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May 4, 2009

David J. Rosen  
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Dear Mr. Rosen:

In response to questions raised at the Department of the Public Advocate's appearance before the Senate Budget and Appropriations Committee on April 20, we offer the following responses:

**To Senator Turner:**

At our appearance before the Committee, you asked the Office of the Child Advocate to respond to concerns regarding the alleged overuse of psychotropic medication, including off-label use of medication for children in out of home placement.

As you might expect, we absolutely oppose the misuse of psychotropic drugs and it would be a matter of concern if this were occurring. Psychotropic medication should normally be used to address a specific diagnosis, and "off label" uses should be carefully scrutinized.

While we do not have specific data concerning this issue, we understand that our colleagues at the Department of Children and Families have undertaken a statewide review of usage of medication by foster children. We look forward to reviewing the results of DCF's effort in this area. As I am sure you know, this is an issue that has received considerable attention in other states. Most notably, in Texas a 2004 study found a disproportionately high rate of psychotropic drug administration among foster children. It also found significant rates of medication usage among children who did not have a conclusive mental health diagnosis. Additionally, research

concerning the safety and efficacy of psychotropic medications in children and adolescents remains limited.

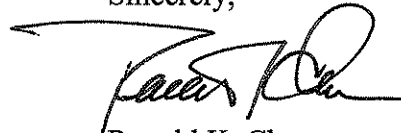
I would note that other states have implemented new approaches to overseeing these issues that may be worthy of consideration in New Jersey. For example, Texas, California and Tennessee addressed concerns about the use of psychotropic medications by children in out of home placement by developing and issuing utilization parameters and best practice guidelines for clinicians, child welfare staff and, in California, the juvenile court system.

This issue is addressed in the modified settlement agreement. We will continue to monitor it going forward and in the future may devote further study to it if we have reason to believe greater examination of these issues is appropriate.

**To Senator Haines:**

At our appearance before the Committee, you asked for a copy of the brief we filed with the Council on Local Mandates. That brief is attached.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald K. Chen", with a long horizontal stroke extending to the left.

Ronald K. Chen

**IN RE COMPLAINT FILED BY THE  
TOWNSHIP OF MEDFORD**

**COUNCIL ON LOCAL MANDATES**

No. 8-08

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**BRIEF OF AMICUS CURIAE DEPARTMENT  
OF THE PUBLIC ADVOCATE OF NEW JERSEY**

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## INTRODUCTION AND INTEREST OF AMICUS CURIAE

Amicus Curiae Public Advocate of New Jersey respectfully submits this brief in support of the Motion for Summary Judgment of Respondents State of New Jersey and Council on Affordable Housing in this matter.

The Department of the Public Advocate is authorized by statute to “represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest.” N.J.S.A. § 52:27EE-57. The Department’s enabling statute broadly defines “public interest” as “an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens.” N.J.S.A. § 52:27EE-12. The ultimate and enduring mission of the Department of the Public Advocate remains the same as when it was originally created in 1974, and when the Supreme Court described it in 1980: “to hold the government accountable to those it serves and . . . to provide legal voices for those muted by poverty and political impotence.” Twp. of Mount Laurel v. Dep’t of the Public Advocate, 83 N.J. 522, 535-36 (1980).

Historically, the Public Advocate has been heavily involved in the major decisions defining the constitutional obligation of local governments to provide realistic opportunities for affordable housing in their region. E.g., Holmdel Builders Ass’n v. Twp. of Holmdel, 121 N.J. 550 (1990) (permissible for municipalities to exact development fees to promote affordable housing); S. Burlington County NAACP v. Twp. of Mount Laurel, 92 N.J. 158 (1983) (Mount Laurel II) (satisfaction of the Mount Laurel obligation shall be determined solely on an objective basis); Hills Dev. Co. v. Twp. of Bernards, 103 N.J. 1 (1986) (upholding COAH and Fair

Housing Act provisions as a constitutionally acceptable alternative to builder's remedy). The Public Advocate of course adheres to the position, stated repeatedly in the past, that the constitutionally mandated obligation on the part of all components of state and local government to provide realistic opportunities to access affordable housing is one of the most compelling and fundamental interests "arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. § 52:27EE-12.

The Public Advocate's participation in this matter, however, is also motivated by another public interest deeply rooted in organic constitutional principles, as well as in the due process and equal protection clauses of the Fourteenth Amendment. In guaranteeing a republican form of government, these constitutional principles and provisions limit the extent to which unreviewable, and explicitly political, decision-making power can be vested in an unelected body. As set forth below, therefore, the Public Advocate urges this Council to adopt a strict and narrow definition of "unfunded mandate," in order to avoid conflict with the prerogatives of both the elected representatives of the people generally empowered to render ultimate political decisions, and the judiciary exclusively empowered to make judicial determinations.

#### **SUMMARY OF ARGUMENT**

Before determining whether the actions contemplated by the COAH third round rules or the recent Fair Housing Act amendments (A500) are "unfunded," it is logically necessary first to determine whether they constitute a "mandate." (Part I.) Because participation in the COAH process is completely voluntary on the part of a municipality, the rules promulgated by COAH cannot constitute a "mandate." (Part I.A.) And to the extent that the provisions of A500 merely

predicate participation in a state-funded program upon compliance with certain conditions, this does not impose a mandate either, but merely offers the municipality a choice of whether or not to participate in that program. (Part I.B.)

Thus, in answer to the Council's inquiry as to "[w]hether the cited provisions impose direct unfunded mandates as opposed to speculative obligations," the Public Advocate believes that the imposition placed on municipalities by the challenged provisions are not only speculative, but in fact are not "obligations" at all.

