August 27, 2002

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

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

Dear Ms. Fullaway and Members of the Council on Affordable Housing:

We represent Harding Township, one of the nine municipalities petitioning the Council on Affordable Housing (COAH) pursuant to N.J.A.C. 5:91-14.3 to extend substantive certification for up to one year from the effective date of COAH's adoption of its third round methodology. We oppose the motion brought by the Coalition on Affordable Housing and the Environment (CAHE) seeking leave to intervene and oppose the nine municipalities' petitions to extend substantive certification.

By our letter to COAH dated August 22, 2002, we objected to the unreasonably short notice of CAHE's motion and the unreasonably short deadline set by COAH for responses to CAHE's motion. We respectfully requested that COAH not consider CAHE's motion on September 4, 2002, and not take action on the petitions of the nine municipalities until October 2, 2002. We now file this letter brief under protest because no adjournment has been granted. We also continue our objection to COAH's bifurcation of the proceedings for the reasons set forth in our letter dated August 22, 2002.
BACKGROUND

Harding Township was granted substantive certification by COAH on November 6, 1996. That certification expires November 6, 2002. Harding has, in good faith, sought to comply with and fulfill its Fair Housing Act obligations.

In 1999, COAH adopted a rule providing interim procedures for municipalities whose second round substantive certifications would expire prior to COAH's adoption of the third round methodology. N.J.A.C. 5:91-14 (the "Rule"). The purpose of the Rule was to ensure that municipalities who had previously been granted substantive certification based upon second round substantive methodology would not be prejudiced by the fact that COAH would not issue third round substantive rules prior to the expiration of their second round certifications.

By letter dated May 14, 2002, COAH advised Harding Township that it could comply with the Rule. Harding Township met all of the requirements for extending the Township's second round certification as set forth in the Rule by adopting a resolution on June 5, 2002.

Copies of COAH's letter advising Harding that it had received substantive certification, COAH's May 14, 2002 letter and Harding's June 5, 2002 Resolution were provided to COAH as Exhibits to Harding's letter brief dated August 2, 2002 in opposition to the motion brought by the New Jersey Builder's Association (NJBA).

POINT I

CAHE'S MOTION SHOULD BE DISMISSED BECAUSE IT IS TIME-BARRED.

CAHE did not appeal the Rule to the Appellate Division within 45 days of its adoption, as would have been allowed under R. 2:2-3. See, e.g., In re Adoption of Amendments to N.J.A.C. 5:93-1.3 and 5:93-5.3 by COAH. 339 N.J. Super. 371 (App. Div. 2001) (challenging constitutionality of amended regulations permitting grant of certifications of fair share plans where inclusionary development plans lacked access to DEP-approved sewer infrastructures). Accordingly, CAHE's motion should be dismissed as time-barred. A challenge to an agency rule must be made to the Appellate Division, not to the agency which drafted the rule.
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POINT II

CAHE'S MOTION SHOULD BE DISMISSED BECAUSE COAH'S RULE IS REASONABLE AND VALID, AND CAHE HAS NOT MET ITS BURDEN OF OVERCOMING THE PRESUMPTION IN FAVOR OF THE RULE'S VALIDITY.

The Rule was an exercise of COAH's legitimate quasi-legislative rulemaking functions and was promulgated in accordance with the standards set forth in the Administrative Procedure Act. The Rule complies with the requirements of Due Process. The Rule is within COAH's statutory mandate. Under the Fair Housing Act, N.J.S.A. 52:27D-301, et seq. ("the Act"), COAH is charged with administering the statutory goals of providing realistic opportunities for affordable housing. Hills Development Co. v. Bernards Township in Somerset County, 103 N.J. 1 (1986). Because COAH has not yet issued third round calculations, COAH acted reasonably in adopting the Rule to secure both the affordable housing protections issued in the second round methodology, as well as the legitimate protections offered to municipalities which have complied with the Act and applicable regulations.

