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January 30, 2004

VIA FEDERAL EXPRESS

Honorable Judges of the
Appellate Division
Superior Court of New Jersey
Hughes Justice Complex
25 West Market Street
Fifth Floor, North Wing
Trenton, New Jersey 08625

Re: In re Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan, N.J. Admin. Code tit. 5, § 80-33.1 to -33.40, by the New Jersey Housing and Mortgage Finance Agency, Docket No.: A-109-03T3

Dear Honorable Judges:

As permitted by this Court's order dated November 24, 2003, amici curiae New Jersey Institute for Social Justice, the Housing and Community Development Network, the Coalition for Affordable Housing and the Environment, and the New Jersey Public Policy Research Institute file this supplemental letter brief.[1]

[1]As described more fully in the earlier brief submitted by these amici, they represent more than one hundred organizations committed to developing affordable housing, preserving the environment, rebuilding the state's cities, and fighting for the

Although the New Jersey Housing Mortgage Finance Agency ("HMFA") has made certain positive changes in the 2003 Qualified Allocation Plan ("QAP"), it continues to assert that it need not abide by the federal Fair Housing Act's pro-integration mandate or effectively further the state's constitution's Mt. Laurel doctrine in the QAP. These legal contentions cannot be allowed to stand, particularly because the federal Low-Income Housing Tax Credit program ("LIHTC") remains the most significant lower income housing development program nationally and in New Jersey. With undiminished ardor, therefore, amici continue to urge this Court: (1) to hold as a matter of law that the federal Fair Housing Act's "affirmatively furthering" provision contained in 42 U.S.C. § 3608(d) applies to HMFA's allocation of LIHTC; and (2) to confirm that as a matter of law the state constitution's Mt. Laurel doctrine applies to the LIHTC and must be effectively promoted in the QAP.

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rights of the state's minority communities. Amici use the designation "NJISJ br." to denote this earlier brief originally filed on July 14, 2003 in the challenge to the 2002 QAP (Docket No. A-10-02T2), and re-filed in this matter on December 5, 2003.

I. PROCEDURAL HISTORY

A. The 2003 QAP

HMFA has made a number of significant changes in the 2003 QAP, many of which are positive. Most importantly, HMFA has abolished its separate "urban" and "suburban/rural" funding cycles, replacing them with an all-encompassing "family" sub-allocation. N.J. Admin. Code tit. 5, § 80-33.4. While certain set-asides are provided within this cycle, the elimination of the geographic distinction at least theoretically offers the opportunity for a consistent set of criteria that would incorporate federal fair housing and state constitutional requirements in all "family" projects.

Among other notable shifts, the 2003 QAP (1) permits some non-urban developments to qualify for the largest point category;[2] (2) increases the points awarded to certain projects that help a municipality meet its Mt. Laurel obligations;[3] (3)

[2]To receive 15 points, a project can be located in the mostly urban "qualified census tracts," or be located elsewhere and commit to extend its period of affordability from 15 years to 30 years. N.J. Admin. Code tit. 5, § 80-33.15(a)(1).

[3]In the 2002 QAP, projects in the suburban cycle received five or six points if they assisted municipalities with their Mt. Laurel obligations. In 2003, the QAP provides 10 points in the family cycle to such projects, but only if they are in those portions of the state delineated in the State Development and Redevelopment Plan as "smart growth areas." N.J. Admin. Code tit. 5, § 80-33.15(a)(7)(i); N.J. Admin. Code tit. 5, § 80-33.2.

attempts to ensure that urban projects are part of larger neighborhood development planning efforts;[4] and, in an unfortunate shift, (4) appears to have deleted provisions that sought to make subsidized units available to very poor families in suburban areas.[5]

In other respects, the 2003 QAP remains unchanged. Most notably, the QAP continues to award no points to projects designed to encourage racial integration or which otherwise operate to integrate an area. The only provision even remotely of this kind is a generic requirement that owners/developers of projects with more than twenty-five units "affirmatively market their projects," N.J. Admin. Code tit. 5, § 80-33.12(c)(14), which, on its own, stands little chance of furthering racial integration. NJISJ br. at 7 n.10. As it has in the past, HMFA fails to require the collection of data on the racial characteristics of a proposed project and its surrounding area,

[4]For projects that are in both QCTs and smart growth areas, HMFA provides 7 points to such projects only if they contribute to a "community revitalization plan." N.J. Admin. Code tit. 5, § 80-33:15(a)(7)(ii). Due to the vagueness of this definition, there is concern about whether it will prove meaningful. § 80-33.2

[5]Compare N.J. Admin. Code tit. 5, § 80-33.5(a)(1) (2002) (providing an affordability set-aside in suburban cycle to projects that committed that 20% of units would be available to those at or below 50% of median income). See NJISJ br. at 4.

or any assessment of whether an affirmative marketing plan helped achieve integration.