Moreover, in construing its jurisdiction, the Council should be mindful of the exclusive role of the courts in exercising the judicial function, and in particular in defining those obligations "which implement the provisions of this Constitution." Given the intimate involvement of the courts in determining whether the COAH third round rules comply with the constitutional Mount Laurel doctrine, and the complementary power of the executive and legislative branches of government to craft appropriate remedies to address constitutional requirements, this Council should avoid extending its jurisdiction in a way that conflicts with the judicial or political functions vested in one of the three traditional branches of government. (Part II.)

The Public Advocate therefore answers in the affirmative the Council's inquiry whether, in view of the Mount Laurel doctrine, the challenged provisions of the Fair Housing Act amendments and COAH's revised third round regulations fall within an exemption to the Council's authority because they "implement the provisions of [the New Jersey] Constitution."

## ARGUMENT

### **I. NEITHER THE COAH THIRD ROUND RULES NOR THE PROVISIONS OF A500 IMPOSE ANY REQUIREMENT UPON A MUNICIPALITY.**

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The sole substantive question before the Council is whether the COAH third round rules, and the challenged provisions of 2008 N.J. Laws, c.46 (also known by its bill number as “A500”), constitute a “provision of . . . law, or of such rule or regulation issued pursuant to a law, which is determined in accordance with this paragraph to be an unfunded mandate upon boards of education, counties, or municipalities because it does not authorize resources, other than the property tax, to offset the additional direct expenditures required for the implementation of the law or rule or regulation.” N.J. Const. art. VIII, § II, ¶ 5(a) (emphases added); accord N.J.S.A. § 52:13H-2.

Judging from Claimant Medford Township’s Brief in Support of Summary Judgment, it appears that the bulk of its argument is devoted to the proposition that the provisions of the COAH rules and A500 are “unfunded,” based upon its empirical (and indeed perhaps, at this juncture, anecdotal) allegations that if Medford were to comply with the challenged provisions, it would be required to expend municipal funds in order to make up the purported difference between the anticipated cost of affordable units and the projected revenue streams provided. Amicus Public Advocate defers to the briefs of Respondents COAH and the State, and of amicus curiae Fair Share Housing Center, in response to Claimant’s allegations on this point, and merely notes that these intensely factual disputes seem singularly ill-suited to resolution at this procedural juncture, on a motion for summary judgment.

For instance, Medford’s contention that use of inclusionary zoning would not result in sufficient affordable units to satisfy the requirements of the COAH rules, Claimant’s Br. 17-19, is at this point an ipse dixit pronouncement that has not been proved, but is to be accepted on

faith. Similarly untested by accepted processes of fact-finding are the allegations that COAH has set erroneous fair share obligations generated by inaccurate vacant land calculations, or that the proposed 2.5% developer's fee will be insufficient to avoid direct municipal expenditures on affordable housing. This Council's Rule 12 (Discovery; Production of Documents and Other Information) and Rule 13 (Hearing Procedures) delineate the procedures to be used for the introduction of evidence, and it is premature to argue these factual contentions in pleadings that are focused specifically to address the two questions of law propounded by the Council.

Amicus Public Advocate does suggest, however, that the Council can and should resolve this matter by determining first whether the challenged provisions could, as a matter of law, constitute a "mandate" within the meaning of the State Constitution and the relevant statutes executing the unfunded mandate proscription. This Council noted the logical order of the analysis in In re Complaint Filed by Ocean Township (Monmouth County) and Frankford Township, No. 10-01 (2002):

To make out a claim of unconstitutionality under the Amendment, the Claimants must prove the following three distinct issues:

First, that the Legislature has imposed a "mandate" on a unit of local government;

Second, that "additional direct expenditures [are] required for the implementation of the law . . . ."; and

Third, that the statute, rule or regulation fails to "authorize resources, other than the property tax, to offset the additional direct expenditures." Amendment at ¶ 5(a).

Op. at 5 (emphases and alterations in original).

As demonstrated below, Amicus believes that none of the challenged provisions could satisfy any plausible definition of "mandate," and thus the Council need not go beyond the first element of the inquiry.

A. **To Constitute a “Mandate,” a Challenged Provision Must Directly Impose an Enforceable and Unavoidable Duty.**

In construing any constitutional or statutory provision, one of course always looks first to the text itself. E.g., Kelly v. Robinson, 479 U.S. 36, 43 (1986); State v. Lewis, 185 N.J. 363, (2005). Under the New Jersey State Constitution, a mandate is a provision that “does not authorize resources, other than the property tax, to offset the additional direct expenditures required for the implementation of the law or rule or regulation.” N.J. Const. art. VIII, § II, ¶ 5(a); accord N.J.S.A. § 52:13H-2. The word “required” clearly indicates that the challenged provision must impose a direct obligation, demand or necessity, in order to constitute a “mandate.”

This construction is also consistent with the common dictionary definitions of the word “mandate”:

- “An authoritative command or instruction” (American Heritage Dictionary of the English Language, 4<sup>th</sup> ed.),
- “[A]n authoritative order or command” (Random House Unabridged Dictionary, 2006 ed.), or
- “An official or authoritative command” (Webster’s Revised Unabridged Dictionary).

A provision that merely results in collateral expenses if the municipality elects to participate in a state-sponsored program, therefore, cannot constitute a “mandate.”

Persuasive evidence of the meaning of “unfunded mandate” can also be gleaned from the federal Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.), which was enacted at approximately the same time as the “state

mandate, state pay” provision of the New Jersey Constitution.<sup>1</sup> The federal act defines a “Federal intergovernmental mandate” as a federal statute or regulation that would “impose an enforceable duty,” and specifically excludes from the definition any “duty arising from participation in a voluntary Federal program,” or one that is “a condition of Federal assistance.”<sup>2</sup> 2 U.S.C. § 658(5) (emphasis added).

