NJLM New Jersey State League of Municipalities

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September 19, 2025

Via E-Mail (jpeasco@njhmfa.gov)
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New Jersey Housing and Mortgage Finance Agency
637 South Clinton Avenue
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RE: PRN 2025-086, Comment in response to 57 N.J.R. 1470 (a), Housing Affordability Controls Proposed New Rules

Dear NJHMFA Policy Staff:

On behalf of the New Jersey State League of Municipalities and its 564 member municipalities, we submit the following comments regarding the Housing and Mortgage Finance Agency's ("HMFA") currently proposed amendments to the Housing Affordability Controls N.J.A.C. 5:80-26.1 et seq. ("UHAC") that were published in the New Jersey Register on July 21, 2025 at 57 N.J.R. 1470(a) (the "Proposed Amendments").

The importance of adopting an updated version of the UHAC that is balanced, clearly written and practical cannot be understated. The next version of the UHAC will have a profound impact on the creation of all new affordable housing, as well as all future residential development and redevelopment in this state for decades to come.

Perhaps most importantly, the next version of the UHAC will also dictate the direction and *continued viability* of New Jersey's existing affordable ownership and rental housing stock through the *extension of existing affordability controls*. This issue, now more than ever, is of urgent concern, as the initial control periods on the majority of the affordable units created in this state will end within the next decade. As recognized in the 2008 New Jersey Housing Policy Task Force Report to the Governor, "New Jersey faces a challenge in the years ahead in terms of *preserving* affordable units." p. 3. [emphasis added].

We believe that the continued viability of existing affordable housing opportunities is largely dependent on municipalities maintaining the right to unilaterally extend affordability controls beyond the initial control periods. This right has been authorized by the Council on Affordable Housing (COAH) since 1989; carried over by the HMFA in the prior UHAC regulations, including the 2024 Rules; and confirmed by the New Jersey Supreme Court and Appellate Division over a decade ago. Accordingly, we are concerned that the Proposed

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Amendments are inconsistent with respect to the municipal right to exercise the option to extend controls or at least do not reflect it with sufficient clarity.

The history of affordable housing in our state and nation underscores the necessity and appropriateness of the need for municipalities to maintain the right to extend affordability controls. The continued preservation of existing affordable units has been a problem of repeated occurrence for over fifty years.

To understand and appreciate this historical context we must bear in mind that New Jersey's seminal affordable housing case, S. Burlington Cty. NAACP v. Township of Mount Laurel ("Mt. Laurel I"), 67 N.J. 151, appeal dismissed and cert. denied, 423 U.S. 808 (1975), was decided in the wake of a significant national and state housing shortage. The housing shortage was due, in part, to the ongoing rollback of the national housing subsidy programs that been initiated after WWII. Throughout the 1950s and '60s federal housing policies and subsidy programs continually shifted and changed with each political party in power, with no consistent clarity on future viability. This resulted in program changes and an unpredictable ebb and flow of funding for public and private affordable housing developers. By 1973, while Mt. Laurel I was winding through the court system, the lack of a clear and consistent federal housing policy and the consequent funding problems reached its most critical point. On January 1, 1973, after drastic budget cuts to HUD programs during the prior year, President Nixon abruptly imposed a moratorium on all new investment spending for both public and private housing subsidy programs through HUD.

Now, some fifty years later, we are again faced with the same issues, and we should learn the lessons of the past.

This was why COAH established the right in municipalities to extend affordability controls when it adopted the first comprehensive affordability control regulations in 1989 under N.J.A.C. 5:92-12.1 through 12.10. See N.J.A.C. 5:92-12.8. In creating the right in municipalities to extend the affordability controls on existing affordable units, COAH recognized in its responses to public comments at that time that "New Jersey and the nation are presently facing a situation where the controls on affordability are expiring on low-income units created by HUD in the 1960s and 1970s. Therefore, New Jersey is losing affordable units and the subsidy necessary to replace them. See 21 N.J.R. 2020(a). This is why the COAH declared existing affordable units to be a "**precious resource**" when it adopted the first set of affordability control regulations in 1989. At that time COAH further elaborated on this observation, stating that "efforts should be made to *retain* or supplement affordable housing" and "municipalities should have the first option to structure programs that accomplish this goal." See 21 N.J.R. 2020(a) [emphasis added].