Nothing in N.J.A.C. 5:91-14 or in the municipalities’ petitions for extensions of their substantive certifications affects N.J.A.C. 5:91-10.1 which allows COAH to issue orders requiring the preservation of "scarce resources." COAH is not required to engage in a scarce resources analysis as a result of the motions filed by the CAHE and the NJBA.

POINT III

CAHE'S MOTION SHOULD BE DISMISSED BECAUSE TO GRANT IT WOULD UNDULY PREJUDICE THE PETITIONING MUNICIPALITIES.

Notwithstanding CAHE's failure to properly challenge the Rule, CAHE, like NJBA, is attempting to have COAH declare its own Rule invalid at the expense of municipalities who have fully complied with all existing regulatory requirements for establishing substantive affordable housing elements.

The petitioning municipalities should not be prejudiced by their present inability to petition for third round substantive certification. See also Bernards Township, supra, at 4 (upholding the constitutionality of the Act and stating that "[t]he delay caused by the Act represents the time needed by the Council to do its job well"); In re Adoption, supra, at 388 ("Our courts have given COAH ‘a reasonable degree of latitude’ in implementing the FHA’s legislative goals") (citations omitted).
Harding Township complied fully with COAH’s duty-promulgated regulation for extending substantive certification until COAH issued its third round methodology. Harding Township has committed to continue to implement its second round certified affordable housing plan until the third round methodology is issued. It would be manifestly unfair for Harding Township to lose the protections afforded by the Fair Housing Act since the Township has acted consistently with the law at all times and in all regards with respect to its affordable housing obligations. The Rule adopted by COAH is designed to safeguard these protections until COAH implements its third round methodology. CAHE should not be permitted to frustrate the sound purposes of N.J.A.C. 5:91-14.

POINT IV

COAH’S RULE MAKING AND ADMINISTRATIVE POWERS SHOULD NOT BE ABROGATED OR REPLACED BY CAHE OR ANY OTHER PARTY.

COAH is entitled to prepare its own rules in administering the goals of the Fair Housing Act. COAH is also entitled pursuant to the Act to exercise its own judgment and discretion in devising the third round methodology. No other party or entity may substitute their views for COAH’s in these matters. The proposals of CAHE for revised rules and procedures are merely suggestions for COAH’s consideration. Because we have been given insufficient time to respond to CAHE’s motion, we are unable to adequately respond to CAHE’s substantive suggestions for third round procedures, except to reiterate that the Rule adopted by COAH was lawfully promulgated and advances the purposes of the Act.

CONCLUSION

CAHE should not be allowed to challenge the grant of interim extensions of second round substantive certification to the petitioning municipalities where CAHE failed to challenge COAH’s Rule when it was promulgated. A denial of substantive certification to municipalities which have complied with the Fair Housing Law will result in undue prejudice to those municipalities. CAHE should not be permitted to have its own views substituted for COAH’s with respect to COAH’s legitimate rulemaking functions.

Based upon the foregoing, we respectfully request that COAH dismiss CAHE’s motion in its entirety.
Harding Township joins in the arguments of similarly situated municipalities in opposition to CAHE's motion.

Respectfully submitted,

Roger S. Clapp
Harding Township Attorney

RSC/mlb

cc: Kenneth Zimmerman, Esq. (via facsimile)
    Henry A. Hill, Esq. (via facsimile)
    Douglas K. Wolfson, A.A.G., Director,
        Division of Law (via facsimile)
    Pamela E. Gellert, Deputy Attorney General (via facsimile)
    Renee Reiss, Council Secretary (via facsimile)
    Thomas F. Collins, Jr., Esq. (via facsimile)
    Kevin P. Nerwinski, Esq. (via facsimile)
    Stuart R. Koenig, Esq. (via facsimile)
    Jacquelin P. Gioioso, Esq. (via facsimile)
    David Bole, Esq. (via facsimile)
    William C. Moran, Jr., Esq. (via facsimile)
    Peter J. Cresci, Esq. (via facsimile)
    Anthony Cialone, Esq. (via facsimile)