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<sup>1</sup> The “state mandate, state pay” provision of the New Jersey Constitution became effective on December 7, 1995, following its proposal by the Legislature and subsequent approval by the people in the 1995 general election.

<sup>2</sup> 2 U.S.C. § 658(5) provides in full:

Federal intergovernmental mandate. The term “Federal intergovernmental mandate” means—

(A) any provision in legislation, statute, or regulation that—

(i) would impose an enforceable duty upon State, local, or tribal governments, except—

(I) a condition of Federal assistance; or

(II) a duty arising from participation in a voluntary Federal program, except as provided in subparagraph (B)[]]; or

(ii) would reduce or eliminate the amount of authorization of appropriations for—

(I) Federal financial assistance that would be provided to State, local, or tribal governments for the purpose of complying with any such previously imposed duty unless such duty is reduced or eliminated by a corresponding amount; or

(II) the control of borders by the Federal Government; or reimbursement to State, local, or tribal governments for the net cost associated with illegal, deportable, and excludable aliens, including court-mandated expenses related to emergency health care, education or criminal justice; when such a reduction or elimination would result in increased net costs to State, local, or tribal governments in providing education or emergency health care to, or incarceration of, illegal aliens; except that this subclause shall not be in effect with respect to a State, local, or tribal government, to the extent that such government has not fully cooperated in the efforts of the Federal Government to locate, apprehend, and deport illegal aliens;

(B) any provision in legislation, statute, or regulation that relates to a then-existing Federal program under which \$ 500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority, if the provision—

(i) (I) would increase the stringency of conditions of assistance to State, local, or tribal governments under the program; or

(II) would place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding to State, local, or tribal governments under the program; and

(ii) the State, local, or tribal governments that participate in the Federal program lack authority under that program to amend their financial or programmatic responsibilities to continue providing required services that are affected by the legislation, statute, or regulation.

Synthesis of these sources of meaning yields a consistent theme: a “mandate” imposes an enforceable duty, and amounts to an authoritative command that, in both form and substance, constitutes an unavoidable order that has inescapable consequences. Conversely, a provision that creates a voluntary program in which a municipality is free to choose to participate or not cannot constitute a mandate simply because expenses are incurred if the municipality elects to participate.

**B. Neither the COAH Third Round Rules Nor the Provisions of A500 Directly Impose an Enforceable and Unavoidable Duty, and Thus They Cannot Constitute a “Mandate.”**

The COAH third round rules do not impose any mandate upon municipalities, but merely provide a procedure by which a municipality may choose, if it wishes, to seek substantive certification that it has satisfied its constitutional obligations under the Mount Laurel doctrine.

**1. The “builder’s remedy” remains the default remedy to enforce a municipality’s Mount Laurel obligations.**

In Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151 (1975) (Mount Laurel I), the New Jersey Supreme Court first articulated the constitutional obligation of local governments to provide realistic housing opportunities for a fair share of their region’s present and prospective low and moderate income families. It is important to note at the outset that this underlying constitutional obligation, whatever costs may be associated with it and whatever resistance it may engender, cannot itself constitute an “unfunded mandate” subject to review in this Council. “The Constitution is, above all, an embodiment of the will of the People,” and it is the unique province of the courts, and in particular of the New Jersey Supreme Court, to carry the “responsibility as final expositor . . . to ascertain and enforce that mandate.” Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 358-359 (2007); see also

Sherman v. Citibank (S.D.), N.A., 143 N.J. 35, 58 (1995) (“It is emphatically the province and duty of the judicial department to say what the law is.”) (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)), vacated on other grounds, 517 U.S. 1241 (1996). In recognition of this principle, both the constitutional provision and the enabling legislation creating this Council limit its jurisdiction to the review of statutes, rules and regulations, N.J. Const. art. VIII, § II, ¶ 5(a); N.J.S.A. § 52:13H-2, and exclude from the definition of “unfunded mandates” “those which implement the provisions of this Constitution,” N.J. Const. art. VIII, § II, ¶ 5(c)(5); N.J.S.A. § 52:13H-3(e). Thus, a municipality cannot appear here to complain of the underlying constitutional obligation or of judicially crafted responses designed to bring municipalities into compliance.

It was the courts that first undertook to remedy the constitutional problem identified in Mount Laurel I. Early exclusionary zoning suits, however, were beset by difficulties, and little, if any, affordable housing resulted. In 1983, the New Jersey Supreme Court took the opportunity to reaffirm and adjust the Mount Laurel doctrine and to provide several mechanisms and remedies to make the doctrine more effective. Mount Laurel II, 92 N.J. 158.

Among the remedies sanctioned by Mount Laurel II, the most noted and controversial was the so-called “builder’s remedy,” which allowed a builder to engage in construction at a higher density than would otherwise have been permitted, on the condition that a sufficient portion of the project was dedicated to providing affordable housing. Specially designated trial judges heard numerous builder’s remedy cases from 1983 until 1986, when most cases were transferred to COAH under the Fair Housing Act of 1985. The builder’s remedy was criticized by many as contrary to the concept of municipal “home rule.” Indeed, the Mount Laurel II Court acknowledged that it would be preferable if the Legislature took the lead in crafting the

appropriate remedy, but nevertheless concluded that it was required to proceed on its own, as “enforcement of constitutional rights cannot await a supporting political consensus.” Mount Laurel II, 92 N.J. at 212.

