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| In re Adoption of the 2002 Low Income Housing Tax Credit Qualified Allocation Plan, N.J.A.C. 5:80-33.1 to -33.240, by the New Jersey Housing and Mortgage Finance Agency | SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION<br><br>DOCKET NO. A-10-02T2<br><br>CIVIL ACTION<br><br>On Appeal from Rulemaking by the Housing and Mortgage Finance Agency, Proposal No. PRN 2002-172, R.2002 d.233, effective July 15, 2002; 34 N.J. Reg. 1574(a) (May 6, 2002); 34 N.J. Reg. 2417(a) (July 15, 2002) |

# BRIEF IN SUPPORT OF MOTION TO APPEAR AS AMICI CURIAE AND ON THE MERITS


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## PRELIMINARY STATEMENT

This case raises fundamental issues of first impression regarding whether the nation's most significant low-income housing program must abide by the federal Fair Housing Act's pro-integration mandate and effectively further the state constitution's Mt. Laurel doctrine. Amici respectfully believe that the answer to both questions must be in the affirmative, both as a matter of law and of policy.

The Low Income Housing Tax Credit ("LIHTC") program, created at the federal level but administered in New Jersey by the state's Housing and Mortgage Finance Agency ("HMFA"), is the nation's most important lower income housing development program, substantially exceeding any other in size, scope, and significance. Although for more than thirty years federal civil rights laws have ensured that public and other assisted housing programs are part of a balanced approach toward development that "affirmatively further[s]" fair housing principles, there has not previously been occasion for a court to determine whether these principles apply to the more recently established LIHTC. Now is that time.

In appearing here, amici seek both to reinforce the fundamental importance of these principles and to ensure that their application results in a balanced lower income housing policy that furthers appropriate development activity in both urban and non-urban areas. The amici represent more than one hundred groups committed to developing affordable housing,

preserving the environment, rebuilding the state's cities, and fighting for the rights of the state's minority communities. As such, amici assert that the LIHTC must address the reality that residential segregation in New Jersey remains at staggering levels which have remained effectively unchanged for the past generation. Consistent with the Mt. Laurel and fair housing mandates, and contrary to the way that HMFA has administered the program to date, the program must create housing options in suburban areas that also further racial and economic integration.

At the same time, amici recognize that urban redevelopment and neighborhood revitalization have been, and remain, important goals of the LIHTC program. When appropriately undertaken, projects in urban areas provide valuable housing options to lower income urban residents which assist in the rebuilding of the state's cities and also promote racial and economic integration.

Amici curiae thus urge this Court: 1) to determine as a matter of law that the federal Fair Housing Act's pro-integration mandate applies to the HMFA's allocation of LIHTC; 2) to confirm that the state constitution's Mt. Laurel doctrine also applies to this allocation and must be effectively promoted through the program; and 3) to order HMFA to incorporate all of the appropriate legal standards into its allocation of tax credit housing resources. For the Court's consideration, amici have included in this brief principles which reflect these legal

standards and, amici respectfully submit, should guide HMFA's LIHTC allocation.

## PROCEDURAL HISTORY

Amici adopt as their procedural history the sequence of events regarding HMFA's proposal and adoption of the 2002 Qualified Allocation Plan ("QAP") set forth by appellants in their procedural history.

## STATEMENT OF FACTS

### THE LIHTC PROGRAM

The LIHTC program is by far the largest federal program supporting the development of lower income housing. According to the General Accounting Office, in 1999 the program cost the federal government approximately $3.5 billion.[1] By fiscal year 1999, the program had been responsible for the construction or rehabilitation of an estimated 700,000-800,000 units of housing.[2] In conjunction with the withdrawal of federal support for most other housing development programs, LIHTC stands out as the most significant such program.[3]

In New Jersey, the program's import cannot be overstated, particularly in a time of significant budget tightening. The state's inventory of projects financed by the LIHTC includes 380 tax credit developments containing more than 21,000 lower income

[1] General Accounting Office, Federal Housing Assistance: Comparing the Characteristics and Costs of Housing Programs, GAO-02-76, Table 21 (Jan. 2002).