Although amici support the general direction of the changes noted above, the consequences of the 2003 LIHTC allocation process are troubling: it has resulted in no family projects in suburban areas, let alone any that further a Mt. Laurel obligation in such places. See HMFA 2003 LIHTC Allocations (available at http://www.nj.gov/dca/hmfa/txcredit/index.html). This is a step backwards from the 2002 QAP which resulted in at least one-fifth of that year's funding to suburban projects. NJISJ br. at 8.

B. HMFA's Position

In HMFA's response to appellants' extensive comments, HMFA states flatly that it "resists imposition of an affirmative duty to promote integration" under the federal Fair Housing Act, 42 U.S.C. §§ 3601-19. 35 N.J. Reg. 3312. Declaring that it takes this position not out of any hostility to the concept of integration, HMFA contends that it must do so because, in its view, the affirmative duty imposed by federal civil rights law fundamentally conflicts with unspecified other legal obligations.

HMFA similarly suggests that the Mt. Laurel doctrine does not apply to HMFA's responsibilities in promulgating the QAP, claiming that the doctrine "concerns municipalities and the exercise of their zoning power." 35 N.J. Reg. 3316. Interestingly, in its explanation, HMFA emphasizes that municipalities must take "affirmative steps" to insure the existence of a realistic opportunity, and that these include "procuring available Federal or State subsidies to aid in the construction of affordable housing." 35 N.J. Reg. 3315-16. Nonetheless, HMFA disclaims that it has any Mt. Laurel obligation when it allocates the LIHTC -– the most significant housing subsidy program.

II. ARGUMENT

A. Federal Law Requires HMFA affirmatively to further fair housing through its allocation of federal tax credits.

For decades, federal law has mandated that all federal housing funds be used "in a manner affirmatively to further" fair housing. 42 U.S.C. § 3608(d). Because HMFA actively resists the "imposition of th[is] affirmative duty," 35 N.J. Reg. 3312, amici respectfully request that this Court hold that HMFA must affirmatively further fair housing in its administration of the LIHTC. As amici demonstrated in their

original brief, the principles which have required the application of fair housing obligations to all federal housing programs, whether administered by federal or state agencies, demand a similar result in this matter. NJISJ br. at 17-25.

In its response to appellants' comments, HMFA points to no statute or judicial decision which supports a contrary conclusion. Instead, HMFA broadly suggests that there is no affirmative obligation to promote integrated housing and that the two leading cases from the Third Circuit support its assertion. This position is misguided. Contrary to HMFA's suggestion, it is well-established that through the Fair Housing Act, "Congress has made a strong national commitment to promote integrated housing." Linmark Assocs., Inc. v. Township of Willingboro, 421 U.S. 85, 94-95 (1977); see also Exec. Order No. 12,259, 46 Fed. Reg. 1253 (1980). More specifically, numerous courts have held that the affirmative duties imposed by § 3608 are designed to further the goal of integration rather than merely banning discrimination in federally assisted housing.[6]

[6] See, e.g., Clients' Council v. Pierce, 711 F.2d 1406, 1425 (8th Cir. 1983); Alschuler v. Department of Hous. & Urban Devel., 686 F.2d 474, 484 (7th Cir. 1982); Jorman v. Veterans' Admin., 579 F. Supp. 1407, 1418 (N.D. Ill. 1984); Young v. Pierce, 544 F. Supp. 1010, 1017-18 (E.D. Tex. 1982); Schmidt v. Boston Hous. Authority, 505 F. Supp. 988, 996-97 (D. Mass. 1981). These authorities reinforce why HMFA is mistaken when it points to

As the Second Circuit wrote regarding the affirmative duties imposed by § 3608(d)(5): "Action must be taken to fulfill, as much as possible, the goal of open integrated housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." Otero v. New York City Hous. Authority, 484 F.2d 1122, 1134 (2d Cir. 1973).