The “builder’s remedy” remains to this day among the available, judicially crafted solutions that, by bringing a municipality into compliance with its constitutional affordable housing obligations, clearly “implement the provisions of this Constitution.” N.J. Const. art. VIII, § II, ¶ 5(c)(5). Indeed, absent affirmative action by a municipality to seek substantive certification under the COAH rules, it remains in form the default remedy to enforce the Mount Laurel doctrine.

**2. Participation in the COAH process was intended by the Legislature as a voluntary alternative to the “builder’s remedy.”**

No doubt motivated in part by concerns expressed by many municipalities about the intrusiveness of the builder’s remedy, in 1985 the Legislature accepted the Supreme Court’s offer to take the initiative and enacted the Fair Housing Act, 1985 N.J. Laws, c. 222 (codified at N.J.S.A. § 52:27D-301et seq.). The Act created the Council on Affordable Housing, and established an administrative procedure by which a municipality could choose to seek “substantive certification” from COAH that it had satisfied its Mount Laurel obligations, in lieu of the judicial remedies that had previously been employed.

Any municipality that has filed a resolution of participation, a housing element, and a proposed fair share housing ordinance implementing the housing element may petition the Council for “substantive certification” of the housing element and ordinances. N.J.S.A. § 52:27D-313. “The housing element shall contain an analysis demonstrating that it will provide . . . a realistic opportunity [for its fair share of low and moderate income housing], and the municipality shall establish that its land use and other relevant ordinances have been revised to

incorporate provisions for low and moderate income housing.” N.J.S.A. § 52:27D-311(a). The Council is required to issue “substantive certification” if: (1) no objection to certification is filed with it within 45 days of publication of notice of the municipality’s petition; (2) it finds that the “fair share plan is consistent with the rules and criteria adopted by the council”; and (3) it finds that the plan “make[s] the achievement of the municipality’s fair share of low and moderate income housing realistically possible.” N.J.S.A. § 52:27D-314 (emphasis added). COAH was directed to adopt criteria and guidelines determining the obligations of each participating municipality. N.J.S.A. §§ 52:27D-307, -307.5. But no municipality is affected in any way by the rules and criteria adopted by the Council, including the third round rules at issue here, until and unless the municipality chooses to participate in the COAH process in the first place.

A municipality that elects to participate in COAH’s administrative process prior to being sued and that submits a compliant fair share plan and housing element is thereby granted immunity from litigation, and most especially the builder’s remedy. Municipalities involved in litigation when the Act was passed were to be able to transfer the litigation to COAH unless manifest injustice resulted. Once a municipality receives substantive certification, its housing plan enjoys the presumption of validity, and a party challenging it “shall have the burden of proof to demonstrate by clear and convincing evidence that the housing element and ordinances implementing the housing element do not provide a realistic opportunity for the provision of the municipality’s fair share of low and moderate income housing.” N.J.S.A. § 52:27D-317(a). Builders and other advocates (including, by way of disclosure, the Public Advocate) challenged the constitutionality of the Act, but the Supreme Court upheld its provisions, including the immunity from the builder’s remedy it provided, in Hills Dev. Co., 103 N.J. 1 .

The Legislature made clear, however, that the COAH process was completely voluntary on the part of the municipality. “Within four months after the effective date of this act, each municipality which so elects shall, by a duly adopted resolution of participation, notify the council of its intent to submit to the council its fair share housing plan.” N.J.S.A. § 52:27D-309(a) (emphases added). “A municipality which does not notify the council of its participation within four months may do so at any time thereafter.” N.J.S.A. § 52:27D-309(b) (emphasis added). “A municipality which has filed a housing element may, at any time during a two-year period following the filing of the housing element, petition the council for a substantive certification of its element and ordinances or institute an action for declaratory judgment granting it repose in the Superior Court . . . .” N.J.S.A. § 52:27D-313(a) (emphasis). See Hills Dev. Co., 103 N.J. at 35 (noting “that municipalities are not required by this legislation to petition for substantive certification”) (emphasis in original).

**3. A mandate cannot exist when a municipality has complete freedom of choice whether or not to participate in COAH.**

The surest indication that participation in the COAH process is voluntary is that, out of New Jersey’s 566 municipalities, only approximately 300 currently participate,<sup>3</sup> leaving more than 250 towns that have elected to proceed without the immunity from litigation that substantive certification affords, but also without the responsibilities that compliance with COAH regulations would demand. The Court “assumed” in Hills Development Co. that most municipalities with Mount Laurel obligations would voluntarily elect to seek substantive certification. 103 N.J. at 36. Regardless of whether that prediction from 1986 has turned out to be accurate today, however, the fact that approximately 300 out of 566 municipalities have

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<sup>3</sup> See COAH Website, <http://www.state.nj.us/dca/affiliates/coah/reports/> (“Reports & Quick Facts”) (last visited on February 9, 2009).

sought substantive certification from COAH, while more than 250 have not, shows that each town is exercising its statutory freedom of choice as to whether or not to submit to COAH regulations, based on its own individualized assessment of which alternative best suits its needs.

Where municipalities are free to exercise such a choice, they are not subject to a “mandate.” By any definition of the term, whether as an “enforceable duty,” an “authoritative command,” or simply a direct expenditure that is “required,” there must exist, as an irreducible minimum, an element of compulsion. A municipality must be obligated by force of the statute or regulation at issue to engage in that expenditure. Only if that predicate exists is it logically necessary, or even appropriate, to inquire further as to whether that mandate is “unfunded.”

This prerequisite of compulsion, however, can hardly be said to exist when a municipality is literally free to walk away from the COAH process at any time it chooses. If it does so, then any and all costs or expenditures that might have been associated with substantive compliance with the COAH rules disappear, and so far as that municipality is concerned, COAH rules become utterly irrelevant. There is no way to enforce compliance with the Council’s rules and criteria upon any municipality that does not choose on its own to engage in such compliance. Simply put, therefore, if the Township of Medford is undergoing “buyer’s remorse” and finds that continued adherence with the COAH rules is unduly burdensome, it should simply decline to seek substantive certification and bid COAH a respectful, but dispositive, farewell.

