

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NUMBER A-5404-07T3
LEAD DOCKET NUMBER A-5382-07T3

IN THE MATTER OF
THE ADOPTION OF
N.J.A.C. 5:96 and 5:97 BY
THE NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING.

) Civil Action
)
) APPEAL FROM THE FINAL ACTION OF
) THE COUNCIL ON AFFORDABLE HOUSING
)

BRIEF ON BEHALF OF APPELLANTS
TWENTY MUNICIPALITIES

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PRELIMINARY STATEMENT

The Appellants in this matter include twenty municipalities, and one individual. The twenty municipalities are: Clinton Township, Hunterdon County; Bedminster Township, Somerset County; Bernards Township, Somerset County; Bernardsville Borough, Somerset County; Bethlehem Township, Hunterdon County; Bridgewater Township, Somerset County; Clinton Town, Hunterdon County; Florham Park, Morris County; Greenwich Township, Warren County; Hanover Township, Morris County; Millstone Township, Monmouth County; Montgomery Township, Somerset County; Peapack-Gladstone Borough, Somerset County; Readington Township, Hunterdon County; Roseland Borough, Essex County; Roxbury Township, Morris County; Union Township, Hunterdon County; Warren Township, Somerset County; Watchung Borough, Somerset County; and Wharton Borough, Morris County. These municipalities have participated in the COAH process, have obtained prior substantive certification, but object to the most recent adoption of regulations. We refer to the Appellants as Twenty Municipalities or the Twenty Town Group. In order to distinguish these appellants from other appellants in other cases, we identify our brief and appendix as TTb and TTa, respectively.

These municipalities have joined together to advance

common complaints against the regulations and methodology. Our view is that COAH could have easily cured the flaws in the 2004 regulations that were identified by the Court. COAH did not properly address the issues, went far beyond what was necessary, and created an onerous and unworkable regulatory scheme. We seek an invalidation of the regulations, and a directed, as opposed to general, remand to the agency.

PROCEDURAL HISTORY

These appellants adopt the procedural history contained in the brief filed by the New Jersey State League of Municipalities (hereinafter "NJLM" or "League"), and do not disagree with the time lines and dates set forth by appellants National Association of Industrial and Office Park Properties (hereinafter "NAIOP"), New Jersey Builders Association (hereinafter "NJBA"), or Fair Share Housing Center (hereinafter "FSHC"). These appellants do supplement the procedural history with the following information.

As noted by other parties, on January 25, 2007, this Court rendered an opinion with reference to the 2004 regulations of the Council on Affordable Housing (hereinafter "COAH"). In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing, 390 N.J. Super. 1 (App. Div. 2007), certif. denied, 192 N.J. 72 (2007) (hereinafter referred to as "2007 Decision"). In that decision the Court gave COAH six months to adopt corrective regulations, which meant they had to be adopted by July 25, 2007. Rather than simply extend the contract with the Center for Urban Policy Research, Edward J. Bloustein School, Rutgers University (hereinafter "CUPR"), which consultant had assisted in the

preparation of the 2004 regulations, COAH issued a request for proposals, which called for submission of proposals by no later than March 2, 2007. TTA127.

On March 2, 2007, CUPR submitted a proposal for \$856,842 to complete all of the work. TTA134. The initial deliverables were to be in place within three months of the execution of the contract. CUPR proposed to use additional consultants from Wharton School GIS Laboratory in the University of Pennsylvania (hereinafter "Wharton"), Econsult Corporation from Philadelphia (hereinafter "Econsult"), Nicholas J. Brunick, Esq., of Applegate & Thorne-Thomsen, P.C., of Chicago (hereinafter "Brunick"), and Virginia Tech University. TTA134. Instead of accepting that proposal, COAH entered into a direct contract with Wharton, as the lead consultant, with associate research teams being Econsult, Brunick, and the National Center for Neighborhood and Brownsfields Redevelopment, Rutgers University (hereinafter referred to as "Center" but sometimes referred to as "NCNBR" or "Rutgers"). COAH awarded contracts to these consultants on or about May 14, 2007, and later extended the contracts. Excerpted copies of the contracts, extensions, and letters awarding the contracts are located at TTA145-206. The total of these contracts was \$1,957,100.

On May 8, 2007 the Executive Director of COAH advised

the COAH members that contracts had been agreed to with the consultants, and that COAH had filed a motion for extension of the July deadline to permit COAH and the consultants sufficient time to complete the rule making process by February of 2008. The letter also indicated that all consultants' data was to be completed by August 2007. TTa207. As we know, the work was not completed until much later.

The Court did not grant COAH the requested extension, and instead set a deadline of December 31, 2007. As a result, COAH approved a proposal on December 17, 2007, for regulations to be published in the New Jersey Register. At the time, two critical work products had not been completed. The vacant land and build-out analysis was in draft form, and was not completed until December 31, 2007. Additionally, while Econsult had provided a report to COAH, it did not include Appendices A and B, the municipal housing allocation and employment allocation. Those Appendices were not completed until January 2, 2008. See the reports in the New Jersey Register, January 22, 2008, at 40 N.J.R. 315 and 335, respectively.

When the regulations were published as a proposal on January 22, 2008, data relied upon by the consultants to create the growth projections and build-out for each municipality, both residential and non-residential, was not provided in the

publication. On or about March 14, 2007, in response to numerous OPRA requests for information as to how these two consultants reached their determinations, COAH placed on its website various consultants' data, but not the final vacant land data file. TTa279 and 281.

Various counties, municipalities, planners, engineers, and others, all with GIS capabilities (we discuss GIS in greater detail, infra), started to attempt to figure out what COAH was calling vacant developable land. The delay in providing the information made it difficult for those commenting on the regulations to understand exactly what COAH was calling vacant developable land. The comment period ended March 22, 2008. 40 N.J.R. 237.

As a result of the second extension of time granted by the Court, COAH was given until June 2, 2008 to adopt the regulations, and they were adopted on that date (hereinafter referred to as "June 2, 2008 Rule Adoption"). 40 N.J.R. 2690, et seq. At the same time, COAH proposed substantive amendments. The amendments were based, in part, on revised consultants' reports. The proposed amendments appeared in the New Jersey Register on June 16, 2008 at 40 N.J.R. 3370, et seq. The Center revised the vacant land and build-out analysis on May 2, 2008. 40 N.J.R. 6083. Econsult revised the allocation of growth to

municipalities on May 1, 2008. 40 N.J.R. 6106. Wharton revised the Growth Share Ratio Methodology on May 1, 2008. 40 N.J.R. 6066. With the amended proposal, COAH placed the consultants' data on the website, together with the data used to create the vacant land spatial data file, but again, not the end product. TTa279. The information was later released. Those regulations were published as adopted on October 20, 2008, in the New Jersey Register (hereinafter referred to as "October 20, 2008 Rule Adoption"). 40 N.J.R. 5965, et seq.

Nineteen of the municipal appellants in this matter filed an appeal challenging the June 2, 2008 Rule Adoption on July 15, 2008. TTa15. An amended appeal was filed on October 30, 2008 by twenty municipalities challenging the October 20, 2008 Rule Adoption. TTa1.

STATEMENT OF FACTS

In this Court's 2007 Decision, supra, 390 N.J. Super. 1, COAH was given clear direction on how to resolve the perceived flaws in the regulations. COAH could have met the Court's six month time frame on the remand if it had moved immediately to address the remanded issues, and not made changes in the regulations which were not required.

In addressing the remand, COAH claims that the June 2, 2008 and October 20, 2008 Rule Adoptions came about as the result of the Court decision, and are a response to that decision. While that is partly true, it is not entirely true. COAH went far beyond what was needed to cure the defects in the 2004 regulations. COAH made decisions to change numerous provisions in the regulations which were not required to be changed (e.g., abandoning spontaneous rehabilitation, eliminating demolition credits entirely, increasing the cost of compliance). COAH substantially increased Statewide need, which in turn resulted in growth share ratios that were much more aggressive. Filtering, which was found to be 59,156 units in the 2004 regulations (N.J.A.C. 5:94, Appendix A, p.94-42), was found by Econsult to be 47,306 units, which COAH then arbitrarily reduced to 23,626 units. 40 N.J.R. 2920-2921.

Instead of counting jobs as the Court directed, COAH held to its job generator calculations, and simply made the calculations more aggressive. COAH did not properly determine vacant developable land, and substantially overstated the amount. As a result, the build-out of the State is overstated, and the projected growth through 2018 for the State and many municipalities is substantially over projected. Statewide rehabilitation need was increased from 24,847 units (N.J.A.C. 5:94, Appendix C) to 51,891 units (N.J.A.C. 5:97, Appendix B; 40 N.J.R. 2926). The prior round obligation was increased from 77,527 units (N.J.A.C. 5:94, Appendix C) to 93,813 units (N.J.A.C. 5:97, Appendix C, 40 N.J.R. 2942). Compliance mechanisms for municipalities were made limited, rendering inclusionary residential development an ineffective compliance mechanism. The cost of compliance, which was in balance with revenues in the 2004 regulations, was made onerous to municipalities. The COAH consultants relied too heavily upon extrapolation and interpolation of data, and failed to verify the accuracy of their conclusions. The results have alienated every constituency, which is why appeals have been filed by municipalities, home builders, commercial builders, and housing advocates.

A. Understanding the Growth Share Methodology. In

Points I, II and III of this brief, we explore the substantial flaws in the growth share methodology employed by COAH which collectively includes the vacant land and build-out analysis prepared by the Center, the growth allocation model prepared by Econsult, and the growth share ratio methodology prepared by Wharton, respectively. Essentially, the methodology starts with the vacant land analysis, which is then used to determine municipal build-out capacity. N.J.A.C. 5:97, Appendix F(1); 40 N.J.R. 6083. Econsult then used the Center's build-out capacity, and an historic rate of growth, to allocate municipal growth through 2018. N.J.A.C. 5:97, Appendix F(2); 40 N.J.R. 6106. The number of Statewide housing units projected by Econsult for 2018, was then used by Wharton to project Statewide affordable housing need. N.J.A.C. 5:97, Appendix A; 40 N.J.R. 6066.

There were changes made to the methodology between the June 2, 2008 and the October 20, 2008 Rule Adoptions that are tracked in the New Jersey Register, June 16, 2008. 40 N.J.R. 3393 for Wharton, 3410 for Center, and 3437 for Econsult.

1. The Vacant Land and Build-out Model. The vacant land and build-out analysis is the foundation of the entire methodology. The purpose of the report was to estimate the amount and capacity of vacant land to support future

development. 40 N.J.R. 6085. To address the task, the Center utilized Geographic Information Systems computer software (hereinbefore and hereinafter referred to as "GIS"), which utilized geographically referenced data; also referred to as spatial data layers.

Essentially, the Center overlaid various spatial data layers and removed developed lands, preserved lands, environmentally constrained lands, and lands too small to be developed. The remaining area was determined to be vacant developable land. The various types of data used are listed in the Center's report. 40 N.J.R. 6100 and 6103. The Center primarily relied on NJDEP 2002 Land Use/Land Cover data (commonly referred to as "LU/LC"), which are derived from 2002 NJDEP aerial imagery. 40 N.J.R. 6100.

The Center then assigned various presumed residential and non-residential "densities" to calculate build-out for each of five regions of the State. How the Center differentiated between residential and non-residential vacant lands is not described in the report.

