it would seem reasonable for the Council to now begin and conclude the rule-making phase of this process within six months.

7. **The relationship between interim or extended certification and third round substantive certification.** Once a municipality petitions for interim or extended certification, it will begin a process of COAH analysis and review that will take some time to complete, if the past is a guide to the future. Implementation of the third round methodology should not become an occasion for further delay. The final rules should provide for a smooth transition in which implementation of the municipality’s interim plan continues while the municipality, protected from builder’s remedy lawsuits, prepares and presents its full third round Housing Element and Fair Share Plan. There should be a presumptive requirement that all of the elements of the interim plan are to be incorporated as components of the final plan, that the municipality may not “second guess” its interim plan elements when devising its final plan, and that approved elements of the interim plan need not be subjected to a second, time-consuming review as part of COAH’s consideration of the full third round proposal. The principle, obviously, is that to the maximum extent possible, the preparation and processing of the plan to satisfy a municipality’s interim obligation should reduce the amount of time required to process the final plan. To the same end, there is no need to give municipalities a full year after the effective date of the third round methodology to file the new plan or petition the Council for substantive certification. Too much time has already been lost to take a leisurely approach once the third round has been clarified. Instead, the revised Subchapter 14 should provide that a municipality granted interim or extended certification must, to remain under the Council’s jurisdiction, either file the final plan or petition the Council for substantive certification of the final plan within 90 days of effective date of the Council’s third round methodology and implementing regulations.
CONCLUSION

For the aforementioned reasons, CAHE requests that COAH deny these petitions for extended substantive certifications, authorize an expedited rule-making procedure for a constitutional interim certification rule, and grant temporary extended certification to the petitioning municipalities until the new interim procedures are adopted.

Respectfully submitted,

Kenneth Zimmerman, Esq.
New Jersey Institute for Social Justice

Dated: August 19, 2002