If a municipality decides not to participate in the COAH process, the only consequence is that it is left in exactly the same position it would have been had COAH never existed and the Fair Housing Act never been passed. It would be free of any duty to comply with COAH rules, but it would not enjoy the immunities, presumptions and protections from litigation that

substantive certification by COAH would bring, and it could theoretically be subject to a builder's remedy lawsuit.

But the Legislature is under no obligation to provide a completely cost-free alternative by which a municipality is liberated from all consequences of its dilatory or lackluster efforts to meet its constitutional obligation to provide a realistic opportunity for the production of housing affordable to low and moderate income households. Indeed, the Legislature was under no obligation to enact the Fair Housing Act at all. If it had done nothing in this area and left the crafting of an appropriate remedial scheme completely to the courts, then Medford could not credibly assert that the Legislature violated the "state mandate, state pay" provision of the state constitution by failing to provide, and presumably pay for, an alternative to the judicially prescribed constitutional remedy.

This Council should emphatically reject any contention that a mandate exists under Article VIII, section II, paragraph 5 whenever the Legislature declines to provide an alternative to municipalities that relieves them of the costs associated with meeting their pre-existing and longstanding constitutional obligations. Such a rule, if taken to its logical endpoint, would wreak havoc on the policy-making mechanisms of this State, and would have the perverse result of imposing an unfunded mandate on the State to pay the costs of a municipality's compliance with its constitutional obligations. If the Legislature was not required to provide any alternative at all to the default judicial remedies, then it certainly was not required to provide an alternative that is cost-free and otherwise to a municipality's liking.

Nor should the Council accept the argument that a "constructive" mandate exists if a municipality finds the prospect of facing the default builder's remedy so distasteful or daunting that it feels that it has no effective choice but to participate in the COAH process, and thereby

take advantage of the protections that such participation affords. Balancing the advantages and disadvantages of any course of action is the essence of decision-making, and of governing. The State cannot be forced to guarantee that every such choice that a municipality faces will be pleasant or easy. The municipalities may find difficult the alternative courses for coming into compliance with their constitutional affordable housing obligations, but that is the price of governance under the Constitution. The difficulty of the alternatives does not transform any one of them into a mandate.

This Council should therefore strictly construe the term “mandate,” as used in Article VIII, section II, paragraph 5, and interpret it according to its common and natural meaning. “Mandate” means that: (1) a municipality is compelled to engage in direct expenditures in order to implement the challenged law or rule, and also (2) there exists an enforcement mechanism that can, where necessary, command the municipality to engage in that implementation. Absent the ability to issue and enforce such a command, there can be no mandate. Because participation in COAH is voluntary, there is no mechanism in law by which a municipality can be forced to comply with the substantive requirements of the COAH third round rules. Therefore those rules, regardless of their substantive contents, cannot constitute a mandate.

- 4. Because the challenged provisions of A500 are all dependent on a municipality’s choice to participate in COAH, they cannot constitute a “mandate.”**

For much the same reason that the COAH rules cannot constitute a mandate, the challenged provisions of the Fair Housing Act contained in A500 (2008 N.J. Laws, c.46) also impose no direct and enforceable obligation: the challenged provisions are either conditioned upon a municipality’s participation in COAH by submitting a housing element and seeking

substantive certification, or else are merely conditions placed upon state financial assistance, which assistance the municipality is free to seek or not.

For instance, Medford complains that “the Legislature has required that municipal fair share plans ensure that at least 13% of the affordable housing units be made available for occupancy by very low income households.” Oct. 30, 2008, Compl. ¶ 3. A500 merely provides, however:

[COAH] shall coordinate and review the housing elements as filed pursuant to section 11 of P.L.1985, c.222 (C.52:27D-311), and the housing activities under section 20 of P.L.1985, c.222 (C.52:27D-320), at least once every three years, to ensure that at least 13 percent of the housing units made available for occupancy by low-income and moderate income households will be reserved for occupancy by very low income households, as that term is defined pursuant to section 4 of P.L.1985, c.222 (C.52:27D-304).

2008 N.J. Laws, c.46, § 7 (codified at N.J.S.A. § 52:27D-329.1) (emphasis added). Thus, by its terms, the obligation that at least thirteen percent of the housing units be reserved for “very low income households” only arises if the municipality has elected to file a “housing element” under section 11 of the original Fair Housing Act of 1985 (codified N.J.S.A. § 52:27D-311).<sup>4</sup> But as demonstrated above, only a “municipality which so elects,” i.e., which decides voluntarily to participate in the COAH process, will even file a housing element with COAH in the first place.

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<sup>4</sup> A500 also refers to the housing activities under section 20 of P.L.1985, c.222 (codified at N.J.S.A. § 52:27D-320) as being subject to the thirteen percent set-aside for very low income households. That provision establishes the “New Jersey Affordable Housing Trust Fund,” a non-lapsing, revolving trust fund which is the repository of all State funds appropriated for affordable housing purposes. N.J.S.A. § 52:27D-329.1 further defines “housing activities”:

For the purposes of this section, housing activities under section 20 of P.L.1985, c.222 (C.52:27D-320) shall include any project-based assistance provided from the “New Jersey Affordable Housing Trust Fund” pursuant to P.L.2004, c.140 (C.52:27D-287.1 et al.), regardless of whether the housing activity is counted toward the municipal obligation under the “Fair Housing Act,” P.L.1985, c.222 (C.52:27D-301 et al.).