The initial final report was issued December 31, 2007, and was used to support the June 2, 2008 Rule Adoption. A revised report was issued May 2, 2008, and was used to support the October 20, 2008 Rule Adoption. The changes made

to the vacant land study reduced the amount of vacant land from 1,030,000 acres to 1,010,000 acres. 40 N.J.R. 3415 - 3416. As can be seen in the following Table, all categories of vacant land and build-out were reduced in the revised report, except for non-residential build-out in the Highlands Planning area, which was increased dramatically.

BUILD-OUT COMPARISON

AREA	DECEMBER 31, 2007		MAY 2, 2008	
	Residential Units	Non-residential Units in Million Square Feet	Residential Units	Non-residential Units in Million Square Feet
Meadowlands	308	8.0	308	8.0
Pinelands	64,772	60.2	42,596	37.8
Highlands Planning	97,553	90.7	37,509	154.2
Highlands Preservation	11,044	0.0	11,044	0.0
Rest of State	752,804	1,023.7	620,214	890.7
Total	926,480	1,180.0	711,670	1,090.0

Source: 40 N.J.R. 3425. The totals were rounded by COAH.

The Center also released its results for each municipality in spreadsheets for the June 2, 2008 and October 20, 2008 Rule Adoptions, respectively. TTa209 and TTa223. We have prepared a compilation of the two spreadsheets showing vacant land, residential build-out, and non-residential build-out for each municipality. TTa233.

As will be discussed in Point I, infra, there are substantial systemic errors in the growth share

methodology because COAH neither addressed known errors, nor did they verify the accuracy of the vacant land analysis.

2. The Allocation Model. Econsult developed a very complex model to allocate growth to municipalities, and calculate the change in housing and employment growth from 2004 to 2018. 40 N.J.R. 6110. The model attempts to estimate housing units and employment at the following intervals - 1993, 2002, 2004, and 2018 - using various conversion factors, extrapolation, and interpolation of population and employment data primarily available from the New Jersey Department of Labor and Workforce Development (hereinafter "NJLWD").

As we will explain in Point II, infra, the methodology developed by Econsult relied on excessive extrapolation of population and employment data that resulted in an unreliable allocation of housing unit and employment growth at the municipal level. It also relied, in part, on the flawed results of the Center's vacant land analysis, relied on old data, and was not verified for accuracy.

The current version of the allocation model appears at N.J.A.C. 5:97, Appendix F(2), 40 N.J.R. 6106, et seq., and is entitled Allocating Growth to Municipalities, prepared by Econsult, May 1, 2008. The allocation model is designed to project the growth in housing units and employment

expected to occur in each municipality from 2004 to 2018. The end results are set forth in two exhibits: Exhibit A, Municipal Growth Rates in the Housing Allocation (40 N.J.R. 6121, et seq.); and Exhibit B, Municipal Growth Rates in the Employment Allocation Model (40 N.J.R. 6143, et seq.). COAH requires that every municipality use these projections, as a minimum, to determine a growth share obligation which the municipality must plan to satisfy. N.J.A.C. 5:97-2.2(d). If the actual growth is less than the projection, the municipality is still required to provide a plan to satisfy the projected obligation through use of the COAH compliance mechanisms. N.J.A.C. 5:97-2.2(e).

a. Allocating Residential Growth. The consultant used population projections issued by NJLWD in 2006. TTa262. The consultant took the projected population from 2014 and 2020, and then used interpolation to project population for 2018 at 9,411,670. 40 N.J.R. 6113. Dividing the 2018 population by the 2000 Census ratio of population to housing units resulted in a projection of 3,697,952 housing units in 2018. 40 N.J.R. 6113, 6114 and 6142. The number was used by Econsult as the county control, to which all municipal projections were "forced" to match. 40 N.J.R. 6018, Section 1.3.1. The results are presented as the municipal units allocated 2018. 40 N.J.R. 6121-6142.

The population number for 2018 is absolutely critical to the methodology, as it was used to determine projected housing units in 2018, which was then used by Wharton to compute Statewide affordable housing need. As we will explain in Point II, infra, Econsult erred in not checking their projections against current population projections, and thereby contributed to an overstated need.

The projection of municipal growth is more complicated. Econsult projected future municipal growth based on historic residential growth rates that occurred between 1993 and 2002. The 1993 housing units for each municipality were derived from interpolation of population and housing unit ratios derived from the 1990 and 2000 Census, applied to 1993 population estimates. 40 N.J.R. 6112, Section 3.1.

The consultant estimated 2002 housing units for each municipality based on the net change in housing units since the 2000 Census. To calculate the net change, the consultant used certificates of occupancy and demolition permits issued for the same year based on data available from the New Jersey Construction Reporter, which may be linked to from the COAH website, and is located at www.nj.gov/dca/codes/cr/conrep.shtml. We use the same process in subsequent points of this brief.

The historic growth rate from 1993 to 2002 was then averaged with an implied or build-out growth rate derived from the Center's build-out analysis, and the resulting growth rate was applied to the 2002 housing units to project the number of housing units in 2018. Id. Adjustments were made, and the results were "forced" to meet the county controls. 40 N.J.R. 6108, Section 1.3.1. It is unclear how the numbers were actually derived, and the projections cannot be replicated or verified.

There is an internal inconsistency in the report on how the consultant estimated 2004 housing units. At one point it is stated that 2004 housing units were derived using interpolation. 40 N.J.R. 6113. The second paragraph of Section 3.3 at 40 N.J.R. 6113, however, suggests that Construction Reporter data was used as was done for 2002. Regardless of method, the difference in housing units between 2004 and 2018 is the net change in housing to which growth share ratios are applied to establish municipal obligation.

b. Allocating Employment or Job Growth. A slightly different method was established to project employment changes in each municipality from 2004 to 2018. Econsult used NJLWD employment projections for 2004 through 2014 to establish 2014 county and Statewide employment. TTa263. The model

excludes State government employment. 40 N.J.R. 6109, Section 1.3.1. The consultant also relied on NJLWD quarterly reports to estimate employment for 2002. The difference in employment from 2002 to 2014, was then extrapolated out to 2018 in order to create the county controls, and resultant Statewide jobs for 2018. Id.

With reference to municipal employment, the consultant had difficulty finding reliable information to estimate employment for 1993 and 2002. Accurate data sets were only found for 1997, 2003, 2004, 2005, and 2006, (40 N.J.R. 6109-6110, Section 1.3.2) although it is noted in a footnote that municipal employment for 2004 and 2006 is not complete (40 N.J.R. 6120, footnote 3). Also, data for 2003 was not reliable for local government employment. As a result, the consultant used a combination of 1993 and 1997 data to estimate 1993 employment, but does not provide specific examples or report on the results. 40 N.J.R. 6109-6110. We have no way to verify the accuracy, because insufficient information is provided.

The historical employment growth rate was based on 1993 and 2006 employment. We are not told how the errors in municipal employment in the 2006 NJLWD report were resolved, except through extrapolation or interpolation. Econsult then calculated an implied growth rate from the vacant

land and build-out analysis prepared by the Center, which was then averaged with the historic growth rate to project employment out to 2018. There is insufficient information to reconstruct any specifics, or verify the conclusions.

The employment results are reported in N.J.A.C. 5:97, Appendix F(2), Section 4.3, in Figures 4.1 and 4.2 (40 N.J.R. 6117), and the Employment Allocation, Exhibit B (40 N.J.R. 6143). Comparing these results with the June 2, 2008 Rule Adoption at 40 N.J.R. 2990, et seq., we find that: 2018 employment was increased from 4,476,042 to 4,480,153 (an increase of 4,111 jobs); net change in employment was increased from 722,805 to 790,465 (an increase of 67,580 jobs); and the computed projected average job growth from 2004 to 2018 increased from 51,635 to 56,462 jobs per annum. In addition, a significant decrease in 2004 employment, from 3,753,156 to 3,689,688 (a decrease of 63,468 jobs), is not explained. It is the reason, however, for the large increase in the projected net change in employment, and presents an issue we discuss in Points II and III, infra.

3. Growth Share Ratio Methodology. The Statewide projected housing units for 2018, prepared by Econsult, were used by Wharton to create a projected affordable housing need, and establish growth share ratios. The Wharton

report, dated May 1, 2008, is at N.J.A.C. 5:97, Appendix A; 40 N.J.R. 6066, et seq. The document has changed only slightly from the June 2, 2008 Rule Adoption, which is at 40 N.J.R. 2916.

Wharton took the 2018 housing unit projection from the June 2, 2008 Rule Adoption (i.e., 3,693,378 units), and converted that to 3,494,057 households in 2018. Wharton did not change this calculation in the October 20, 2008 Rule Adoption. Wharton then took the estimated population from 1999, and converted it to households to determine there were an estimated 3,116,867 households in 1999. The result was a household change from 1999 to 2018 of 377,190 units. 40 N.J.R. 6067.

The next step was to determine how much of the 1999-2018 household change would need to be affordable. The consultant used a factor of 37.7% to arrive at an initial projected need of 142,201 units. 40 N.J.R. 6069. The consultant then made a series of adjustments, such as the reduction for filtering, to arrive at the adjusted projected need of 115,666 units. 40 N.J.R. 6072. It is noted by Wharton that Econsult found that 47,306 units would filter down and reduce need, but COAH only decided to use one-half of that amount, or 23,626 units, so as not to count urban filtering. 40 N.J.R. 6070. The arbitrary reduction of filtering drives up

need, and thereby, makes the growth share ratio more aggressive for suburban and urban municipalities alike, an issue we address in Point III, infra.

In the June 2, 2008 Rule Adoption, Wharton determined that affordable housing need to be delivered by growth share was 115,666 units. It determined that 60% of the obligation would be delivered by residential growth, and 40% would be delivered as the result of non-residential growth. The only change in the October 20, 2008 Rule Adoption is that the percentage of the obligation to be addressed as a result of residential growth was reduced to 57%, which was the result of Econsult's projected reduction in net housing unit change 2004-2018 from 280,190 units (40 N.J.R. 2988 and 3014) to 269,448 units (40 N.J.R. 6114 and 6142).

The reduction in the percentage of the need to be satisfied by housing growth meant the percentage of need to be delivered as a result of employment growth had to be increased to 43%. In other words, with less housing growth, in order to support the same affordable housing need and ratios, the change in projected employment had to be increased, an issue discussed in Points II and III, infra.

Based on the methods employed by COAH, if the anticipated growth in housing does not occur, or the

projected number of housing units in 2018 is altered, the need is altered as well. Despite the misperception of some of the appellants, affordable housing need is not a fixed or static number in the model. Instead, it is a function of projected growth, and if the projected growth is too high, the actual need number should be decreased, accordingly.

The growth share ratios established by Wharton appear at 40 N.J.R. 6074. For residential growth share, the obligation is one among every five units, and for non-residential, one for every sixteen jobs. Those ratios are applied against each municipality's projected housing and employment growth established in N.J.A.C. 5:97, Appendix F(2), Exhibits A and B; 40 N.J.R. 6121 and 6143, respectively, to determine a growth share obligation. COAH has calculated the municipal obligation. TTa243.

POINT I

THE VACANT LAND AND BUILD-OUT ANALYSIS
IS FLAWED, AND UNDERMINES THE ENTIRE
METHODOLOGY.

This Court determined in the 2007 Decision that COAH needed to properly assess the amount of vacant developable land existing in the State, and each of the housing regions, before it could implement a growth share methodology. The Court said:

Prior to implementing a growth share methodology and growth share ratios, COAH must have data from the State Planning Commission or from some other reputable source that the State as a whole, and that each region within the State, have sufficient vacant developable land within growth areas to enable the ratios to generate enough housing to meet the need. Id. at 53-54.