[2] Federal Housing Assistance at 72.

[3] See 24 C.F.R. § 81 (1998)(explaining that the LIHTC is the "only major Federal assistance program … that is currently active" for funding new or rehabilitated subsidized housing units).

units. HMFA, Federal Low Income Tax Credit Program <http://www.state.nj.us/dca/hmfa/txcredit/lihtcpgmsmry.htm>. In 2002 as in 2003, HMFA has distributed, or expects to distribute, about $15 million worth of credits which, given the expected duration of the projects and manner in which the credits leverage other investment, translates into between $105 and $125 million of total equity investment. Id.; 34 N.J. Reg. 2417. By a considerable margin, the LIHTC program is New Jersey's largest funding program for the development of lower-income housing.[4]

Unlike most federal housing programs which are operated by the United States Department of Housing and Urban Development ("HUD"), the Treasury Department, through the Internal Revenue Service ("IRS"), is responsible for the LIHTC, as this program utilizes the tax code to leverage resources for lower income housing. In essence, the LIHTC program operates by allowing developers of residential rental property to claim tax credits, normally for ten years, for a significant percentage of the value of new and substantially rehabilitated housing units available to lower-income persons.[5]

[4] This brief uses the term "lower-income housing" to refer to housing restricted to persons with incomes at or below 80% of median and to avoid confusion given differences between federal and state definitions. (Federal housing programs generally use the term "low-income housing" to refer to housing available to persons below 80% of median, and very low-income to persons below 50%. New Jersey uses the term "low-income" to refer only to those persons below 50%, and "moderate" for those between 50% and 80% of median.) Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 221 n.8 (1983).

[5] Among other requirements, a project qualifies for the credit only if, for a period of fifteen years, the property owner rents at least 20% of the units to households with incomes at or below 50% of the area median gross income, or the property owner rents at least 40% of the units to households with incomes at or below 60% of area median gross income. 26 U.S.C. § 42(g)(1). For a brief description of how the LIHTC functions, see Florence Roisman,

While the tax credits are created at the federal level and governed by a federal regulatory framework, the program requires substantial state involvement. Most significantly, the IRS annually allocates a share of lower-income housing tax credits to each state, and each state is then charged with distributing through a QAP "approved by the [appropriate] governmental unit."[6] In New Jersey, this is the HMFA.

The LIHTC allows state agencies, such as the HMFA, significant flexibility in determining how to allocate the annual distribution of tax credits. While the QAP must be "appropriate to local conditions", 26 U.S.C. § 42(m)(1)(B)(i), this phrase is undefined. The only specifications Congress imposes on the plan is that it give preference to projects that: (1) serve the lowest income tenants; (2) agree to serve qualified tenants for the longest periods of time; and (3) are located in census tracts with a concentration of lower-income people (called "qualified census tracts" ("QCTs")) and which contribute to a concerted community revitalization plan. 26 U.S.C. § 42(m)(1)(B)(ii).[7] While QCTs are defined, neither the statute nor the governing regulations provides a definition or

Mandates Unsatisfied: The Low Income Housing Tax Credit Program & the Civil Rights Laws, 52 U. Miami L. Rev. 1011, 1014 (1998).

[6] 26 U.S.C. § 42(m)(1).