But this definition of “housing activities” sweeps in only those supported by the state funds described, which a municipality remains free to accept or reject.

N.J.S.A. § 52:27D-309(a) (emphasis added). Thus, the obligation to provide thirteen percent of its affordable housing units to very low income households is conditioned upon, and triggered by, the municipality's decision to seek the protections that the COAH process affords.

The Township of Medford also complains that "COAH regulations require the preparation of very expensive housing elements and fair share plans without providing a source of funding." Oct. 30, 2008 Compl. ¶ 3. The easy response is that the municipality is under no obligation to submit a housing element or fair share plan in the first place, and thus any expenses associated with those submissions are expenses that the municipality has voluntarily chosen to assume.

Medford's principal complaint about A500 is that, when combined with COAH's growth share regulations under the third round rules, it creates a potential statewide unfunded municipal liability of "in excess of \$6 billion dollars." Oct. 30, 2008 Compl. ¶ 3. It arrives at this figure based on its claim of inaccurate vacant land evaluations, and its belief that the 2.5% non-residential development fee,<sup>5</sup> which essentially replaced regional contribution agreements as a funding source for affordable housing, will be insufficient to meet the cost of the COAH-estimated statewide affordable housing need of 115,000 units, and that as a practical matter the municipalities will have to make up the difference. This argument again assumes that the COAH rules impose an obligation upon municipalities that they cannot instantly avoid by the simple expedient of declining to participate in the COAH process. Because participation in COAH is voluntary, any costs associated with such voluntary participation that are derived from the new provisions of A500 are also voluntary.

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<sup>5</sup> See N.J.S.A. § 40:55D-8.6(c).

## II. THE PROVISIONS OF THE FAIR HOUSING ACT AND THE COAH RULES ADOPTED THEREUNDER IMPLEMENT THE PROVISIONS OF THE STATE CONSTITUTION

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Once this Council concludes as a matter of law that the provisions of the COAH third round rules and A500 do not constitute a “mandate,” no further analysis is necessary in order to grant the motion by Respondents the State and COAH for summary judgment. Even if one goes beyond the issue of whether a mandate exists, however, the New Jersey Constitution and the enabling statute of this Council both expressly exclude from the definition of “unfunded mandate” laws or regulations “which implement the provisions of this Constitution.” N.J. Const. art. VIII, § II, ¶ 5(c)(5); N.J.S.A. § 52:13H-3(e). The COAH rules and revisions to the Fair Housing Act were promulgated precisely to implement the principle inherent in N.J. Constitution Article I, paragraph 1, that animates the Mount Laurel doctrine: “all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws.” Mount Laurel I, 67 N.J. at 174 . They therefore fall squarely within the constitutional and statutory exclusion from this Council’s jurisdiction.

### A. The Provisions of the COAH Rules and A500 Enforce and Implement the Constitutional Obligations of Municipalities To Provide a Realistic Opportunity for Affordable Housing.

The task of implementing the constitutional obligation at all levels of government to provide realistic housing opportunities for low and moderate income families is one that has been undertaken by all three branches of government: the Judiciary, which first announced the Mount Laurel doctrine and developed its initial enforcement mechanisms; the Legislature, which enacted the Fair Housing Act to create a mechanism to promote the constitutional goals though

comprehensive statewide planning; and the Executive, which, through the Council On Affordable Housing, has implemented that legislative policy.

It is important to note the distinction between interpreting the meaning of the New Jersey Constitution, which is a role ultimately vested in the New Jersey Supreme Court, and fashioning the appropriate remedial scheme to implement the constitution, which is a function that all three branches share. In the latter case, the Legislature and the Executive act with the express consent, and indeed encouragement of the Judiciary. The Supreme Court reflected upon the desirability of the Legislature, rather than the courts, becoming involved in fashioning the remedy in Mount

Laurel II :

[A] brief reminder of the judicial role in this sensitive area is appropriate, since powerful reasons suggest, and we agree, that the matter is better left to the Legislature. We act first and foremost because the Constitution of our State requires protection of the interests involved and because the Legislature has not protected them. We recognize the social and economic controversy (and its political consequences) that has resulted in relatively little legislative action in this field. We understand the enormous difficulty of achieving a political consensus that might lead to significant legislation enforcing the constitutional mandate better than we can, legislation that might completely remove this Court from those controversies. But enforcement of constitutional rights cannot await a supporting political consensus. So while we have always preferred legislative to judicial action in this field, we shall continue -- until the Legislature acts -- to do our best to uphold the constitutional obligation that underlies the Mount Laurel doctrine. That is our duty. We may not build houses, but we do enforce the Constitution.

We note that there has been some legislative initiative in this field. We look forward to more. The new Municipal Land Use Law explicitly recognizes the obligation of municipalities to zone with regional consequences in mind, N.J.S.A. 40:55D-28(d); it also recognizes the work of the Division of State and Regional Planning in the Department of Community Affairs (DCA), in creating the State Development Guide Plan (1980) (SDGP), which plays an important part in our decisions today. Our deference to these

legislative and executive initiatives can be regarded as a clear signal of our readiness to defer further to more substantial actions.

The judicial role, however, which could decrease as a result of legislative and executive action, necessarily will expand to the extent that we remain virtually alone in this field. In the absence of adequate legislative and executive help, we must give meaning to the constitutional doctrine in the cases before us through our own devices, even if they are relatively less suitable. That is the basic explanation of our decisions today.