Far from supporting HMFA's broad contention, both Shannon v. United States Department of Housing & Urban Development, 436 F.2d 809 (3d Cir. 1970) and Business Association of University City v. Landrieu, 660 F.2d 867 (3d Cir. 1981) reinforce that 42 U.S.C. § 3608 imposes an affirmative pro-integration obligation on public agencies that distribute federal housing resources. In Shannon, the Third Circuit emphasized the significance of this provision, 436 F.2d at 816, and held that it required an agency distributing federal housing funds to "utilize some institutionalized method whereby, in considering site selection

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cases such as DeBolt v. Espy, 47 F.3d 777 (6th Cir. 1995), to show that it has no fair housing obligation. Debolt addresses a separate legal provision: 42 U.S.C. § 3604 which is a straightforward prohibition on housing discrimination on the basis of race, family status, or other protected status. Unlike § 3604, the above-listed cases involve § 3608 which obliges the government to take affirmative steps beyond the basic anti-discrimination protections of § 3604.

or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts." Id. at 821.

A decade later in Landrieu, the Third Circuit reaffirmed this holding. The court emphasized that the location of new housing "could lead to the undue concentration of persons of a given race, or socio-economic group in a given neighborhood, . . . substantially impairing accomplishment of the (integrative) object of the 1968 Civil Rights Act." 660 F.2d at 869 (internal quotations omitted). It found that § 3608(d) "require[s] housing officials to thoughtfully weigh the question of racial impact." Landrieu, 660 F.2d at 874. HMFA cannot deny that it has an affirmative obligation to promote integrated housing pursuant to 42 U.S.C. § 3608(d).

The alternative contention HMFA raises regarding the affirmative obligation to promote integrated housing stems from an exaggerated perception of what such an obligation entails. HMFA asserts that it resists "imposition of an affirmative duty to promote integration" because it fundamentally conflicts with other legal obligations. 35 N.J. Reg. 3312. HMFA does not specify what these barriers are, but it appears that the perceived insurmountable conflict arises because HMFA interprets

the affirmative obligation under federal law as prohibiting it from "provid[ing] urban revitalization assistance," id., which is one of HMFA's several purposes under state law. This is simply not the case.

As an initial matter, it is clear-cut from Shannon and Landrieu that a starting point for compliance with the affirmatively furthering obligation is an "institutionalized method" for considering racial and other demographic information. NJISJ br. at 34-35. HMFA has not undertaken even this initial step. The broader lesson of these and other cases, however, is that the context of the particular program will guide the steps and mechanisms that are available and appropriate to further integrated housing and prevent increased racial concentration.[7] As amici emphasized in their earlier brief, HMFA has substantial discretion regarding how to allocate the annual allotment of tax credits, but part of that discretion

[7]HMFA's premise that urban housing can never further integration is wrong. Particularly given the nationwide increased emphasis upon "mixed income" housing development, federally supported urban housing can and should promote integration. It is also important to note that the location of lower income housing in suburban locations, without the "informed judgment" and action required by Shannon, frequently fails to further racial integration. NJISJ br. at 11. See also Urban Land Institute, Mixed Income Housing: Myth and Fact (2003) (available at: http://research.uli.org/Content/Reports/PolicyPapers/PUB_M61.pdf).

involves how best to affirmatively further fair housing. NJISJ br. at 5-6, 32-34. In this instance, mechanisms might include the creation of a fair housing funding cycle or set-aside, rewarding projects that promote integration with additional points in the allocation process, or modified application of HUD's regulations governing site selection. See, e.g., 24 C.F.R. §§ 891.125(c), 941.202(c), 983.6(b)(3).[8]

As amici emphasized in their opening brief, the affirmatively furthering obligation does not mandate where housing will be located or who will occupy it. NJISJ br. at 34-35. Instead, it requires the public agency to evaluate whether its housing will promote integration and prevent further racial concentration and, if not, to take what steps are appropriate in response. As the Third Circuit stated in Shannon, "[n]or are we suggesting that desegregation of housing is the only goal of national housing policy . . . . We hold only that the agency's judgment must be an informed one." 436 F.2d at 822. Unquestionably, the tax credit program is intended to achieve a

[8]Despite HMFA's purported fear that any action taken to comply with the affirmatively furthering obligation would violate the Constitution's Equal Protection Clause, compliance with the Fair Housing Act does not require prohibited race discrimination. Rather, the Act requires HMFA to develop projects in a manner that promotes integration and simultaneously prohibits it from denying housing to eligible tenants on the basis of race.

range of objectives. NJISJ br. at 32-34. In seeking to meet these, however, HMFA cannot ignore the federal Fair Housing Act's pro-integration mandate.