[7] The LIHTC's authorizing statute also requires that the plan provide a procedure for compliance monitoring. While the statute further mandates that certain "selection criteria" be used, including project location, neither the statute nor IRS' regulations describe how or in what manner an allocating agency is to use these criteria. 26 U.S.C. § 42(m)(1)(C).

other guidance regarding what is meant by a "concerted community revitalization plan."[8]

**HMFA'S ALLOCATION OF THE LIHTC**

In its 2002 QAP, as it has previously, HMFA distributed its almost $15 million in tax credits by means of several cycles, which included sub-allocations limited to urban areas, suburban/rural areas, HOPE VI[9], and special needs. HMFA provided varying amounts to each of these categories, with the urban cycle receiving $6,000,000 (almost twice the next largest allocation) and the HOPE VI cycle (also dedicated to urban areas) over $2,000,000. In each cycle, a specified percentage of the credits are set aside for senior citizen projects; senior citizen projects remain eligible to apply for the remainder as well. See, e.g., N.J. Admin. Code tit. 5, § 80-33.4(a)(3) (reserving 15% of urban cycle for senior projects).

In the QAP, HMFA also encourages and reinforces development priorities by awarding points to projects with certain characteristics. The two most significant such priorities, which each count for 15 points, are: 1) location in a QCT; and 2) extending the compliance period to 30 years. N.J. Admin. Code tit. 5, § 80-33.16(a). HMFA also provides priority status for a broad range of other features in projects, including projects which incorporate commercial development (up to 10

[8]QCTs are census tracts in which 50% of the households have incomes less than 60% of the median. 26 U.S.C. § 42(5)(C)(ii).

[9]Hope VI is a federal housing program which provides funds for the elimination of severely distressed public housing through demolition, rehabilitation, relocation, or new construction of mixed-income projects. HUD, About HOPE VI <http://www.hud.gov/offices/pih/programs/ph/hope6/about>.

points), N.J. Admin. Code tit. 5, § 80-33.16(a)(3)(ii), use historic tax credits or are located on a brownfield site (two points), N.J. Admin. Code tit. 5, § 80-33.16(a)(17), or are near public transportation or a park (one point), N.J. Admin. Code tit. 5, § 80-33.16(A)(13)(iii).

The QAP does not encourage racial integration through an award of points. It does not provide points if a project includes measures designed to ensure a racially integrated tenant pool or otherwise operates to integrate the area in which it is located.[10] In fact, neither in the QAP nor in its implementation of the program, does HMFA request or obtain information regarding the anticipated racial composition of the project.

With regard to projects that assist municipalities to meet their Mt. Laurel obligations, the QAP does provide for the award of either five or six points to such projects in the Suburban/Rural Cycle. N.J. Admin. Code tit. 5, § 80-33.17(a). The QAP does not, however, provide a basis for determining how its allocation addresses regional lower income housing needs or otherwise ensuring that LIHTC projects help satisfy unmet fair share obligations identified through the Mt. Laurel compliance framework. Instead, the QAP focuses on a project by project

[10] All projects with 25 units or more are required to submit an Affirmative Fair Housing Marketing Plan at the time of application, as well as a subsequent certification that the Plan was used. N.J. Admin. Code tit. 5, § 80-33.13(c)(14). However, no data collection on the racial characteristics of the project or area, or determination of whether the marketing is successful or meaningfully promotes the ultimate integration of the project is required. By itself, affirmative marketing stands little chance of furthering racial integration.

analysis, with housing needs as established on a municipality basis without regard to regional housing considerations.[11]

The consequence of HMFA's method of allocating its tax credits has been to concentrate projects in urban areas without regard to racial concentration or regional housing allocation. 34 N.J. Reg. 2417 ("[HMFA] has designed the [QAP] to address the acute housing needs of New Jersey's diverse urban communities.") According to HMFA, it allocated funding in the 2002 QAP so that a minimum of 62% and a maximum of 79% of the dollars would go to urban areas. Id. In practice, the 2002 allocation provided funding for 840 units in urban areas (as part of its urban, Hope VI, and final cycles), of which 668 are family units, while the suburban cycle provided funding for 238 units in suburban areas, of which 139 are family units.[12]

**HMFA'S POSITION**

In conjunction with its issuance of the final QAP, HMFA provided detailed responses to the contentions posed by the NAACP and Fair Share appellants. 34 N.J. Reg. 2417. Although appellants have evidently contested HMFA's allocation policies

[11] See, e.g., 34 N.J. Reg. 2418 ("[T]he touchstone of the QAP is the verifiable housing need identified by the municipalities themselves."); 34 N.J. Reg. 2419 (When prioritizing projects for LIHTC allocation in 2002 QAP, agency determined that appropriate criteria was "current need of a municipality's residents").