92 N.J. at 212-14 (emphasis in original) (footnote omitted).

This explicit invitation to take the lead in crafting the appropriate remedy to implement the Mount Laurel doctrine received an equally explicit affirmative response from the Legislature in enacting the Fair Housing Act in 1985:

In the second Mount Laurel ruling, the Supreme Court stated that the determination of the methods for satisfying this constitutional obligation “is better left to the Legislature,” that the court has “always preferred legislative to judicial action in their field,” and that the judicial role in upholding the Mount Laurel doctrine “could decrease as a result of legislative and executive action.”

N.J.S.A. § 52:27D-302(b). In particular, the Legislature articulated in the Fair Housing Act its view that the COAH process, rather than the “builder’s remedy,” was the preferred alternative for achieving fair housing.

The Legislature declares that the statutory scheme set forth in this act is in the public interest in that it comprehends a low and moderate income housing planning and financing mechanism in accordance with regional considerations and sound planning concepts which satisfies the constitutional obligation enunciated by the Supreme Court. The Legislature declares that the State’s preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act and not litigation, and that it is the intention of this act to provide various alternatives to the use of the builder’s remedy as a method of achieving fair share housing.

N.J.S.A. § 52:27D-303 (emphasis added).

The history behind the Fair Housing Act and the creation of the COAH therefore makes clear that the Legislature intended its provisions to supplement, and perhaps someday supplant, the prior existing remedies, including the builder's remedy, which had been created on a more ad hoc basis by the courts. Because the COAH process was intended as a substitute for a remedy that indisputably implemented the provisions of the New Jersey Constitution, it follows that it also implements the provisions of the Constitution, and thus falls within the exclusion from the definition of unfunded mandate.

The Township of Medford's main argument appears to be that the COAH third round rules go beyond the minimum effort that it interprets the Mount Laurel doctrine to require, and therefore the rules do not implement the Constitution but rather constitute new, non-constitutional remedies. The Township argues that the Mount Laurel doctrine requires only that it not use exclusionary zoning to impede affordable housing, and does not require that it bear the affirmative burden of financing the construction of affordable housing. Claimant's Br. 12.

In the first place, the role of interpreting the minimum requirements of the New Jersey Constitution is one ultimately committed to the courts. To the extent that it is a judicial prerogative to define the scope of the constitution's requirements under the Mount Laurel doctrine, it would be inconsistent for this Council to make a political determination that answers the same question. Indeed, Claimant Township of Medford and many other municipalities, as well as amicus curiae New Jersey League of Municipalities, are currently engaging in a parallel proceeding in the Appellate Division in which they are seeking very much the same relief as they do here.<sup>6</sup> This Council should leave it to the courts to determine the scope of the New Jersey

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<sup>6</sup> The Township of Medford's Brief before the Appellate Division begins with the following language, which could just as easily have been taken from its brief before this Council:

Constitution's demands. Once it has been determined that the challenged provisions were fairly intended to implement the provisions of the Constitution, then the exclusion from the definition of unfunded mandate applies, and it is neither necessary nor appropriate for this Council to make further inquiry into the legal question of whether there is a sufficiently close fit between the constitutional ends and means.

Moreover, it is a faulty syllogism to contend that in order to "implement" a constitutional provision, an equitable remedial scheme can extend only so far as the precise boundaries of the right being addressed. "[T]he creation of a right is distinct from the provision of remedies for violations of that right." eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392 (2006). "Once a right and a violation have been shown, the scope of a [court's] equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Oakwood at Madison, Inc. v. Madison, 72 N.J. 481, 572 (1977) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)). Thus, once a palpable danger to a constitutional right has been identified, there is a long and venerable history of adopting broad and prophylactic measures to prevent harm to that right.<sup>7</sup>

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In this appeal Medford Township ("Medford") joins hundreds of other New Jersey municipalities in challenging Council on Affordable Housing ("COAH") regulations that are based on deeply flawed data, violate the Mount Laurel doctrine and the FHA, and are certain to impose an enormous financial obligation on New Jersey's already over-burdened taxpayers. The rules stray far from the core principle of the Mount Laurel doctrine that municipalities adopt land use regulations to create a realistic opportunity for the construction of affordable housing. The third round rules force municipalities into the business of providing affordable housing at taxpayer expense, a task that exceeds the constitutional mandate and one that municipalities are ill equipped to perform.

Brief for Appellant-Township of Medford at 1, In re Adoption of Third Round COAH Rules, Nos. A-5382-07T3 and A-5423-07T3 (App. Div. February 2, 2009).

<sup>7</sup> See generally, Owen Fiss, The Civil Rights Injunction (1978), available at <http://www.law.yale.edu/documents/pdf/Faculty/injunction.pdf>; Tracy Thomas, Proportionality and the Supreme Court's Jurisprudence of Remedies, 59 Hastings L.J. 73 (2007); Tracy Thomas, The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief, 52 Buffalo L. Rev. 301 (2004).

The New Jersey Supreme Court has expressed a preference for legislatively crafted remedies in part because legislation can “incorporate[] . . . a comprehensive rational plan for the development of this state, authorized by the Legislature and the Governor for this purpose.” Hills Dev. Co., 103 N.J. at 43 . But if the permissible means to implement the provisions of the Constitution were limited to only those measures that were absolutely essential to match the precise right that has been violated, there would have been no reason to defer to the Legislature to craft a comprehensive remedial scheme; under this minimalist theory of constitutional remedies, it would have been more appropriate to leave it to a judge to devise the narrowest possible order that fit the individual circumstances of a particular case.