One of the primary reasons the Court reversed and remanded parts of the 2004 Regulations was to have the agency properly assess the amount of vacant developable land. The agency has failed to follow that directive.

In the 2007 Decision, this Court observed:

COAH does not know the amount of vacant developable land located within growth area municipalities because the State Planning Commission has not issued that information. Without that basic knowledge, COAH cannot assume that its Growth Share methodology will provide a realistic opportunity to meet the Statewide need and regional need. We conclude that the Growth Share methodology

can be valid only if COAH has data from which it can reasonably conclude that the allocation formula can result in satisfaction of the Statewide need. A significant mismatch between need and remaining vacant land would require COAH to either change the Growth Share ratio or to devise a different method for allocating the need. Id. at 54-55.

The State Planning Commission adopted the State Development and Redevelopment Plan (State Plan) in 2001. On April 28, 2004, the Commission issued an updated draft State Plan for cross-acceptance pursuant to N.J.S.A. 52:18A-202.b, and twenty-one counties, working with their municipalities, submitted cross-acceptance reports between January and September of 2007. WWW.nj.gov/dca/divisions/osg/plan/ca.html. COAH chose not to consider such data.

Instead, COAH retained the Center to assist in an analysis of affordable housing needs, and "provide a basis for ensuring there is adequate undeveloped, unconstrained, and buildable lands on which these units might be constructed". TTa191. The goal was to construct a spatial data file identifying "land available for development", and a spread sheet of build-out capacity by municipality. TTa191.

It is extremely important to COAH's growth share methodology that the vacant developable land, and resultant build-out analysis, be as accurate as possible. Econsult

acknowledged the importance of the vacant land analysis to the allocation model when it said:

The vacant land analysis results provided by NCNBR are key data inputs to the allocation model. . . These estimates are essentially "build-out" constraints for each municipality. 40 N.J.R. 6110, Section 1.3.3.

As explained by Econsult, a build-out growth rate derived from the Center's vacant land and build-out analysis was averaged with the historic growth rate, computed by Econsult, to arrive at the allocation of growth for each municipality through 2018. 40 N.J.R. 6112. Econsult then compared those projections to the build-out capacity of the municipality to make certain build-out was not exceeded. 40 N.J.R. 6113. Under the methodology, if the amount of vacant land is overstated, the build-out capacity is too high, and does not provide an appropriate constraint on 2018 growth projections.

In addition, Wharton has acknowledged the importance of the vacant land analysis to the entire methodology. It was said about the vacant land and build-out analysis:

Using this information, Econsult constructs housing unit projections from municipalities based on county-wide projections, communities' historical growth rates, physical growth capacities, and expected growth rates (a function of the relationship between local build-out levels

and historical growth rates) in the State's 566 municipalities. This technique produces housing totals going backward to 1999 and going forward to 2018. 40 N.J.R. 6067.

It was also said:

[T]hese totals establish the expected need for affordable units which municipalities are obligated to respond to through zoning and other methods. . . . At a minimum, municipalities must zone or otherwise provide for their projected increase in housing units based on available vacant land. 40 N.J.R. 6075.

As a result, if the amount of vacant land is too high, not only is the allocation of growth too high, but the Statewide need number is also overstated.

As soon as COAH posted the consultant's data on its website on March 14, 2008, it was evident that the vacant land analysis contained significant error. See the Star Ledger article of April 10, 2008. TTa282. The comment and response document issued by COAH on June 2, 2008 contains significant comment about this issue. 40 N.J.R. 2874-2884. The comments in the response document of October 20, 2008 continued the criticism. 40 N.J.R. 6046-6054. See the Comments of Somerset and Hunterdon Counties. TTa284 and TTa291. The flaws in the vacant land analysis are, in fact, substantial, and serve to invalidate the entire methodology.

A. The Computation of Vacant Land Relied Upon Outdated Information. The Center relied on the NJDEP 2002 Land Use/Land Cover (LU/LC) spatial data to determine vacant land. 40 N.J.R. 6103. As a result, vacant land included lands which were developed after 2002, and lands preserved by municipalities and counties after that date. COAH replies in the response document that the consultant relied upon the most current data to prepare the report and analysis. At the same time, however, COAH acknowledges counties and municipalities have more up to date information. By their own admission, COAH did not use the most current or accurate data.

In AMG Realty Co. v. Warren Tp., 207 N.J. Super. 388, 453 (Law Div. 1984), it was observed that one of the three keystones to a reasonable methodology is the use of reliable data, and another is an internal system of checks and balances. As the Court said:

Reliable data refers to the best source available for the information needed and the rejection of data which is suspect.

* * *

An internal system of checks and balances refers to the effort to include all important concepts while not allowing any concept to have a disproportionate impact. Id.

Given the importance of the vacant land analysis to the entire

methodology, COAH cannot stand on the proposition that they could exclude the use of more current and accurate information. At the very least, COAH should have submitted the vacant land results to the various county planning boards in order to obtain their input on the accuracy of the results. The counties, in particular, which had all just gone through the cross-acceptance process with the State Planning Commission, had a vast wealth of up to date knowledge which was the best source available.

B. COAH Knew There Was Significant Error in the Vacant Land and Build-Out Analysis. At some point, based upon complaints about the accuracy of the vacant land analysis, COAH requested the Center conduct a study to test the accuracy of the analysis. On July 9, 2008, the Center provided COAH with the results of that study entitled "Using Parcel Based Data to Improve the Accuracy of Measuring Developed Land at the County Level" (hereinafter referred to as "Pilot Study"). TTa333.

As noted in the Pilot Study, Somerset County was used to determine the accuracy of COAH's vacant land analysis using individual property data. In simple terms, county property line data was inserted into the Center's GIS computer model. The results indicate that the amount of vacant land in Somerset County was overstated by an admitted error of 14.9%, residential build-out capacity was overstated by an error of

16.9%, and non-residential capacity was overstated by an error of 15.4%. The county results are summarized on a table attached to the report, which also reports the error in each of the municipalities in the county. TTa345.

In reviewing these numbers, the results referred to as "Updated" numbers represent the corrected numbers based on the Pilot Study. The results entitled "Current", reflect vacant land and build-out numbers which are neither from the June 2, 2008 nor October 20, 2008 Rule Adoptions. In other words, the Center used the wrong numbers for comparison.

Accordingly, we have prepared a Table, similar to the one in the Pilot Study, using the correct numbers for Somerset County municipalities from the October 20, 2008 Rule Adoption. TTa346. In all three categories, the Center understated the degree of error in the Pilot Study. When compared to the adopted rules, we find the actual degree of error to be 16.2% in vacant land, 19.8% in residential capacity, and 17.9% in non-residential capacity. TTa346.

It is clear that COAH knew, as early as July 9, 2008, or sooner, there was significant error in the vacant land and build-out analysis. Nonetheless, they approved amended regulations on September 22, 2008, and published those regulations as adopted on October 20, 2008. Those regulations

contained significant errors in municipal growth projections, due to known errors in the vacant land and build-out analysis.

Compounding the issue is the fact that COAH never made the Pilot Study readily available. The New Jersey State League of Municipalities submitted an OPRA request on October 20, 2008, seeking "copies of any and all studies designed to test the accuracy of the various consultants' reports that were used to create the COAH regulations, including but not limited to vacant land, build-out. . . ." NJLMA18. The Pilot Study was not provided in response, as appears at NJLMA19. It was as if COAH was attempting to conceal its existence.

If nothing else, the substantial error identified in the Pilot Study warranted further review of the vacant land and growth projections. Instead, COAH went forward with the October 20, 2008 Rule Adoption, without reference to the study.

C. A Large Portion of What Is Referred to as Vacant Developable Land by COAH Is not Vacant or Developable. While substantial, the error identified in the Pilot Study does not address all of the error in the vacant land analysis. These appellants enlisted the assistance of the four county planning departments in Morris, Somerset, Hunterdon and Warren Counties. Using GIS capabilities, the spatial data developed by COAH as representing vacant land was placed as a yellow transparency on

top of the aerial imagery used by NJDEP to create the 2002 LU/LC data used by COAH to determine vacant land. While we could have produced over 1,000 images showing land which was improperly classified as vacant developable land, we have chosen 100 representative images to present to the Court. TTa27 to 126.

The images support and confirm the numerous complaints COAH was receiving in comments to the regulations. The images reveal several categories of error in the vacant land analysis. The first category is public facilities, such as: an airport where the land between the taxi-way and runway is deemed vacant land (TTa27); cemeteries (TTa28-29); areas of trees between fairways of golf courses (TTa30-34); churches (TTa35); correctional facilities (TTa36); municipal buildings (TTa37); county buildings (TTa38); college campuses (TTa39); local roadway rotaries (TTa40); the square outside of the Warren County Courthouse (TTa41); landscaped grounds and walkways of a senior complex (TTa42); watersheds of reservoirs (TTa43); electrical substations (TTa44-45); railroad rights-of-way (TTa45); sewer treatment facilities (TTa46-48); water tank sites (TTa49); the Warren County incinerator (TTa50). The second category is schools, where the front yards and grounds, other than athletic fields, were determined to be vacant developable land. TTa51-67. In TTa61 we even see the courtyard in the

middle of the Manville High School as vacant land even though schools are exempt from growth share under COAH regulations. N.J.A.C. 5:97, Appendix D; 40 N.J.R. 6080. The third category is roadway rights-of-way, medians and interchanges. TTa63-74. The fourth category is the yard areas, buffers, walkways and driveways of commercial buildings and corporate campuses (TTa75-91), including the circular landscaped walkway area and fountain between two buildings (TTa83). The fifth category is open space in connection with multi-family residential development and cluster development, including inclusionary projects. TTa92-105. The sixth category is the yard areas of detached single family dwellings (TTa106-126). Similar pictures could be produced from all over the State, and are provided here to give the Court a visual image of the errors in COAH's calculation of vacant developable land.

The images establish that neither the consultant nor COAH verified the accuracy of the vacant land identified by the Center, nor the resultant build-out. An important concept to the methodology should have been an internal check, wherein COAH verified that vacant land identified by the Center's computer model was in fact vacant and developable. AMG Realty Co. v. Warren Township, 207 N.J. Super., supra, at 453. The failure to engage in such a simple verification of the results,

especially in light of the numerous complaints, is inexcusable. It results in the very foundation of the methodology being substantially flawed. The failure is systemic, and incapable of a cure by individual municipal requests for adjustments, as it is interrelated with the computation of Statewide need.

In order to assist the Court in understanding the errors in COAH's vacant land analysis, we have prepared three figures which appear at TTb33. Figure 1.1 depicts an area of vacant land found by the Center's computer model, shown in yellow, to which the Center applied densities to arrive at build-out capacity. Figure 1.2 depicts the same spatial data with parcel data (i.e., property lines) inserted into the Center's vacant land. It depicts the work of the Pilot Study. Figure 1.3 shows the above information displayed on the 2002 aerial imagery. It is consistent with the procedure that should have been used to verify the accuracy of the consultant's work, and is the same process used to prepare the images beginning at TTa27. In this case, we see that what COAH calls vacant developable land is actually the campus of Morris County Community College.

Figure 1.1



Figure 1.2



Figure 1.3



While it is difficult to quantify the degree of error Statewide, Montgomery Township in Somerset County prepared a report that was submitted to COAH as part of the municipal comments on the proposal. TTa347. The report was prepared on March 20, 2008, and sets forth in detail, in the conclusion, many of the flaws we have identified. When Montgomery Township supplemented the Center's model with local data, they concluded there were only 2,774 acres of vacant developable land in the municipality. COAH determined in the October 20, 2008 Rule Adoption that Montgomery Township had vacant land of 6,924 acres. TTa230. Based upon the Montgomery report, COAH's vacant land analysis is in error by 60%. While one municipality may not be sufficient to draw Statewide conclusions, COAH should have conducted its own review to verify if the consultant's work was accurate.