[12] The urban projects are in Trenton, Orange, Elizabeth, Union City, Bridgeton (in two projects), Tinton Falls, Paterson, and Newark (in two projects). The only senior projects in the urban cycles were those in Tinton Falls (whose qualification as part of the urban cycle is unclear) and one based in Newark. HMFA, 2002 Low Income Housing Tax Credit Program Reservations (Oct. 25, 2002) <http://www.nj.gov/dca/hmfa/txcredit/2002allocations.pdf>. The suburban locations include Medford, Salem, Maple Shade, and Mount Laurel (for the project being developed by appellants).

for a number of years, including by written submission five months prior to the finalization of the 2002 QAP, HMFA did not include in its responses any information regarding the racial composition of the tenants of LIHTC projects or the areas in which the LIHTC projects have been located.

Instead, HMFA contended that the Fair Housing Act's pro-integration mandate as reflected in 42 U.S.C. § 3608 does not apply to its allocation of the federal low-income housing tax credits. 34 N.J. Reg. 2419. HMFA similarly explained that, in its view, it was not required to collect any data regarding the racial concentration consequences of its allocation decisions or adopt any site selection criteria intended to evaluate and prevent the LIHTC program from furthering racial concentration. Id. In its responses, HMFA noted that it surveyed at least 24 other state housing finance agencies and found that no other state collects such information or uses such site selection criteria. Id.

**NEW JERSEY'S RACIAL AND ECONOMIC SEGREGATION**

New Jersey's racial and economic segregation has long been acknowledged by the state and identified as a challenge that impedes all residents and parts of the state. The New Jersey State Development and Redevelopment Plan, for example, recognized the need to take affirmative measure to combat the concentration of New Jersey's poor and minority residents in its urban areas. N.J. State Planning Comm'n, The N.J. State Devel. & Redevel. Plan, at 28 (Mar. 1, 2001).

Despite this plan and others generated over the years, New Jersey remains one of the most racially and economically segregated areas in the country, in terms of both its housing and its public schooling patterns. According to data from the 2000 census measuring the nation's 50 largest metropolitan areas based on the widely-used Index of Dissimilarity, the Newark metropolitan area is the fifth most segregated in the nation.[13] On a scale in which a value of 60 connotes very high levels of segregation, the Newark metropolitan area has a score of 80.[14] Ethnic Diversity Grows, Neighborhood Integration Lags Behind at 7, Lewis Mumford Center (Apr. 3,2001) <http://mumford1.dyndns.org/cen2000/WholePop/WPreport/MumfordReport.pdf>. The Newark metropolitan area, in particular, has shown little progress since the 1980 census; its 1980 index of dissimilarity of 83 is not significantly different than the current value of 80.

Consistent with these realities, the development of lower income suburban housing, even that which has been created pursuant to the Mt. Laurel mandate, has rarely resulted in

[13] The Index of Dissimilarity ("D") measures the extent to which two different groups are spread among the census tracts of a particular city. According to the Lewis Mumford Center for Comparative Urban and Regional Research at the University of Albany, "[t]he index ranges from 0 to 100, giving the percentage of one group who would have to move to achieve an even residential pattern -- one where every tract replicates the group composition of the city. A value of 60 or above is considered very high. For example, a D score of 60 for black-white segregation means that 60% of either group must move to a different tract for the two groups to become equally distributed. Values of 40 to 50 are usually considered moderate levels of segregation, while values of 30 or less are considered low." Ethnic Diversity Grows, at 2.