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At that time COAH had a vision to help safeguard against the sorts of calamities that can result from shifting affordable housing policies and funding uncertainties. Specifically, COAH confirmed in its regulations that "a municipality shall have the *right to determine that the most desirable means* of promoting an adequate supply of low- and moderate-income housing is to *prohibit the exercise of the repayment option and maintain* controls on lower income housing units sold within the municipality beyond the [control period]." See N.J.A.C. 5:92-12.8a [emphasis added].

That regulation has continually been in place in every subsequent version of COAH's regulations and was ultimately re-adopted by the HMFA in the 2004 version of the UHAC under N.J.A.C. 5:80-26.25. In response to a direct challenge to this provision in 2007 the New Jersey Appellate Division held "[e]xtending affordability controls on existing housing prevents the loss of much needed affordable housing." In re N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1, 84 (App. Div. 2007). This ruling was reaffirmed by the New Jersey Supreme Court in the most recent seminal Mount Laurel decision, In re N.J.A.C. 5:96 & 5:97 ("Mt. Laurel IV"), 221 N.J. 1, 32 (2015).

Nothing contained within the 2024 Fair Housing Act amendments (P.L. 2024, c. 2, hereafter "FHA 2") changes this self-evidently sensible policy in favor of municipal extension of controls; indeed, FHA 2 actually strengthens it by recognizing it, statutorily, for the first time. For example, N.J.S.A. 52:27D-311k makes clear that municipalities may continue to receive new construction credits toward Fourth-Round prospective need obligations by extending expiring affordability controls on both ownership and rental units in the Fourth Round. This is reiterated in N.J.S.A. 52:27D-321. FHA 2's policy in favor of municipalities' right to extend affordability controls is further evidenced by the fact that FHA 2 does not require municipalities to provide funding for such extensions. Rather, the only instance in which FHA 2 requires a municipality to provide funding for extending affordability controls is with respect to *rental units* and, in such instance, only if a municipality *also seeks to secure bonus credits*. See N.J.S.A. 52:27D-311k(7).

Unfortunately, the 2024 Rules and the Proposed Amendments contain many provisions that lack clarity and/or are otherwise inconsistent with and contradict the established policies of the Mount Laurel doctrine, and the Fair Housing Act, as amended by FHA 2. In addition, it appears the Proposed Amendments impose new and additional financial and procedural barriers on municipalities which make it virtually impossible, and at best completely impractical, to preserve these existing affordable housing opportunities in a uniform and fair manner on a municipal, regional and statewide basis.

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Our review of the Proposed Amendments suggests that HMFA's proposed limitations on municipal extensions of affordability controls might somehow be related to HMFA's policy decision to discontinue "95/5 units." If that is so, we wish to point out that there is no such "connection" between these two separate and distinct policy objectives by which a change in one would necessitate a change in the other. Indeed, the "95/5" regulations have no bearing on *whether* or *on what terms* a municipality may terminate or extend affordability controls. Rather, "95/5" pertains only to the *apportionment and distribution of proceeds* that result from a non-exempt sale after the controls expire and are not extended. Accordingly, HMFA can phase out "95/5" regulations without the need for any changes relating to the municipalities' right to extend affordability or release the units from the affordability controls.

By way of example, with respect to ownership units, the Proposed Amendments make a significant change to the definition of "95/5 units" (now "95/5 restriction") in section 5:80-26.1. The term "95/5 units" was a specific term of art created by the HMFA when it adopted the 2004 version of the UHAC on November 23, 2004. The HMFA's responses to public comments at the time of adoption confirm that this definition was carefully and intentionally chosen in order to distinguish between units constructed and receiving substantive certification from COAH prior to October 2001 ("95/5 units") from those constructed after October 2001 in order "to preserve the settled expectations of municipalities and other parties when the 95/5 units received substantive certification." See 36 N.J.R. 5713(a). The definition of "95/5 units" has now been in place for 21 years. Any change to the definition of "95/5 units" at this juncture would only serve to create ambiguity in a provision of the prior version of the UHAC that was otherwise clear and unambiguous.