D. The Vacant Land and Build-out Analysis Failed to Consider Water and Wastewater Treatment Capacity in Determining the Build-out Capacity. The Center acknowledges in both the June 2, 2008 and October 20, 2008 Rule Adoptions that water and wastewater treatment capacity were not considered in conjunction with the preparation of the vacant land or build-out analysis. It is said:

The Center did not use water and wastewater

treatment capacity data to evaluate whether the vacant land capacity estimates in this report generate water demand that exceeds the capacity of the local provider or ground water resource, or effluent flows that exceed the treatment capacity of any sewer service area. 40 N.J.R. 6096 and 40 N.J.R. 2972.

This Court has recognized that the inclusion of tracts without water or sewer service for construction of affordable housing does not provide a realistic opportunity. In the Matter of Adoption of N.J.A.C. 5:94 and 5:95 by the New Jersey Council on Affordable Housing, 390 N.J. Super., supra, at 16-17, citing In Re Petition for Substantive Certification, Township of Southampton, 338 N.J. Super. 103, 120, 121 (App. Div. 2001).

COAH will allow a municipality a durational adjustment if it presently has insufficient water and/or sewer capacity, which presupposes the capacity is realistically achievable. N.J.A.C. 5:97-5.4(e). In reviewing whether or not sites may appropriately be considered for affordable housing, COAH requires sufficient information to determine the prospects of a site receiving adequate infrastructure during the period of substantive certification. N.J.A.C. 5:97-5.4(f). Since water and sewer capacity is critical to development, as COAH recognizes, it should have been considered in any analysis that land is "developable."

The Center overstated build-out capacity because it did not consider limitations in water and wastewater capacity. The issue is clearly brought to light when comparing the COAH build-out to the Highlands Council build-out for the eighty-eight municipalities in the Highlands region. The Highlands Act required COAH to take into consideration the Highlands Regional Master Plan (RMP) prior to making any determination regarding the allocation of fair share under the Fair Housing Act. N.J.S.A. 13:20-37. COAH acknowledges the Highlands Council issued a Regional Master Plan and supporting technical information on November 30, 2007. N.J.A.C. 5:97, Appendix F(1), 40 N.J.R. 6094, Section 4.4.1. As part of the technical data released on November 30, 2007, there were detailed data sets for water and wastewater capacity, that COAH did not consider. TTa356-367. By failing to consider the limitations of water and wastewater capacity in the Highlands, COAH has failed to properly consider the RMP as directed by the Act.

On June 5, 2008, the Highlands Council released the Regional Build Out Analysis Technical Report and Appendices. TTa368. Those appendices included, among other things: a regional impact summary, Appendix A-2, with build-out showing restrictions applying only in the preservation area (TTa399);

and Appendix A-3, showing build-out with 100% of the municipalities in the planning area electing to conform to the Highlands Regional Master Plan (TTa400). Pursuant to the Highlands Act, lands in the preservation area are required to conform to the RMP, while municipalities with lands in the planning area may conform. As a result, Appendices A-2 and A-3 represent the range of build-out expected in the Highlands Region. To further assist in our analysis, we prepared a compilation from the COAH spreadsheets appearing at TTa209 and TTa223, solely for the eighty-eight Highlands municipalities. TTa401.

COAH asserts that the build-out capacity from the October 20, 2008 Rule Adoption, "approximates the baseline or probable maximum capacity of lands within the planning area pursuant to the pending Highlands Regional Master Plan."

N.J.A.C. 5:97, Exhibit F(1), 40 N.J.R. 6094, Section 4.4.1. As the documents released by the Highlands reveal, the COAH assertions are grossly inaccurate. The following Table 1.1 and 1.2 illustrates the magnitude of difference between COAH's build-out, and the Highlands Council build-out for housing units and non-residential floor space, respectively. The analysis indicates that COAH's projections for residential build-out are overstated in the Highlands by anywhere from 40.8% to 74.7%.

With reference to non-residential build-out, the COAH projections are overstated in the Highlands by 44.3% to 87.6%.

Table 1.1
Comparison of Housing Unit Buildout Capacity within Highlands Region

Highlands Regional Buildout Scenario	Housing Units for Highlands Municipalities from October 20, 2008 Rule Adoption	Housing Units from Highlands Regional Buildout Capacity Technical Report	COAH Buildout in Excess of Highlands Buildout	Differenc in Percent
Preservation Area Conformance Only	48,632 (1)	28,800 (2)	19,832	40.8%
Full Conformance	48,632 (1)	12,300 (3)	36,332	74.7%

Table 1.2
Comparison of Non-Residential Buildout Capacity within Highlands Region

Highlands Regional Buildout Scenario	Non-Residential Floor Space for Highlands Municipalities from October 20, 2008 Rule Adoption	Non-Residential Floor Space from Highlands Regional Buildout Capacity Technical Report	COAH Buildout in Excess of Highlands Buildout	Differenc in Percent
Preservation Area Conformance Only	154,223,214 (1)	85,825,434 (2)	68,397,780	44.3%
Full Conformance	154,223,214 (1)	19,095,861 (3)	135,127,353	87.6%

(1) Source: N.J.A.C. 5:97, APPENDIX F, published October 20, 2008, report entitled Analysis of Vacant Land in New Jersey and Its Capacity to Support Future Growth prepared by National Center for Neighborhood & Brownfields Redevelopment, E.J. Bloustein School of Planning & Public Policy, Rutgers, The State University of New Jersey, Revised Report dated May 2, 2008, tabular results available at

<http://www.state.nj.us/dca/coah/dec07proposal/rutgers/june08update/buildout.xls>. 40 N.J.R. 6121 for Residential: 40 N.J.R. 6143 for Non-Residential

(2) Source: New Jersey Highlands Water Protection and Planning Council, report entitled Highlands Regional Buildout Technical Report, Appendix A-2, Regional Summary Table, available at

http://www.highlands.state.nj.us/njhighlands/master/build_out_analysis.html. TTa 399

(3) Source: New Jersey Highlands Water Protection and Planning Council, report entitled Highlands Regional Buildout Technical Report, Appendix A-3, Regional Summary Table, available at

http://www.highlands.state.nj.us/njhighlands/master/build_out_analysis.html. TTa 400

E. Summary. The error in over-projecting growth in the Highlands Region, or for that matter anywhere, is not an issue of dilution of the need as some advance. The Statewide need of 115,666 affordable units is not a fixed or static number. It is derived from projected growth in housing units. If the growth is over-projected, then the need is also over-projected. Arguments made to this Court by FSHC, and perhaps others, that affordable housing need in the Highlands should be reallocated, because the projected growth will not or cannot occur, is without merit. If the growth will not or cannot occur, the need sought to be reallocated does not exist.

POINT II

THE ALLOCATION OF GROWTH TO MUNICIPALITIES CONTAINS SUBSTANTIAL ERRORS AND MUST BE INVALIDATED.

In Point I, supra, we addressed the errors in the vacant land and build-out. As we pointed out, the allocation of both housing and employment growth to municipalities, is flawed, because Econsult's historic growth rate relies on a flawed build-out capacity. There are, however, substantial additional flaws in Econsult's allocation model brought about by excessive use of extrapolation and interpolation, reliance on historic changes in population to project future housing growth, use of outdated population and employment projections, and failure to verify the accuracy of the model against other reliable data sources. As a result, the regulations should be invalidated.

A. Housing Projections 2018. As indicated in the Statement of Facts, supra, the establishment of the total number of housing units in 2018 is critical to the methodology. It not only establishes the county controls to which municipal projections were "forced" to match, but forms the basis for Wharton to project Statewide need for affordable housing. Econsult, and COAH, used population projections issued in 2006 for each county converted to housing units to arrive at a 2018

Statewide housing total of 3,697,952. 40 N.J.R. 6113, 6114, and 6142. The number was derived by interpolating NJLWD population projections for 2014 to 2020 (TTa262), to estimate 2018 population of 9,411,670. 40 N.J.R. 6113. These projections were released in an article entitled "Population and Labor Force Projections for New Jersey: 2004-2025" New Jersey Economic Indicators, June 2006. TTa272.

In June 2008, NJLWD released updated Statewide population projections, which superseded and reduced the earlier projections relied on by COAH. See the article "Population and Labor Force Projections for New Jersey: 2006-2025" New Jersey Economic Indicators, June 2008. TTa414. Using the same method employed by Econsult, the current projections, would indicate a population of approximately 9,176,050 in 2018, or 235,620 less than the number used by Econsult. Converted to housing units, the updated population projections would indicate approximately 3,609,918 housing units. Thus, using current NJLWD data, COAH over-projected housing units in 2018 by approximately 88,034 housing units. As a result, as discussed in Point III, infra, COAH overstated affordable housing need by approximately 30,000 units.

Moreover, COAH is requiring municipalities to plan for projected housing growth of 269,448 units, which is the

projected net change 2004-2018 in the October 20, 2008 Rule Adoption. 40 N.J.R. 6113, 6114 and 6142. The most current projections from NJLWD indicate the number should be approximately 181,414 housing units (i.e., 269,448 minus 88,034). By failing to use current data, COAH is requiring municipalities to plan for housing growth which is 48% higher than is justified.

COAH cannot claim it was not aware of the more recent data when it adopted the regulations. In response to the June 16, 2008 proposal, the Somerset County Planning Board submitted comments. TTa284. The very first comment made by the County was that COAH was relying on outdated projections from NJLWD, and that the current projections should be utilized. COAH simply ignored the comment in the response document, and violated the requirement in AMG Realty, supra, 207 N.J. Super. at 453, that the methodology use the best source available and not rely upon data which is suspect.

B. Errors in Allocation of Housing Growth to Municipalities. The method employed by COAH to project municipal growth from 2004 to 2018 relies upon excessive extrapolation, and a failure to check the computer model against actual events. Additionally, the allocation model unreasonably assigns larger growth obligations to municipalities, like

appellants, which have been compliant with their affordable housing obligation.

1. Excessive Conversions, Interpolations, and Extrapolations. In the Statement of Facts, supra, we described the process whereby COAH assigns residential growth projections to municipalities, and computes a Net Change 2004-2018 in housing, which when divided by five creates the residential portion of the growth share obligation municipalities are required to plan to satisfy. Taking the 1993 population for each municipality from NJLWD estimates, COAH applied a population to housing unit factor derived from an interpolation of those factors from the 1990 and 2000 Census data to establish housing units in 1993. In the October 20, 2008 Rule Adoption, 2002 housing units were derived from the 2000 Census, plus certificates of occupancy minus demolitions post-2002 40 N.J.R. 6113, Section 3.3. The difference produced an "historic growth rate" which was applied unless the build-out, which we have already shown is flawed, served as a constraint on those historic growth rates. Applying the chosen growth rate, COAH then used extrapolation to project housing units by municipality out to 2018.

In AMG Realty Co. v. Warren Tp., supra, 207 N.J.Super. at 453, it was established that a reasonable

methodology needs to make as few assumptions as possible, which means it needs to avoid "any data which requires excessive mathematical extrapolation." It was also said, the conversion of family data into household data, "requires assumptions, which if even slightly incorrect, can create a large margin of error." Id. at 454. The interpolation of two calculated conversion ratios of population into housing units, and the extrapolation of the result out from 1993 to 2018 violates AMG Realty, and makes the methodology unreliable.