[14] The Philadelphia metropolitan area, which includes parts of New Jersey, is twelfth, with an index of 72. While Philadelphia's index of dissimilarity has improved from its 78 in 1980 to 72 in 2000, it also remains an intensely segregated area. Ethnic Diversity Grows, at 7.

significant racial integration without supplemental measures. Naomi Bailin Wish & Stephen Eisdorfer, The Impact of Mount Laurel Initiatives: an Analysis of the Characteristics of Applicants and Occupants, 27 Seton Hall L. Rev. 1268 (1997).

## ARGUMENT

### POINT I

**THIS COURT SHOULD GRANT LEAVE TO PARTICIPATE AS AMICI CURIAE TO THE NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE, THE COALITION FOR AFFORDABLE HOUSING AND THE ENVIRONMENT, THE HOUSING AND COMMUNITY DEVELOPMENT NETWORK, AND THE NEW JERSEY PUBLIC POLICY RESEARCH INSTITUTE.**

The New Jersey Institute for Social Justice ("NJISJ"), the Coalition for Affordable Housing and the Environment ("CAHE"), the Housing and Community Development Network ("HCDN"), and the New Jersey Public Policy Research Institute ("NJPPRI") here move pursuant to R. 1:13-9 for leave to participate as amici curiae. The role of amici curiae is to "assist in the resolution of an issue of public importance." R. 1:13-9. Such assistance may be rendered by "provid[ing] the court with information pertaining to matters of law about which the court may be in doubt," Keenan v. Board of Chosen Freeholders, 106 N.J. Super. 312, 316 (App. Div. 1969), or by advising the court "of certain facts or circumstances relating to a matter pending for determination." Casey v. Male, 63 N.J. Super. 255, 258 (Essex Co. Ct. 1960). The participation of amicus curiae is particularly appropriate in cases with "broad implications," Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6, 17 (1976), or of "general public interest." Casey, 63 N.J. Super. at 259. See also State v. Maguire, 84 N.J. 508 (1980) (granting leave to appear as amicus curiae due to public importance of the issues involved).

This matter is an appropriate one for the participation of amici curiae. First, it presents an issue of first impression regarding the application of the federal Fair Housing Act to the HMFA's administration of the LIHTC program. This matter also addresses the scope of HMFA's obligations under the Mt. Laurel doctrine. Because the LIHTC is the most important source of federal funds for lower income housing and because residential segregation remains a difficult problem in New Jersey, this matter presents issues of unique public importance.

Moreover, amici are four non-profit organizations, representative of scores of groups that work to develop affordable housing, preserve the environment, rebuild the state's cities, and promote the interests of its African-American and minority communities. Collectively, they share a vision that critical housing resources, such as those of the LIHTC program, must be used consistent with civil rights and constitutional mandates and in a manner that recognizes the regional context of the state's affordable housing, environmental, and planning challenges.

CAHE is a coalition of over forty affordable housing, environmental protection, and regional planning non-profit organizations that have come together to promote a just and sustainable New Jersey.[15] CAHE's goals are to increase

[15] Some of CAHE's members include: the Association of New Jersey Environmental Commissions; Clean Ocean Action; Episcopal Community Development, Inc.; Housing and Community Development Network of New Jersey; Ironbound Community Corporation, Inc.; Isles, Inc. (Trenton); La Casa de Don Pedro (Newark); New Community Corporation; New Jersey Audobon Society; New Jersey Conservation Foundation; New Jersey Environmental Federation; New Jersey Future; Regional Plan Association; Regional Planning Partnership; Sierra Club (New Jersey

affordable housing, to preserve the state's natural resources, and to revitalize the state's urban areas – all of which are promoted by sound and comprehensive regional planning efforts.[16]

HCDN is a statewide association of hundreds of individuals, non-profit affordable housing and community development corporations, and other organizations that support the creation of housing and economic opportunities for low and moderate income people. HCDN has extensive experience developing affordable housing and evaluating the effects and limitations of the Mt. Laurel doctrine.