Indeed, the language of Article VIII, section II, paragraph 5(c)(5) of the New Jersey Constitution might itself become unnecessary if the scope of provisions that “implement the provisions of this Constitution” were limited to those that would have been already available through a judicial remedy. It is axiomatic that “A construction of a legislative enactment which would render any part thereof superfluous is disfavored.” Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 68 (1978); accord Abbotts Dairies v. Armstrong, 14 N.J. 319, 328 (1954); Hoffman v. Hock, 8 N.J. 397, 406-07 (1952). That Article VIII, section II, paragraph 5(c)(5) excludes statutes or regulations that implement the Constitution from the “state mandate, state pay” provision is itself evidence that it intended to embrace a broader definition that goes beyond a parsimonious reading of what measures implement constitutional remedies.

**B. The Exclusion of Obligations That Implement the Provisions of this Constitution From the Council’s Jurisdiction Embodies a Basic Constitutional Principle of Separation of Powers.**

This Council plays a unique role in New Jersey governance. Although, like judges, its members are unelected, the Council nevertheless makes political, not judicial, determinations.

N.J. Const.art. VIII, § II, ¶ 5(b) (“The decisions of the Council shall be political and not judicial determinations”).<sup>8</sup> But neither are this Council’s determinations reviewable by, or subject to the control of, the elected members of the political branches of government. Rather, it is the actions of those executive and legislative branches that are subject to this Council’s ultimate review.

Amicus respectfully suggests, however, that with the great power vested in this Council comes a concomitant responsibility to construe that power as objectively, and as narrowly, as possible. Although the Council makes “political” determinations, it is not constituted as a legislature, nor should its power to void legislation or regulations that constitute “unfunded mandates” be construed so broadly that the Council would in effect be assuming general fiscal powers. As the United States Supreme Court has held, at some point a governmental body falls “within the category of governmental bodies whose ‘powers are general enough and have sufficient impact throughout the district’ to require that elections to the body comply with equal protection strictures.” Bd. of Estimate v. Morris, 489 U.S. 688, 696 (1989) (holding New York City Board of Estimate to be unconstitutional as violation of Equal Protection Clause) (quoting Hadley v. Junior Coll. Dist. of Metropolitan Kansas City, 397 U.S. 50, 54 (1970)).

Just as courts often invoke the doctrine of constitutional avoidance,<sup>9</sup> so too this Council should steer well clear of assuming powers that are “general enough” to trigger the federal

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<sup>8</sup> The apparent purpose of this provision is to make this Council’s decisions immune from judicial review under the “political question” doctrine. See generally, Baker v. Carr, 369 U.S. 186 (1962) (political question doctrine limits power of courts to decide issues in which there is a “textually demonstrable constitutional commitment of the issue to” another branch of government); De Vesa v. Dorsey, 134 N.J. 420 (1993) (holding that custom of senatorial courtesy was political question beyond competence of courts to review). What is implicit in the Constitution is made explicit in the enabling statute. N.J.S.A. § 52:13H-18 (“Pursuant to Article VIII, Section II, paragraph 5(b) of the New Jersey Constitution, rulings of the council shall be political determinations and shall not be subject to judicial review”).

<sup>9</sup> E.g., Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 359-360 (2007); State v. Miller, 170 N.J. 417, 433 (2002); Garfield Trust Co. v. Dir., Div. of Taxation, 102 N.J. 420, 433 (1986); State v. Profaci, 56 N.J. 346, 350 (1970) (“it is the duty of this Court to so construe the statute as to render it constitutional if it is reasonably susceptible to such interpretation”); Holster v. Bd. of Trustees of the Passaic County Coll., 59 N.J. 60, 66

constitutional limitations. It should therefore construe the word “mandate” in as narrow and unattenuated fashion as possible, lest the analysis degenerate into an indeterminate inquiry into the substantive merits of fiscal policy, an inquiry that is beyond this Council’s role to undertake. Such a narrow construction will avoid conflict between this Council’s role and the rightful prerogatives of the elected political branches of government.

Amicus Public Advocate also respectfully suggests that Article VIII, section II, paragraph 5(b), which makes clear that this Council makes political determinations and not judicial determinations, be read in pari materia with Article VIII, section II, paragraph 5(c)(5), which reinforces the principle that this Council does not usurp the particular judicial function of determining what remedy is required to implement the provisions of the New Jersey Constitution. Constitutional adjudication is ultimately a function for the courts. Previous versions of the COAH third round rules have already been extensively vetted (and indeed found constitutionally insufficient) by the courts,<sup>10</sup> and challenges to the current published version of the rules are already pending in the Appellate Division. Whether the third round rules successfully “implement the provisions of this Constitution” is a question that, in the end, is for the courts to determine. This Council should give the courts the necessary latitude to make that determination.

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(1971) (“It is an accepted principle of interpretation that, if possible, legislation will be read as to sustain its constitutionality.”).

This canon applies even if the statute’s constitutionality is only drawn in question or put in serious doubt. See Int’l Ass’n of Machinists v. Street, 367 U.S. 740, 749 (1961) (“Federal statutes are to be so construed as to avoid serious doubt of their constitutionality.”); Crowell v. Benson, 285 U.S. 22, 62 (1932) (“When the validity of an act of Congress is drawn in question . . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”).

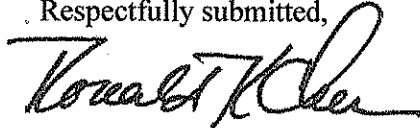
<sup>10</sup> In re Adoption of N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1 (App. Div. 2007), certif. denied, 192 N.J. 71 (2007).

## CONCLUSION

Because as a matter of law the COAH third round rules and the accompanying provisions of A500 do not constitute a "mandate," and moreover because they are clearly intended to implement the provisions of the New Jersey Constitution, they do not fall within the ambit of the Local Mandates Act. The motion of Respondents State of New Jersey and Council on Affordable Housing for Summary Judgment should therefore be granted.

February 11, 2009.

Respectfully submitted,



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