2. Counting Prior Round Inclusionary Development as Part of Historic Growth. If a municipality had an increase in population between 1993 and 2002, it is assigned a higher historic growth rate than a municipality that did not have such an increase. As a result, a municipality that experienced a great amount of growth due to compliance with its first or second round affordable housing obligation is assigned a higher projected growth to 2018, and as a result, a higher growth share obligation. Bernards Township, for example, reports that between 1993 and 2002 it issued 3,104 residential certificates of occupancy, and that 2,376 (or 77%) were issued in connection with four large inclusionary projects resulting from prior round compliance. Conversely, a municipality that did not grow during those years has a lower growth projection, and a lower growth

share obligation.

We have prepared an exhibit representing the fifty municipalities with the greatest over-projection by COAH of residential growth. TTa428. The exhibit takes net certificates of occupancy (issued certificates less demolitions in each year) for 2004-2007 from the Construction Reporter, extrapolates out to 2018, and compares that projected growth to COAH's projected growth. Most of these municipalities complied with their first and/or second round obligation, and are over-projected as a result of COAH not excluding inclusionary development in the historic growth rates used to project to 2018. They are being obligated to provide greater amounts of affordable housing, because they provided affordable housing in the past.

3. The Failure to Verify the Allocation Model Against What Actually Happened in 2004-2007. The above referenced exhibit evidences that neither COAH nor Econsult attempted to verify the allocation model by reviewing it against actual certificates of occupancy issued between 2004 and 2007. We can empirically establish the model was not verified, and is flawed, by reviewing another group of municipalities.

There are 64 municipalities that have issued more net residential certificates of occupancy in the period

2004-2007 than COAH projects they will issue through 2018. We include an exhibit which lists those municipalities. TTa426. It presents the COAH projections from each adoption, and the total net certificates of occupancy issued for the period 2004-2007, inclusive, for each listed municipality. The exhibit shows that neither COAH, nor Econsult, checked the allocation model to verify the accuracy of the projections against what was actually happening in terms of residential growth, and shows the lack of reliability in the allocation model. There is simply no rational way for COAH, in 2008, to justify projections of growth through 2018 that are less than the growth that already occurred through 2007.

C. Employment Growth. The projections of employment growth for 2018 also fail to rely on the most recent data available.

1. Projection of Employment in 2018. COAH projects Statewide employment in 2018 will be 4,480,153 jobs. 40 N.J.R. 6117 and 6166. As explained in the Statement of Facts, supra, this number is derived from NJLWD employment projections for 2002 and 2014, extrapolated out to 2018. The 2014 Statewide projection was released in an article entitled "Industry and Occupational Employment Projections for New Jersey: 2004-2014", New Jersey Economic Indicators, June 2006.

TTa263. As with housing, the projections were superseded by projections for 2006 to 2016 issued in June 2008. TTa405. The revised projections from NJLWD are substantially lower than those used by COAH, and project total employment at 2016 to be 4,325,100 jobs. NJLWD prepared a detailed report in April of 2008, upon which the above referenced article is based. TTa262. It reflects that total employment (4,325,100), less State government employment excluded by COAH (154,200), would be 4,170,900 in 2016. If we take COAH's 2002 employment of 3,640,016 (40 N.J.R. 6116-6117, Section 4.3, and 40 N.J.R. 6166), and use the updated 2016 employment of 4,170,900, on a straight line extrapolation to 2018, the 2018 employment would be approximately 4,246,741 instead of the 4,480,153 projected by COAH. The significance of this difference is explained, infra.

COAH cannot argue it was not aware of the updated projections when considering the October 20, 2008 Rule Adoption. As with the updated housing projections, the Somerset County Planning Board brought the updated employment projections to COAH's attention in their comments on the proposed regulations. TTa284. In addition, Econsult reported it had several conversations with NJLWD researchers. 40 N.J.R. 6109. It would be hard to believe Econsult was not informed of pending revisions to projections for population and employment. NJLWD

prepared the recent employment projections in April 2008. Econsult prepared its revised report to COAH on May 1, 2008. COAH proposed the regulations on June 16, 2008. The revised projections were contained in the New Jersey Economic Indicators published by NJLWD in June 2008. The Somerset County Planning Board brought the publication to COAH's attention in comments issued August 12, 2008. COAH adopted the regulations by vote on September 22, 2008. The regulations were published on October 20, 2008. It is quite clear that COAH did not want to consider the most current information from the very source it was relying upon, because it was not consistent with the conclusions already reached. The updated projections superseded the earlier projections, and made them suspect. COAH did not rely upon the best source available. AMG Realty Co. v. Warren Township, 207 N.J. Super., supra, at 453. As a result, the regulations should be invalidated.

2. Average Projected Employment Growth. COAH's projection of employment is also undercut by examining average Statewide employment growth. In the June 2, 2008 Rule Adoption, COAH projected employment growth from 2004 to 2018 to be 51,630 jobs per annum. 40 N.J.R. 2990. At that time, and subsequently, COAH relied upon the NJLWD employment projections for 2004-2014 issued in 2006. That publication, however,

projected an increase of 404,100 jobs over the next ten year span, or an average of only 40,410 jobs per annum, not 51,630. TTa264. In the October 20, 2008 Rule Adoption, COAH increased its projection of employment growth to 58,493 jobs per annum. 40 N.J.R. 6116, Section 4.3. The New Jersey Economic Indicators published by NJLWD in June 2008, projects that between 2006 and 2016 there will be an increase of 254,100 jobs, or an average increase of only 25,410 jobs per annum. TTa406. Thus, while NJLWD was revising its job projections per annum down from 40,410 to 25,410, at the same time, COAH increased its projections from 51,630 to 58,493 per annum. These averages support Appellant's position that COAH's employment projections are grossly inaccurate and overstated.

3. Actual Jobs 2004-2007. COAH's employment projections are not supported by actual job growth. The one advantage we have in reviewing COAH's model is that it attempts to partially project growth which has already occurred. NJLWD reports annually on New Jersey employment based upon unemployment insurance reports. We provide the December reports for 2003 and 2007 at TTa429 and TTa435, respectively. If we take the total employment, and subtract State government employment to be consistent with COAH's methodology, we find that as of December 2003 there were 3,788,829 jobs in the State.

In December of 2007, the report indicates the number was 3,884,611 jobs. Thus, between December 2003 and December 2007, there were 95,782 actual jobs created in the State, or an average over four years of 23,946 jobs per annum. The actual jobs created in 2004-2007 supports the revised NJLWD projections, not COAH's projections of over 50,000 per annum, proving again that COAH has inflated projected job growth.

4. The 2004 Employment Numbers. COAH concludes in their October 20, 2008 Rule Adoption, that Statewide employment was 3,689,688 in 2004. 40 N.J.R. 6117 and 6166. We are not told how the number was derived, only that it is "based on data published by the Department of Labor." 40 N.J.R. 6112. From the June 2 to the October 20 Rule Adoption, we find COAH reduced the 2004 employment count by a total of 63,468 jobs. See 40 N.J.R. 6166 and 40 N.J.R. 3037. NJLWD had already reported on the estimated number of jobs for 2004 (TTa263), and COAH relied on that report to project employment to 2018. 40 N.J.R. 6109, Section 1.3.1, under the heading "2018 County Employment Projections." Additionally, COAH indicates, at 40 N.J.R. 6109-6110, that it found five years of reliable municipal employment estimates that matched data reported at the State and county levels. One of those years was 2004. It also reports that it used September estimates for reporting. Id. If we

review the NJLWD reports for September of 2004, we find total employment was 3,918,048, less State employment of 135,305, giving us 2004 employment of 3,779,743 based upon COAH's methodology. TTa431. COAH's stated employment for 2004 of 3,689,688 underestimates the NJLWD reported number by 90,055 jobs. COAH's number is not supportable, and appears to be contrived to support the methodology.

5. The Effect of Overstating Employment for 2018 and Understating Employment for 2014. By establishing Statewide employment in 2004 to be 3,689,688, and projecting Statewide employment in 2018 to be 4,480,153, COAH projects there will be a Net Change 2004-2018 of 790,465 jobs. 40 N.J.R. 6117 and 6166. Based upon the chosen ratio of one affordable unit for sixteen jobs, municipalities are being required to plan to create approximately 49,400 affordable housing units based upon projected employment increase. Using the more recent employment projection of 4,246,741 by 2018, as discussed above, and NJLWD's reported employment of 3,779,743 for 2004, the net change 2004-2018 is more realistically 466,998 jobs, not 790,465. As a result, pursuant to the methodology, municipalities should be required to plan for 29,187 affordable housing units based upon non-residential development. As we discuss in Point III, infra, COAH intentionally overstates the

employment growth to support its methodology.

D. Summary. COAH has acted in an arbitrary, capricious, and unreasonable manner in adopting the allocation model prepared by Econsult.

In projecting 2018 housing units, COAH did not consider more current, and lower, population projections used to establish the projections. The information was rejected, despite it being brought to COAH's attention, specifically, in the comment period on the regulations. COAH did not even respond to the comment, instead, it forged ahead to adopt an allocation model it knew was based on inaccurate and outdated data. Moreover, Wharton used the higher number to overstate affordable housing need.

In allocating housing growth to municipalities, COAH used two conversion ratios of population to housing units, interpolated between the two to reach 1993, and then extrapolated out to 2018 to establish historic municipal growth rates. COAH included, in historic growth rates, units developed in municipalities in compliance with prior round housing obligations, thus placing larger growth projections and burdens upon municipalities which complied with their affordable housing obligations. COAH also failed to verify the model against what was actually happening, and failed to recognize, in 2008, that

many municipalities had issued more net certificates of occupancy by 2007 than COAH projected they would issue by 2018.

The establishment of projected 2018 employment, and establishment of municipal employment growth, suffer from the same unreasonable measures employed with reference to housing. However, we have added factors with employment which show how unreasonable COAH has been. COAH increased the projection of the number of jobs per annum it expected to be created between 2004-2018, at the same time NJLWD, upon which COAH was relying in large part, was reducing per annum employment projections. COAH overstated employment growth projections by over 50% above what NJLWD was projecting. COAH arbitrarily and substantially reduced the estimate of 2004 employment, knowing it was wrong, all to make it appear employment growth 2004-2018 would be greater than could be reasonably expected.

The allocation model is grossly unreliable, and must be declared invalid. There is no substantial evidence to support COAH's determinations, and the Agency clearly erred in reaching conclusions that could not reasonably have been made based upon the relevant factors. George Harms Constr. Co., Inc. v. New Jersey Turnpike Auth., 137 N.J. 8, 27 (1994).

POINT III

THE GROWTH SHARE METHODOLOGY IS
FLAWED, AND MUST BE INVALIDATED.

At N.J.A.C. 5:97, Exhibit A, COAH adopted a growth share ratio methodology prepared by Wharton dated May 1, 2008. 40 N.J.R. 6066. The growth share methodology contains errors which require the adoption to be invalidated.

A. Statewide Need. The Statewide need remained the same in both the June 2, 2008 and October 20, 2008 Rule Adoptions, despite the fact that Econsult lowered both the projections for 2018 housing units and the net change in housing 2004-2018. The methodology continued to use the June 2, 2008 Rule Adoption numbers, despite the downward amendment. In this regard, Wharton used Econsult's earlier projection of 3,693,378 housing units for 2018 to determine there would be 3,494,057 households in 2018. 40 N.J.R. 6067. Using 1999 households of 3,116,867, gave a household change 1999-2018 of 377,190. Id.