B. This Court should make clear that the Mt. Laurel doctrine of the New Jersey Constitution applies to the actions of HMFA and that HMFA has failed to meet its obligations thereunder.

As noted above, HMFA in its response to appellants' comments to the 2003 QAP reasserted its resistance to accepting responsibilities under the Mt. Laurel doctrine. Instead, HMFA claimed, "[t]he Mount Laurel doctrine thus concerns municipalities and the exercise of their zoning power, and the remedy relies on private actors, builders seeking to construct housing in the municipality." 35 N.J. Reg. 3316. As amici explained in their initial brief, the Supreme Court has established that the Mt. Laurel doctrine applies as fully to the state and its agencies as it does to municipalities, whose zoning authority emanates solely from the state itself. NJISJ br. at 27-28. See In re Egg Harbor Assocs. (Bayshore Centre), 94 N.J. 358, 367 (1983). See also Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 208-09 (1983) (hereinafter, "Mt. Laurel II"); Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 174-75 (1975) (hereinafter, "Mt. Laurel I").

HMFA's position is particularly alarming because of the potential benefit of the strategic use of LIHTC resources to expand "the realistic opportunity" for construction of lower income housing to meet regional needs. The Supreme Court has actively encouraged the use of federal subsidy programs to promote the goals of Mt. Laurel, emphasizing that the affirmative measures municipalities must take to make an opportunity "realistic" include obtaining access to such resources. Mt. Laurel I, 67 N.J. at 217, 262. HMFA thus miscomprehends the doctrine when it contends that "the remedy relies on private actors, builders seeking to construct housing in the municipality." 35 N.J. Reg. 3316. While builders, and particularly for-profit developers, have been an integral component of compliance with the doctrine, municipalities can, have, and must take steps to facilitate the actions of "private actors" to meet their obligations. HMFA must thus acknowledge its Mt. Laurel obligation and ensure that the largest source of such subsidies is available in appropriate circumstances to further it.

In its response to appellants' comments, HMFA also suggests that, even if Mt. Laurel were to apply, the QAP would "in no way conflict with the Mount Laurel doctrine." 35 N.J. Reg. 3316. This is the case, HMFA asserts, because "[t]he Mount Laurel

doctrine is not intended to mandate an out-migration from the cities to the suburbs. To the contrary, the State is required to 'encourage housing construction in urban areas.'" Id. (emphasis in original, footnote omitted). To the extent that HMFA asserts that such exclusive support of urban housing somehow fulfills its Mt. Laurel obligations, it is mistaken. This contention fundamentally misrepresents the Mt. Laurel doctrine, which from its inception sought to confront the problem that HMFA perpetuates: the over-concentration of lower income housing in central cities. See Mt. Laurel I, 67 N.J. at 172-73; Mt. Laurel II, 92 N.J. at 209-10, 214-15; Toll Bros., Inc. v. Township of West Windsor, 173 N.J. 502, 542-43 (2002). The LIHTC resources allocated by HMFA are particularly critical in creating realistic opportunities for the poorest households below 45% of median income who are not served by private market inclusionary zoning plans. Cf. Toll Bros., 173 N.J. at 539.[9]

As in the fair housing context, HMFA enjoys substantial discretion in identifying the steps it must take to comply with the Mt. Laurel doctrine. For example, it could award additional

[9]Furthermore, this misguided interpretation of the doctrine undermines HMFA's own smart growth policy goal and the state's environmental goals related to air and water quality by promoting overreliance on inclusionary zoning as the exclusive means of suburban and rural Mt. Laurel compliance.

points to projects furthering Mt. Laurel goals or include a set-aside for Mt. Laurel projects in each of the LIHTC funding cycles. However HMFA chooses to do so, however, it can no longer ignore its obligations under Mt. Laurel.

III. CONCLUSION

Amici respectfully request that this Court hold that HMFA has failed to meet its legal obligation to affirmatively further fair housing as required by 42 U.S.C. § 3608(d) and its legal obligations under the state constitution's Mt. Laurel doctrine, and must comply with these legal rules when it puts forth a QAP and administers the LIHTC.

Respectfully submitted,

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