NJISJ is an urban research and advocacy organization dedicated to the advancement of New Jersey's urban areas and residents. NJISJ regularly engages in advocacy to challenge the barriers that constrain cities and their residents from achieving their full potential. NJISJ's Executive Director, Kenneth Zimmerman is a former Deputy Assistant Secretary for Fair Housing Enforcement at the United States Department of Housing and Urban Development who oversaw HUD's fair housing enforcement and programmatic activities.

NJPPRI has over the past twenty-five years worked to promote the interests of the African-American community in New Jersey by identifying, researching, and promoting issues important to this community in New Jersey. In its 2002-03 annual

Chapter); and the Trust for Public Land.

[16]In particular, CAHE supports the preservation of the Mt. Laurel doctrine especially in conjunction with more effective means of increasing rental and home ownership opportunities affordable to low and moderate income people.

report, NJPPRI examined residential segregation in New Jersey and found that residential segregation remains a severe problem. NJPPRI, The State of Black New Jersey <http://policy.rutgers.edu:16080/njppri/pdf/annual_report.pdf>.

New Jersey's courts have previously recognized the value of these organizations' expertise in related matters, allowing them to participate as amici in a number of cases. For example, CAHE and HCDN have served as amici curiae before the New Jersey Supreme Court in Toll Brothers, Inc. v. Township of West Windsor, 173 N.J. 502 (2002), a matter which raised important issues regarding a municipality's obligation to provide a realistic opportunity for the development of low and moderate income housing. Similarly, by order of the New Jersey Supreme Court, NJISJ appeared as amicus curiae before this Court in a matter addressing the application of the Fair Housing Act to predatory lending practices. See Associates Home Equity Services, Inc. v. Troup, 343 N.J. Super. 254 (App. Div. 2001).

The participation of the expert and committed organizations as amici curiae will not prejudice any party. Additionally, their input will assist the Court as it addresses the complex and important issues raised by the parties to this matter. Moreover, because this brief is submitted simultaneously with the amicus curiae brief of the Local Initiatives Support Corporation, granting leave to appear will not delay resolution of this matter. Finally, should the Court grant the motion of

the proposed amici, they respectfully request the opportunity to participate in oral argument.

## POINT II

### HMFA FAILED TO COMPLY WITH THE FAIR HOUSING ACT'S REQUIREMENT THAT FEDERALLY SUPPORTED HOUSING PROJECTS "AFFIRMATIVELY FURTHER" RACIAL INTEGRATION.

In the more than thirty years since Congress passed the Fair Housing Act in 1968, the courts have resolved many questions about the scope of its application. First, it is well-settled that the Act's "affirmatively furthering" requirement applies to all federal housing programs, whether those programs are administered by the Department of Housing and Urban Development or other agencies. An unbroken line of cases also demonstrates that the Act's "affirmatively furthering" requirement applies to state and local agencies using federal funds to operate public housing or housing voucher programs. The only novel issue regarding the Fair Housing Act presented in this matter is whether the "affirmatively furthering" requirement also applies to state plans for allocation of federal LIHTC. Because the LIHTC is like other federal programs administered by states to which the Act's requirements apply, this Court should hold that HMFA must comply with the Act when formulating its QAP.

#### .A The Fair Housing Act Mandates That All Federally Funded Housing Programs Promote Residential Desegregation.

Passage of the Fair Housing Act was the culmination of almost twenty years of federal housing policy to combat urban blight and segregation. Although Congress had directed in the

1949 Housing Act that federal housing programs promote community improvement and in the 1964 Civil Rights Act that federal housing programs not have discriminatory effects, Shannon v. United States Dep't of Hous. & Urban Devel., 436 F.2d 809, 816 (3d Cir. 1970), Congress recognized by 1968 that it had to strengthen these laws. The Fair Housing Act was the result.