As we addressed in Point II, supra, Econsult relied upon out of date and superseded population projections to project housing units in 2018. If more current population projections from NJLWD were utilized, the projected housing units in 2018 would be approximately 3,609,918 units. As a

result, using Wharton's method of applying a 5.4% vacancy factor, there would be 3,414,982 households in 2018, a household change of 298,115, not 377,190, and a Projected Need of 112,389 affordable units (37.7%), not 142,201. 40 N.J.R. 6067 - 6069. Use of current and more accurate data would, therefore, have served to reduce affordable housing need by 29,812 units (142,201-112,389). Wharton and COAH have committed error in projecting affordable housing need based upon the failure to consider more current population data that was available to them prior to the October 20, 2008 Rule Adoption.

B. Growth Share Ratios. As we have indicated in Point II, supra, Econsult reduced the Net Change 2004-2018 in housing from 280,397 in the June 2, 2008 Rule Adoption to 269,448 in the October 20, 2008 Rule Adoption. The change has significant impact on the number of residential units available to deliver the current round obligation. Wharton found in the June 2, 2008 Rule Adoption there would be 324,813 units available for that purpose. 40 N.J.R. 2924. In the October 20, 2008 Rule Adoption the number was reduced to 314,069. 40 N.J.R. 6074. Rather than readdress the Statewide net need of 115,666 affordable units, or alter growth share ratios, Wharton chose to declare that housing growth would simply absorb 57% of the total obligation, as opposed to the prior 60%, a proportionate

reduction. 40 N.J.R. 6066 and 40 N.J.R. 2924.

The problem, however, was that with such a residential reduction, employment growth had to pick up 43% of the obligation, instead of 40%. Id. In order to accomplish that goal, employment growth had to be increased from a net change of approximately 722,886 for 2004-2018 in the June 2, 2008 Rule Adoption to 790,465 in the October 20, 2008 Rule Adoption. 40 N.J.R. 2924 and 40 N.J.R. 6074, respectively. As we discussed in Point II, supra, this increase was created by having Econsult arbitrarily reduce the estimated employment numbers for 2004, despite NJLWD reports that estimated the number was much higher. Conveniently, an employment increase of 790,465 jobs when divided by 16 equals 49,404, or 42.7% of the 115,666 net affordable housing need number. There is simply no reasonable data to support the COAH 2004 employment estimates, and Econsult, Wharton and COAH must have known the projected increase in employment growth was contrived for purposes of holding onto preconceived results.

C. Filtering Was Arbitrarily Reduced. Wharton observed the following about filtering:

According to this Econsult analysis (these methods are described in further detail in Appendix F), 47,306 units are expected to filter down to households of lower incomes between 1999 and 2018. Half (50 percent)

of these filtered units (23,626 units) are located in suburban communities (as defined by the Rutgers University Center for Urban Policy Research). This suburban share of filtering is included in this analysis. 40 N.J.R. 6071.

In N.J.A.C. 5:97, Appendix F(3), as part of the June 2, 2008 Rule Adoption at 40 N.J.R. 3038, et seq., COAH adopted Econsult's report on filtering. The report did not change in the October 20, 2008 Rule Adoption. Econsult found that between 1999-2018, there will be 47,306 net units filtering down Statewide to be affordable to moderate income levels. 40 N.J.R. 3051.

COAH arbitrarily decided to reduce the filtering to 23,626 units, rejecting urban filtering as a secondary source of supply. 40 N.J.R. 3038. The reduction, however, serves to arbitrarily drive up Statewide need to over 100,000 units, increases the aggressiveness of growth share ratios, and drives up the affordable housing obligation for all municipalities, suburban and urban alike.

While the concept of filtering may have been difficult to comprehend as a source of affordable housing supply when the Court was reviewing the 2004 Regulations, it is not so hard to imagine after the 2008 credit meltdown and downturn in the housing market.

If COAH had properly included the filtering found by the consultant, the secondary sources of affordable housing supply would have been increased by 23,680 units. Combined with the reduction in projected need of 29,812 affordable units, if COAH used more current and accurate projections of growth, the Adjusted Projected Need would approximate 62,174 affordable units, not 115,666. The growth share ratios could have been made more reasonable, and the economy of the State less burdened.

D. The Combination of Factors Employed by COAH Leads to Irrational Results. The overstatement of vacant land and build-out, resulting in over-projections of growth, discussed in Point I, supra, combined with the multiple errors in the projections and allocations, discussed in Point II, supra, lead to an excessive and burdensome affordable housing obligation. In Region 6, Econsult projects that the Net Change 2004-2018 in housing units is approximately 20,145 residential units. 40 N.J.R. 6113. Econsult's projections include all the housing expected to be constructed, including both affordable and market rate units (thus, the division by five, representing one affordable unit for every four market rate units). At the same time, Wharton indicates the Adjusted Projected Need for Region 6 is 23,251 affordable units. 40 N.J.R. 6072. This implies that

115% of the Net Change in housing units through 2018 in Region 6 would have to be affordable to satisfy the need; a mathematical impossibility.

Incredibly, there are 39 municipalities where the projected growth share obligation exceeds the total number of market rate and affordable units expected to be constructed in those municipalities. See the list at TTa464.

The excessive use of conversions, interpolations, and extrapolations results in the sum of the parts not equaling the whole. In N.J.A.C. 5:97, Appendix A, we find that the columns of figures do not total the stated total. 40 N.J.R. 6067, 6069, 6070. Notably, the chart Adjusted Projected Need 1999-2018 totals 111,641 affordable units, not the stated 115,666. 40 N.J.R. 6071.

E. Summary. We have seen in Points I, II and III that the conclusions reached by the consultants and COAH were not verified for accuracy, and contained no real internal checks and balances. The models and conclusions were not based on the most reliable data, meaning the most current and accurate data as opposed to suspect and superseded data. The methodology involves excessive extrapolation and interpolation, and relies upon multiple conversions of population data into households and housing units. As a result, it fails to satisfy any of the

three keystone ingredients required of a reasonable methodology, and must be invalidated. AMG Realty Co. v. Warren Tp., 207 N.J. Super. 388, 453-454 (Law Div. 1984).

POINT IV

CONTINUED RELIANCE ON JOB GENERATOR
CALCULATIONS IS IMPROPER.

In this Court's 2007 Decision, supra, 390 N.J.Super. at 64-65, it was observed that job data can be secured from Department of Labor statistics. It was also observed that municipalities are able to provide the necessary employment data to provide a more accurate calculation of real growth. COAH was instructed to devise a means of reporting actual jobs, rather than rely upon the job generator calculations provided in Appendix E of N.J.A.C. 5:94.

As a result, COAH commissioned Econsult to prepare a report entitled "Counting Jobs at the Local Level", dated December 11, 2007. 40 N.J.R. 3130, et seq. The report, essentially, concluded the court was wrong, and COAH's job generator calculations was a better approach. In fact, the report indicates, "Econsult was tasked with reviewing and potentially updating COAH's existing non-residential categories and ratios." 40 N.J.R. 3137, Section 4.1. COAH never had any intention of abandoning its job generator calculations approach. See the Econsult contract with COAH. TTa185-186.

In N.J.A.C. 5:97, Appendix D, COAH adopted new job

generator calculations. 40 N.J.R. 6080. The only change in the October 20, 2008 Rule Adoption from the June 2, 2008 Rule Adoption was that the Jobs Per 1,000 Square Feet for Storage use was reduced from 1.5 to 1.0. Compare Appendix D at 40 N.J.R. 2956. N.J.A.C. 5:97-2.4(b) requires municipalities to use the job generator calculations, unless the municipality projects higher numbers.

There is one exception to using Appendix D as a minimum calculator. The exception is with reference to Storage use. Cranbury Township, and four other municipalities, submitted a study dated March 19, 2008, to COAH as part of the comments on the regulations. TTa437. It concluded a more accurate reflection of the warehouse industry was 0.26 jobs per 1,000 square feet, not COAH's 1.5 jobs. As a result, in the October 20, 2008 Rule Adoption, COAH reduced the Storage calculator to 1.0 jobs, and added a footnote that "actual jobs created may be submitted by municipalities for this [Storage] use group." 40 N.J.R. 6081.

The job generator calculations adopted by COAH in Appendix D, are not only incorrect in terms of Storage use, they grossly overestimate job creation. We provide at TTa453 to 460 the Statewide totals of square footage of non-residential development by year and use group for the years 2004 through

2007, inclusive, taken from the Construction Reporter that may be accessed on COAH's website. In Point II, supra, we discussed the NJLWD job reports and determined there were 95,782 jobs created in the State between the end of December, 2003 and the end of December, 2007, inclusive. We have prepared an exhibit that totals all of the non-residential certificates of occupancy by square footage, and by use group, for 2004 through 2007, inclusive, and have applied COAH's job generator calculations. TTa457. The job generator calculations would indicate that the State should have created 196,199 jobs in the same period in which it created only 95,782 jobs according to NJLWD.

The numbers indicate that Appendix D, when compared to actual jobs generated, is in error by more than 50%. Based upon Appendix D, COAH would impose a growth share obligation (2004-2007) on municipalities of 12,262 affordable housing (196,199 divided by 16), when the actual number, assuming all else to be correct, should be 5,986 (95,782 divided by 16). It is yet another example of COAH and its consultants failing to verify the accuracy of their models and methods. The use of Appendix D needs to be invalidated, and COAH needs to respect the prior ruling of this Court directing that more accurate employment data be used to assign growth share obligations.

POINT V

THE REGULATIONS PROVIDE INSUFFICIENT
COMPLIANCE MECHANISMS.

Facially, the regulations provide a wide array of compliance mechanisms. Those mechanisms include: rehabilitation in N.J.A.C. 5:97-6.2; ECHO units in N.J.A.C. 5:97-6.3; inclusionary development for residential and non-residential uses in N.J.A.C. 5:97-6.4; redevelopment in N.J.A.C. 5:97-6.6; municipally sponsored and 100% affordable developments in N.J.A.C. 5:97-6.7; accessory apartments in N.J.A.C. 5:97-6.8; a market to affordable program in N.J.A.C. 5:97-6.9; supportive and special needs housing in N.J.A.C. 5:97-6.10; assisted living in N.J.A.C. 5:97-6.11; regional contribution agreements in N.J.A.C. 5:97-6.12; an affordable housing partnership program in N.J.A.C. 5:97-6.13; extension of expiring controls in N.J.A.C. 5:97-6.14; and other innovative approaches in N.J.A.C. 5:97-6.15. Of these methods, however, most are of limited application.

The regulations impose various affordable housing obligations on municipalities. These consist of rehabilitation share, prior round obligation (1987-1999), and growth share, which includes a retroactive component back to January 1, 2004,

and prospective obligations for both residential and non-residential development. N.J.A.C. 5:97-2.2. As a result of COAH's fixation on new construction for affordable housing, the remedy of rehabilitation is limited only to the rehabilitation obligation. N.J.A.C. 5:97-4.5(f). ECHO units are limited to ten in number, and may only be applied to the rehabilitation obligation. N.J.A.C. 5:97-6.3(b)(2). Redevelopment is limited to areas in need of redevelopment pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1, et seq., and requires an agreement to provide affordable housing. N.J.A.C. 5:97-6.6. An accessory apartment program is limited to ten units or 10% of the obligation. N.J.A.C. 5:92-6.8(b)(1). The program has not proved successful because of COAH's insistence upon affirmative marketing which reduces the pool of interested landlords. A market to affordable program is limited to twenty units, unless and until there is a demonstration of a successful history. N.J.A.C. 5:97-6.9(b)(4). Supportive and special needs housing is limited to State licensed facilities. N.J.A.C. 5:97-6.10(a). Assisted living residences are specialized licensed facilities that count within the 25% cap on age-restricted units. N.J.A.C. 5:97-6.11(a). Extensions of expiring controls are limited to those instances where existing affordability controls are expiring, and there exists documentation to support

the extension. N.J.A.C. 5:97-6.14(a) and (b). We are unaware of any "other innovative approaches" approved by COAH.