Likewise, the provisions of the Proposed Amendments at 5:80-26.6 are ambiguous because of sentence and grammatical structure, and the inclusion of certain wording. One example is the language and structure utilized in proposed subsections 5:80-26.6(h)4 through 26.6(h)6. The language suggests that a "notice of any intent by the owner to make an exit sale," is all that is required to cut-off the municipality's ability to extend the affordability controls. It implies that the municipality's right to extend the controls can be taken away, and that the municipality cannot extend the affordability controls unless it pays the unit owner an "equity share amount." The language also fails to address the municipality's ability to extend controls if the unit owner either does not accept the "equity share amount" or alternatively does not accept the municipality's purchase of the restricted unit at the maximum restricted sale price and the equity share amount.

Furthermore, the "equity share" approach inhibits municipalities from treating each similarly situated affordable unit owner in a uniform manner. Municipalities do not have an

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unlimited supply of affordable housing trust fund monies. Smaller municipalities and municipalities where development is restricted by environmental standards/regulations established by State and regional planning entities have even less available affordable housing trust funds. With limited affordable housing trust fund monies available, municipalities will be forced to choose which affordable units they can extend, purchase or release. When one unit owner is treated differently than another unit owner, this can lead to confusion and divisiveness between affordable unit owners and with the municipality. It is also likely to lead to a scenario where unit owners who refuse to cooperate with municipalities are rewarded.

Another example is the inclusion of the last sentence of 5:80-26.6(i), which states: "[i]f the owner does not sell the unit within one year of the date of the delivery of the notice of intent to sell, the option to extend controls on the unit will be restored and the owner must submit a new notice of intent to sell at least 60 days before any future proposed date of sale." This sentence is highly problematic, for many reasons, including, again, the inference that the municipality's right to extend the controls can be taken away.

If the reason for these changes is due to a concern that existing affordable unit owners are unable to obtain a significant return on equity built-up in their affordable units over time, we believe those concerns have already been properly addressed through the 2004 version of UHAC. Indeed, the Maximum Resale Price regulations embodied in UHAC and the 2024 Rules provide a significant return for the affordable unit owner. Hypothetically, if a 2-bedroom low-income unit was purchased in 1995 for $58,200, the Maximum Resale Price today that the same original unit owner would be entitled to sell their unit would range between $132,288.21 and $161,000, depending on Mount Laurel Region – a return on "investment" of more than one hundred percent, in addition to the obvious and intended financial benefits derived from thirty years of low housing costs.

Next, we have noted that proposed subsection 5:80-26.6(l) allows a foreclosure judgment on an affordable unit to *extinguish* affordability controls. This is completely improper, inconsistent with the Fair Housing Act and the Mount Laurel doctrine, and allows any foreclosing entity to get an undeserved, publicly-funded windfall, at the expense of municipalities, and to the detriment of New Jersey's protected class of low- and moderate-income households. In our years of experience foreclosures are already a problem even without these regulatory changes. More often than not, lienholders who foreclose on affordable units do not notify the affected municipalities in advance of their foreclosure complaint filings and rarely name the municipalities as defendants. This occurs most typically when the foreclosing plaintiff is a homeowner's association. Consequently, some municipalities' hard-won affordability controls are already being extinguished by

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foreclosures. UHAC should be amended in a way that eliminates rather than exacerbates this problem.

Furthermore, subsection 5:80-26.6(m) of the Proposed Amendments provides that extensions of affordability controls must comply with the requirements of the Proposed Amendments in order to obtain credit as an affordable housing unit under the FHA. This language is confusing, as it would seem to indicate that these new requirements might apply to *any* units with control periods commencing prior to December 20, 2024. This would even include all units where an extended control period commenced prior to December 20, 2024. As it is impossible for extensions to have complied with the yet-to-be-adopted Rules, this would potentially nullify all extensions that were not a part of an approved Third Round Plan. Many municipalities have placed significant emphasis and expended substantial funds on securing extensions in anticipation of the Fourth Round. This language needs to be clarified to avoid any impact on post-Third Round extensions. We recommend the following language be used for N.J.A.C. 5:80-26.6(m)[changes underlined]:

> ***(m) All extensions of affordability controls on restricted ownership units must be made according to the requirements of this section to receive credit pursuant to the Act. This requirement applies to extensions of affordability controls on any restricted ownership units currently governed by control periods that commenced prior to December 20, 2024, including all units governed by 95/5 restrictions. However, the requirements of this section shall not apply to any restricted ownership units where the municipality has exercised its right to prohibit the exercise of the repayment option and extended the affordability control period or an extension agreement was otherwise entered into prior to [the effective date of this rule].***

Finally, we note that N.J.A.C. 5:80-26.12(f) in the 2024 Rules and the Proposed Amendments is inconsistent with and contradicts the above-cited provisions of FHA 2, as it requires municipalities to provide *minimum* financial contributions to landlords of affordable rental units in order to extend the affordability controls. Moreover, the statewide "blanket" application of these minimum contribution amounts fails to take into consideration that rental costs and pricing varies in each Mount Laurel Region of the State.

Current market trends in the rise of "institutional homeownership" in this state have been identified by the DCA, which also underscores the importance of UHAC regulations that authorize municipalities to preserve the existing affordability controls by extension as a "precious resource". In particular, an October 2022 DCA study revealed that a substantial increase in "institutional" (i.e., mostly "private for-profit business entity") ownership of residential property across the state has taken place over the course of an 8-year period

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between 2012 and 2020. The report indicates that, during this time period, the number of institutionally-owned residential properties nearly doubled, and the steady trend of institutional residential property acquisitions "shows no signs of abatement." According to the report, as of 2020 approximately 6%, or 1 in 17 residential properties in the state are now institutionally owned, about 71% of which are residential properties owned by corporate or business entities.

Most troubling, the DCA found that "[t]he areas where many low-income homebuyers live are also the ones losing the most available housing stock and seeing larger home price increases as a result." As such, the DCA's own study suggests that the exit-sale approach set forth in the Proposed Amendments could undermine the foundational goals of the Mount Laurel doctrine and the Fair Housing Act. The Mount Laurel doctrine and the Fair Housing Act was never designed to benefit one homeowner or renter over low-and-moderate-income households in search for affordable housing. It was designed to benefit the protected class of *all* low-and-moderate-income households in need of good decent housing of their choice. Low-and-moderate-income units that become unrestricted have a greater likelihood of being purchased by institutional entities at a significantly higher price and then resold or rented at significantly higher market rates. The negative impact on low-and-moderate-income families in need of affordable housing will be two-fold: first, these families will lose the opportunity to purchase an existing low-and-moderate-income unit in a community of their choice; and second, the increased unrestricted purchase price of a previously restricted affordable unit will only create greater market disparity in homeownership and rental housing.

Anticipated state funding shortages also provide good reason to preserve the "precious resource" of existing affordable units through prudent UHAC regulations. Only $35 million has been made available for the HMFA to award to only ten or twenty affordable housing projects through the AHTF program for FY2026. The AHTF program is the primary state funding source available "to provide municipalities, for-profit and non-profit developers with financial assistance to spur the development of affordable housing across the state." See https://www.nj.gov/dca/dhcr/offices/ahtf.shtml.

In sum, the Proposed Amendment's complete re-write of existing UHAC regulations with respect to the matters discussed above is highly problematic because it will create many unintended consequences including the loss of actual *existing* affordable housing opportunities at a time when the need for low-and-moderate-income housing is particularly acute. If anything, municipalities' rights to extend the affordability control on existing ownership and rental units should be strengthened and reaffirmed through clearly written regulations.

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Rather than the Proposed Amendment's complete re-write of the existing UHAC regulations, greater attention should be given to maintaining continuity in the methods by which affordability controls have been permitted to be extended in the past. The continued preservation of the state's existing affordable housing stock through the extension of affordability controls is the one true and predicable mechanism upon which municipalities may rely to ensure that actual affordable housing units remain available to the state's low-and-moderate income population.

Very truly yours,

Michael Cerra
Executive Director