Speaking in support of the 1968 Act, Senator Brooke was troubled by the government's failure to stop funding segregated housing: "Rarely does HUD withhold funds or defer action in the name of desegregation. In fact, if it were not for all the printed guidelines the housing agencies have issued since 1964, one would scarcely know a Civil Rights Act had been passed." 114 Cong. Rec. 2527-2528 (1968). Senator Brooke went on to point out that Congress had to stop the federal government's complicity in continuing residential segregation and called for passage of the Fair Housing Act because "an overwhelming proportion of public housing . . . in the United States directly built, financed and supervised by the Federal Government is racially segregated." 114 Cong. Rec. 2528.

Accordingly, under the Fair Housing Act, government agencies must "affirmatively further" integrated housing by considering the goal of housing integration when developing their housing policies. At a minimum, therefore, an agency must, when selecting projects that will receive federal funding, have "before it the relevant racial and socio-economic information necessary for compliance with its duties under the

1964 [Civil Rights Act and 1968 Fair Housing Act]." Shannon, 436 F.2d at 821. See also NAACP v. Secretary of Hous. & Urban Devel., 817 F.2d 149, 156 (1st Cir. 1987) (Breyer, J.). Using this information, the agency must consider how its use of federal housing funds will further the nation's fair housing policy. NAACP v. Secretary of Hous. & Urban Devel., 817 F.2d at 156-57; Shannon, 436 F.2d at 821-22; Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 77-78 (D. Mass. 2002).

Congress made clear its intention to apply the Fair Housing Act as broadly as possible during the debates leading to passage of the law. Senator Brooke stated that passage of the Act was needed to pressure local governments to assist in the fight against residential segregation:

> Today's Federal housing official commonly inveighs against the evils of ghetto life even as he pushes buttons that ratify their triumph, even as he ok's public housing sites in the heart of Negro slums, releases planning and urban renewal funds to cities dead-set against integration, and approves the financing of suburban subdivisions from which Negroes will be barred. . . . In other words, our Government, unfortunately, has been sanctioning discrimination in housing throughout this Nation. [114 Cong. Rec. 2281 (1968) (emphasis added).]

Similarly, another supporter of the Act, Senator Mondale, stated that the Act was needed to redress the discriminatory consequences of practices common among federal, state, and local governments:

> Negroes who live in slum ghettos, however, have been unable to move to suburban

> communities and other exclusively White areas. In part, this inability stems from a refusal by suburbs and other communities to accept low-income housing. . . . An important factor contributing to exclusion of Negroes from such areas, moreover, has been the policies and practices of agencies of government at all levels. [114 Cong. Rec. 2277 (1968).]

In light of these statements of purpose, as well as the text of the Fair Housing Act, the United States Supreme Court has observed that "Congress has made a strong national commitment to promote integrated housing." Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 94-95 (1977).

It is also undisputed, in light of this history and caselaw, that the "affirmatively furthering" requirement applies to all federal housing programs. 42 U.S.C. § 3608(d) (Act applies to "[a]ll executive departments and agencies [with programs] relating to housing and urban development."). See also Albany Apartments Tenants' Ass'n v. Veneman, No. Civ. 01-1976, 2003 WL 1571576, at *10-*11 (D. Minn., Mar. 11, 2003) (Department of Agriculture housing program); Jones v. Office of Comptroller of Currency, 983 F. Supp. 197, 204 (D.D.C. 1997) (Office of the Comptroller of the Currency program). Thus, all

federal housing programs, including the LIHTC,[17] must further the national policy of integrated housing.

### .B The Fair Housing Act's "affirmatively furthering" Requirement Applies To State and Local Agencies Administering Federal Housing Programs.

It is likewise undisputed that an unbroken string of court decisions have held that the Fair Housing Act's "affirmatively furthering" requirement applies to state and local agencies using federal housing funds. For example, just a few years after the Act's passage, the Court of Appeals for the Second Circuit held that the Act imposed a duty to promote integration on a local housing authority. The court wrote: "[w]e are satisfied that the affirmative duty placed on the Secretary of HUD by § 3608(d)(5) and through him on other agencies administering federally-assisted housing programs also requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built." Otero v. New York City Hous. Auth., 484 F.2d 1122, 1133-34 (2d Cir. 1973).