As a result, municipalities with any appreciable affordable housing obligation are left with few compliance options, to wit: inclusionary development; municipally sponsored or 100% affordable construction; and regional contribution agreements (which subsumes an affordable housing partnership program pursuant to N.J.A.C. 5:97-6.13(b)(5)). On July 17, 2008, P.L. 2008, c.46, became effective. In the October 20, 2008 Rule Adoption, COAH made no adjustment for the impact of the legislation which had become effective July 17, 2008. The legislation had two major impacts on the COAH compliance mechanisms. First, in order to satisfy the special interests of certain housing advocates, regional contribution agreements were eliminated as a compliance mechanism. Second, in order to satisfy the special interests of non-residential developers, municipalities were prohibited from using inclusionary development as a compliance mechanism in connection with non-residential development. The legislative action left residential inclusionary zoning and municipal sponsored and 100% affordable construction as the only compliance mechanisms available to satisfy any appreciable affordable housing obligation.

COAH, itself, has now rendered inclusionary residential zoning an ineffective compliance mechanism. The inclusionary development fashioned by the Supreme Court in South Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158, 279 (1983), which called for an increased density with a 20% set aside, is no longer a viable compliance mechanism. In the 2004 regulations, COAH established an obligation of one affordable housing unit for each eight market rate units (or one among nine). An inclusionary requirement equal to the obligation created by that development was permitted to be imposed no matter the density. A greater set aside could have been required if a density bonus was provided. N.J.A.C. 5:94-4.4. In the 2007 Decision, this Court indicated that in order to require an affordable set aside, COAH needed to establish a bonus or incentive for the developer. 390 N.J. Super. at 69. As a result, in the June 2, 2008 Rule Adoption, N.J.A.C. 5:94-6.4, COAH established that to require inclusionary development a municipality needed to provide an incentive greater than one extra market rate unit for each required affordable unit. In the October 20, 2008 Rule Adoption, COAH substantially revised the regulation to require that inclusionary zoning needed to provide a minimum presumptive density of eight units per acre in Planning Area 1, six units per acre in Planning Area 2, and four

units per acre in Planning Areas 3, 4 and 5 sewer areas.

N.J.A.C. 5:97-6.4.

With the latest requirement for increased densities before inclusionary zoning may be required, and a residential growth share ratio of 20% (one among five), an increase in permitted density to the presumptive minimums, with a 20% set aside for affordable units, yields a municipality no gain on its growth share obligation. The affordable set aside only serves to satisfy the increased growth share obligation created by the increased density provided by the ordinance. As a practical matter, inclusionary development is not capable of being used to satisfy any of the following: a growth share obligation created as a result of prospective residential densities less than COAH's presumptive densities; prospective non-residential development; or retroactive growth share obligations back to January 1, 2004.

The last mechanism available is municipal sponsored or 100% affordable construction. The problem with 100% affordable projects is they require large subsidies. COAH indicates that affordable units each require a subsidy of between \$145,903 to \$182,859 depending on the COAH region. N.J.A.C. 5:97-6.4(c). On the Federal level, tax credits provide an incentive for the construction and rehabilitation of low income rental housing.

The program has become the largest Federal subsidy for the development and rehabilitation of affordable housing. In re 2003 Low Income Housing Tax, 369 N.J.Super. 2, 11-12 (App. Div. 2004). However, the 9% tax credits offered by the Federal government are a limited and competitive resource, and most applications are denied. Id. at 39; In re Tax Credit of Pennrose, 346 N.J.Super. 479, 485 (App. Div. 2002).

Federal 4% tax credits are not so limited, but COAH has recognized that even with large additional subsidies, relief from COAH regulations is required. See, Resolution Granting Community Investments Strategies a Waiver, COAH, Docket 08-2008 (TTa458), wherein a one hundred unit affordable project using 4% tax credits, with donated land, a \$3.5 Million contribution, real property tax relief through a PILOT, and funding through tax exempt bond financing and Home Express Funds from Housing and Mortgage Finance Agency (HMFA), still needed relief from COAH's income limits on residents.

The primary source of funding for 100% affordable projects at the State level has been the Balanced Housing Program. However, these funds are also limited, with HMFA advising all interested parties on July 15, 2008, that those funds ran out for the year. TTa458. The reality is funding does not exist to use this compliance mechanism to satisfy the

quantity of need being established by COAH.

COAH needs to find and provide for new compliance mechanisms at reasonable cost. The current mechanisms are insufficient to satisfy any appreciable portion of the stated need. The Court needs to set aside the regulations for failure to provide adequate compliance mechanisms. We suggest the Court require COAH to loosen its restrictions on compliance mechanisms, compel the agency to allow rehabilitation to be a means to satisfy all components of the obligation, and recognize that many municipalities have large numbers of units with low and moderate income occupants that are not dilapidated or in need of rehabilitation, yet do not count as "affordable" only because they are not subject to deed restrictions as required by N.J.A.C. 5:80-26.5(d) through N.J.A.C. 5:97-9.1(a). As required in the last sentence of N.J.S.A. 52:27D-307, COAH is required to reduce regional need based upon the provision of affordable housing through any federal, State, municipal, or private housing program.

POINT VI

THE REGULATIONS CREATE FINANCIAL
IMPACTS IN VIOLATION OF THE
FAIR HOUSING ACT.

The Fair Housing Act, N.J.S.A. 52:27D-311, provides:

Nothing in this act shall require a municipality to raise or expend municipal revenues in order to provide low and moderate income housing.

COAH has violated the provision in the Act in a number of ways:

A. Municipal Resolutions. With reference to many compliance mechanisms, COAH requires a municipality to submit, with its Petition for Substantive Certification, a municipal resolution appropriating funds or expressing an intent to bond in the event of a shortfall of funds. The resolution is required with reference to rehabilitation at N.J.A.C. 5:97-6.2(b)(3), ECHO units at N.J.A.C. 5:97-6.3(b)(2), accessory apartments at N.J.A.C. 5:97-6.8(b)(4), market to affordable at N.J.A.C. 5:97-6.9(d)(5), special needs housing at N.J.A.C. 5:97-6.10(e)(8), assisted living at N.J.A.C. 5:97-6.11(b)(8), and extensions of expiring controls at N.J.A.C. 5:97-6.14(c)(3). COAH then proceeds, in N.J.A.C. 5:96-11.8(b)(2), to state that a municipality may be required to act on its municipal resolution and appropriate funds from "general revenues" or to bond in the

event of a shortfall in funding for a proposed mechanism.

The intent is clear. If the funding mechanisms for the provision of affordable housing, either through State and Federal subsidies, development fees and payments in lieu of construction authorized by COAH, and/or private subsidies or donations, are insufficient to fund a compliance mechanism, COAH will require municipalities to raise and expend municipal funds from general revenues or bond ordinances to cover any shortfall. The clear intent of the statute is that the economics of the regulatory scheme must be in balance in order to avoid negative impact upon property taxpayers, which would only serve to make the State less affordable. The above referenced regulatory provisions violate N.J.S.A. 52:27D-311.

B. The Regulatory Scheme Is not in Economic Balance.

COAH sets forth the subsidies required to deliver affordable units by Region in N.J.A.C. 5:97-6.4(c). It also acknowledges a blended rate of \$161,095 per unit across the State. N.J.A.C. 5:97, Appendix F(5), at 40 N.J.R. 6192, Figure 4.3. COAH has established a Statewide Adjusted Projected Need of 115,666 affordable units (the projected growth share obligation). The math indicates COAH has created a potential program cost of over \$18 Billion, exclusive of the cost to comply with the remaining second round obligation and the rehabilitation obligation.

The Office of Legislative Services (hereinafter "OLS"), which provides non-partisan support services for the Legislature and its members pursuant to N.J.S.A. 52:11-54, et seq., conducted a review of the funding sources identified by COAH, and estimated those funding sources, if real, would be insufficient to fund the affordable housing obligations of municipalities by as much as \$2.0 Billion per annum (NJLma20), which would be \$20 Billion over the next ten years through 2018. The review included both second and third round cost, and acknowledged that given the range of costs to achieve various compliance mechanisms, and crediting, the analysis had a 50% margin of error. NJLma23. Even assuming that degree of error, it is clear there will be a substantial shortfall in funding, and the only debate is how many billions of dollars are involved.

The burdensome cost of compliance is the very reason that non-residential developers sought passage of P.L. 2008, c.46, which replaced the requirements imposed on those developers by COAH for 40% of the cost of the program with a 2.5% development fee which was designed, according to the fiscal statement on the bill, to generate approximately \$1.6 Billion over the next ten years. Those developers supported a \$1.6 Billion fee on themselves, because they feared the much larger

numbers being imposed by the COAH obligation. The shortfall is designed by COAH to be absorbed by municipalities, and the real property taxpayers across the State, since there is no-one else to absorb the shortfall. The effect will be to make the State less affordable for everyone.

COAH was not required to devise a regulatory scheme that creates economic burden. For example, in the December 20, 2004 regulations, N.J.A.C. 5:94, COAH established a residential growth share ratio of one affordable unit for every eight market rate units (one among nine), established a cost for a unit subject to a Regional Contribution Agreement (RCA) of \$35,000 (N.J.A.C. 5:94-5.4), and a development fee of 1% (N.J.A.C. 5:94-6.6). The New Jersey Construction Reporter, indicates that the average sales price of a new home in 2005 was \$460,931. TTa463. Applying the development fee to the construction of eight average priced homes would have yielded \$36,874, which was sufficient to cover the cost of an RCA unit with a little left over for administrative cost.

In the June 2, 2008 and October 20, 2008 Rule Adoptions, COAH established a ratio of one affordable housing unit for every four market rate units (one among five), increased the RCA cost to between \$67,000 and \$80,000 (N.J.A.C. 5:97-7.1), and increased the residential development fee to 1.5%

(N.J.A.C. 5:97-8.3(c)). Taking the same average home price of \$460,931, the development fee to be generated from construction of four new homes would now yield only \$27,656 against a cost of between \$67,000 and \$80,000. The adoption of P.L.2008, c.46, eliminating RCA as a compliance mechanism, increased the cost to the \$161,095 average subsidy, and will, of necessity, force municipalities to raise and expend funds through property tax increases. The system is out of balance economically, and was, presumably unwittingly, designed to force property tax increases. COAH needs to establish a methodology that assures compliance with N.J.S.A. 52:27D-311.

C. The Economic Impact Statement (EIS). N.J.S.A. 52:14B-4(a)(2) required COAH, prior to the adoption or amendment of the regulations, to prepare a description of the expected socio-economic impact of the Rules. The Rules for Rule-making, N.J.A.C. 1:30-5.1(c)(3), require publication of an economic impact statement "which describes the expected costs, revenues and other economic impact upon governmental bodies of the State, and particularly any segments of the public proposed to be regulated." In the Economic Impact Statement in the regulations proposed on January 22, 2008, which became the June 2, 2008 Rule Adoption, COAH said:

While the municipalities involved incur

costs associated with the application of the Council's rules, such as professional fees required in the preparation of a housing element and fair share plan prepared in accordance with the Council's rules, such costs may be defrayed through the collection of development fees. The proposed increase in the maximum development fee percentages and option for a tiered fee schedule will have a meaningful benefit in funding additional affordable housing that outweighs the costs. The maximum permitted residential development fee percentage has been increased from one percent of equalized assessed value to one and one-half percent. 40 N.J.R. 240-241.

The assertion that increased development fees will cover the cost of affordable housing, as discussed in paragraph B above, was blatantly false.

In the Economic Impact Statement to the regulations proposed on June 16, 2008, which became the October 20, 2008 rule adoption, COAH said:

The proposed amendments and new rule will have a positive economic impact on municipalities. . . ." 40 N.J.R. 3379.

If this issue were not so serious, the assertion would be laughable.

D. Summary. COAH is required to develop a regulatory scheme that does not require municipalities to raise and expend municipal revenues in order to provide affordable housing. As shown above, COAH directly requires municipalities

to use general revenues to fund any shortfall by requiring and enforcing municipal resolutions of intent. Additionally, the regulatory scheme, giving COAH full credit for all the funding sources it alleges exist, will leave a shortfall of revenues to cover the cost of compliance. The shortfall will have to be borne by municipalities, as there is no other source of funding. By definition, low and moderate income households are those with incomes less than 80% of the median household income (N.J.S.A. 52:27D-304), which means 40% of all households. The unjust reality of COAH forcing municipalities, who wish to comply with their obligations, to raise and expend municipal funds on compliance, in violation of the Fair Housing Act, is that a substantial part of that economic burden will fall upon low and moderate income households. It is a cruel hoax in the name of affordable housing.

Having violated the statute, the regulations must be invalidated. COAH must create a regulatory scheme that is in economic balance, not only to comply with the statute, but to avoid economic burden on low and moderate income households. COAH must also prepare an Economic Impact Statement that accurately describes the expected costs, revenues and other economic impacts upon municipalities.

POINT VII

COAH HAS NO STATUTORY AUTHORITY
TO IMPOSE RETROACTIVE OBLIGATIONS.

COAH makes the regulations at issue retroactive in two respects. First, COAH calculates Statewide need from 1999 to 2018. N.J.A.C. 5:97, Appendix A; 40 N.J.R. 6066. Second, it allocates a growth share obligation to municipalities based upon certificates of occupancy issued after January 1, 2004. N.J.A.C. 5:97-2.2(d). It is the retroactivity which, in large part, makes the regulations onerous. We submit there is no statutory authority for COAH to employ these retroactive measures.

In order to determine whether the regulations should be applied prospectively or retroactively the intention of the Legislature must be determined. In Appeal of N.J.A.C. 7:7A-1.4, 240 N.J.Super. 224 (App. Div. 1989), the Appellate Division addressed whether or not the Fresh Water Wetlands Protection Act transition areas could be applied retroactively to development projects which had received site plan or subdivision approval. The majority of the Court concluded the Legislature intended DEP's transition area regulations to be applied retroactively. A dissent was filed by Judge Skillman, who said:

A regulation adopted by an administrative agency to implement legislation, such as DEP transition area regulations, is legislative in nature. Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 328-337, 478 A.2d, 742 (1984). Consequently, administrative regulations are ordinarily construed to be solely prospective in operation. Bowen v. Georgetown University Hospital, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d, 493 (1988); see also, 2 Davis, Administrative Law Treatise, Section 7.23 (2d ed. 1979). In fact, our Supreme Court has indicated that one hallmark of an administrative regulation is that it has "prospective effect." Metromidia, Inc. v. Director, Div. of Taxation, supra, 97 N.J. at 329, 478 A.2d, 742. Regulations ordinarily do not apply retroactively because "[p]ersons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are restricted or penalized by an agency for what it then decides was wrong from its hindsight conception of what the public interest requires in the particular situation." Boller Beverages, Inc. v. Davis, 38 N.J. 138, 152, 183 A.2d, 64 (1962). Id. at 239.

An appeal was filed by the New Jersey Builders Association, which had been permitted to intervene in the Appellate Division proceedings. The Supreme Court reversed the judgment below, substantially for the reasons set forth in Judge Skillman's dissenting opinion. Appeal of Adoption of N.J.A.C. 7:7A-1.4, 118 N.J. 552, 554 (1990).

The Fair Housing Act provides that COAH is, from time to time, to:

[E]stimate the present and prospective need for low and moderate income housing at the State and regional levels. N.J.S.A. 52:27D-307(b).

N.J.S.A. 52:27D-307(c) (1) requires COAH to adopt criteria and guidelines for:

[M]unicipal determination of its present and prospective fair share of the housing need in a given region.

The term "Prospective need" is defined, as:

[A] projection of housing needs based on development and growth which is reasonably likely to occur in a region or municipality, as the case may be, as the result of actual determination of public and private entities. . . N.J.S.A. 52:27D-304(j)

The term speaks prospectively, not retroactively.

The term "present need" is not defined by statute, but has been defined in regulations. In N.J.A.C. 5:92-1.3, the term "Present need" was defined as:

[T]he total number of deficient housing units occupied by low and moderate income households as of July 1, 1987. "Present need" is the sum of indigenous and reallocated present need. . . .

The term "Indigenous need" was defined as:

[D]eficient housing units occupied by low and moderate income households within a

municipality and is a component of present need. Ibid.

In N.J.A.C. 5:93-1.3, the second round rules which became effective on June 6, 1994, and do not expire until October 14, 2009, the term "Present need" was defined as:

[T]he sum of indigenous need and reallocated present need. . . .

There was no change in the pertinent part of the definition of the term "Indigenous need." With the advent of a growth share methodology, and the elimination of the concept of reallocated present need, there was no need to define the term "Present need." It simply became what had been known as "Indigenous need." The term "Indigenous need" was also no longer defined as it became the "Rehabilitation share", which was defined in N.J.A.C. 5:94-1.4 as:

[T]he number of deficient housing units occupied by low and moderate income households within a municipality, established in accordance with the provisions of N.J.A.C. 5:94-2.1(b) that must be addressed in a Fair Share Plan.

COAH declared the "Present need" in the 2004 regulations was the same as existed in the 2000 Census. N.J.A.C. 5:94-2.1(c).

Similar language appears in the present regulations at N.J.A.C. 5:97-1.4, although instead of referring to Census numbers, the regulation refers to the numbers established for each

municipality in N.J.A.C. 5:97, Exhibit B. As a result, the present need is the rehabilitation share.

The responsibility of COAH, as directed by the Fair Housing Act, is to determine the "present" and "prospective" need for affordable housing. It is clear from the statute, and the implementation of the statute in prior regulations, that present need is what exists today, and prospective need is what is to arise over the next ten years. N.J.S.A. 52:27D-310(b). There is simply no express or implied authority for COAH to adopt retroactive provisions. The retroactivity of the regulations, both as determining Statewide need from 1999, and imposing municipal growth share obligations from January 1, 2004, are ultra vires the statute.

There are two practical reasons why this legislation should not be given retroactive effect. First, Judge Skillman, in Appeal of Adoption of N.J.A.C. 7:7A-1.4, supra, at 239, observed that those to be regulated, in this case municipalities, deserve more than a general declaration of statutory purpose to guide their conduct. Municipalities had no way of knowing in 1999, or even 2004, that COAH would substantially increase the affordable housing obligation, and effectively double the intensity of ratios that were adopted in 2004. Second, present need is the need that currently exists.

Those that seek retroactive application will argue that there was need created between 1999 and the adoption of these regulations which was not satisfied. The fact of the matter is that some of that need may very well have been satisfied by other means, and the need which was not satisfied, and still remains, should not be double counted as it is already a part of present need.

POINT VIII

UNREASONABLE AMENDMENTS TO THE REGULATIONS.

Aside from the issues raised, supra, COAH amended the regulations in numerous ways which were not required by the Court on remand. Many of those changes have made it more difficult for municipalities to comply, such as increases in various components of the obligation and increases in cost of compliance. For purposes of this appeal, however, we limit our discussion to two issues.

A. Prior Round Obligation. In the 2004 regulations, COAH indicated that the Third Round obligation would consist of three components: rehabilitation share; "remaining prior round obligation" (Emphasis Added); and growth share. N.J.A.C. 5:94-2.1(a). In the current regulations, COAH included the same three elements, but changed the second one to read "prior round obligation." N.J.A.C. 5:97-2.2. Instead of having municipalities seek substantive certification in a third round plan for any "remaining" prior round obligation, COAH now requires municipalities to submit plans to satisfy the "entire" prior round obligation.

In the 2004 Regulations, COAH explained that the municipal third round obligation would only include the

obligation from the prior round, less the activity, reductions and adjustments, to that prior round already approved. N.J.A.C. 5:94, Appendix B. In N.J.A.C. 5:97, Appendix C, municipalities are assigned the entire prior round obligation. N.J.A.C. 5:97-3.2(a)(3) requires municipalities to submit, among other things, a description of mechanisms intended to address the prior round obligation. N.J.A.C. 5:97-3.2(a)(4)(i) requires a municipality to submit, with the petition for substantive certification, documentation for the mechanisms to address the second round obligation.

The effect of the change is to require municipalities to justify their past compliance, and allows for the reopening of any prior disputes with objectors that were resolved in a prior round substantive certification. Municipalities should be entitled to repose in connection with prior round compliance. Only the remaining prior round obligation should be considered in a third round plan. The regulations as written are unreasonable.

B. Demolition Credit. In the 2004 regulations, COAH allowed a credit for demolitions of residential units in calculating the net residential growth share obligation. N.J.A.C. 5:94-2.4(a)(1). COAH's position at that time was that the growth share obligation was based upon net residential

growth, and that the demolition and rebuilding of a residential unit should not impose a growth share obligation. The Court sustained COAH with reference to the issue, recognizing that the purpose of the methodology was to correlate municipal affordable housing obligations with actual growth. 2007 Decision, supra, 390 N.J. Super. at 61 and 65.

In both the June 2, 2008 and October 20, 2008 Rule Adoptions, COAH eliminated the demolition credit with reference to residential dwellings. N.J.A.C. 5:97-2.4 and 2.5, do not contain a reference to the demolition credit, instead requiring the obligation to be calculated based upon gross, not net, certificates of occupancy. The approach is inconsistent with the growth share methodology, which recognizes that municipal obligations are based upon "Net Changes 2004-2018" in housing. N.J.A.C. 5:97, Appendix F(2), Exhibit A; 40 N.J.R. 6121. Having established the obligation based upon net changes in housing, it is unreasonable to require production of affordable housing based upon gross changes. It is also unreasonable to impose an affordable housing obligation upon a municipality where a residential unit, whether it be owned or rented, is voluntarily demolished, or destroyed by fire, flood or other natural disaster, and is then rebuilt. Such construction does not create growth. We join in the argument at

N.J.L.M.b45. The issue is extremely important to many fully developed municipalities where a large part of construction activity is the demolition and reconstruction of residential units.

CONCLUSION

We respectfully request that the regulations be invalidated for the reasons expressed, supra. The matter should be remanded to the agency. COAH should be required to accurately determine vacant developable land, build-out, growth projections, allocation of need, Statewide need, and growth share ratios. The regulatory scheme must be in economic balance to avoid burden on property taxpayers, including low and moderate income taxpayers. The State needs to recognize the system can only support what the economics can afford, otherwise the State becomes less affordable and competitive as a whole. COAH needs to expand its compliance mechanisms, and curtail regulatory roadblocks to compliance. We are confident that a reasonable growth share methodology can result in much more affordable housing than has been generated in the past, in a manner in which affordable housing becomes a natural by-product of development, with minimal financial burden on any party.

Respectfully submitted,

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Dated: February 2, 2009

By: _____
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