Similarly, in Resident Advisory Board v. Rizzo, 429 F. Supp. 222 (E.D. Pa. 1977), the court squarely rejected the arguments of a municipality and its agencies that § 3608 applied only to

[17] The Secretaries of the United States Departments of Treasury, Housing and Urban Development, and Justice recently confirmed the Fair Housing Act's application to the LIHTC program. In August 2000, the three secretaries agreed "to promote enhanced compliance with the Fair Housing Act . . . , 42 U.S.C. §§ 3601 et seq., for the benefit of residents of low-income housing tax credit properties and the general public." Mem. of Understanding, at 1 (Aug. 11, 2000) <http://www.usdoj.gov/crt/housing/mou.htm> (hereinafter, "MOU"). The MOU created an enforcement mechanism for certain provisions of the Fair Housing Act not relevant to the issues in this matter, and it demonstrates the application of the Act to the LIHTC.

the federal Department of Housing and Urban Development: "the obligation to act affirmatively to promote racial integration is not limited to HUD, but is equally applicable to other governmental agencies participating in federally assisted housing programs." Id. at 225. See also Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987, 1015-17 (E.D. Pa. 1976), aff'd 564 F.2d 126 (3rd Cir 1977).

Indeed, court after court has concluded that, contrary to the position of HMFA here, the Fair Housing Act's "affirmatively furthering" requirement applies to state and local agencies that receive federal housing money. See Crow v. Brown, 332 F. Supp. 382, 390-92 (N.D. Ga. 1971) (holding that county violated its "affirmatively furthering" obligation); Banks v. Perk, 341 F. Supp. 1175, 1179 (N.D. Ohio 1971) ("It is the duty of city administrations in the United States to support and aid progressive proposals which have as their goal the elimination of racial concentrations in their cities."); Blackshear Residents Org. v. Housing Auth. of Austin, 347 F. Supp. 1138, 1148 (W.D. Tex. 1972) ("[B]oth the housing authority and HUD are charged with the affirmative obligation to further the national housing policy expressed in the [1964 Civil Rights Act and 1968 Fair Housing Act].").

This understanding of the scope of the Fair Housing Act remains unchanged. Just last year, in Langlois v. Abington Housing Authority, 234 F. Supp. 2d 33 (D. Mass. 2002), a federal district court found that several local public housing

authorities were liable for violating the Fair Housing Act's "affirmatively furthering" requirement. Id. at 78. Rejecting the housing authorities' argument that the Fair Housing Act applied solely to the Secretary of HUD, the court stated: "[w]hen viewed in the larger context of [the Fair Housing Act], the legislative history, and the case law, there is no way -- at least, none that makes sense -- to construe the boundary of the duty to affirmatively further fair housing as ending with the Secretary." Id. at 73.

Only a few months earlier, another federal court held that a county using federal funds for public housing was subject to the Fair Housing Act's "affirmatively furthering" requirement. It concluded: "[t]he Court finds that the duty to 'affirmatively' further fair housing imposes a binding obligation upon the States." Reese v. Miami-Dade County, 210 F. Supp. 2d 1324, 1329 (S.D. Fla. 2002). Thus, every court that has faced this issue has concluded that, like federal agencies, state and local agencies administering federal housing programs must comply with the Fair Housing Act's "affirmatively furthering" mandate.

### .C The Fair Housing Act's "affirmatively furthering" Requirement Should Apply To HMFA's Administration of the LIHTC Program.

No court has yet had occasion to address the narrow issue presented in this matter: does the Fair Housing Act apply to a state's allocation of its federal LIHTC? In response to Appellants' comments on this point, HMFA denied any obligation

to affirmatively further fair housing. The only justification for this position offered by HMFA was that, while the Act imposes an obligation on the Secretary of HUD, "it contains no similar mandate for State agencies such as [HMFA]." 34 N.J. Reg. 2418. HMFA failed to address any of the many cases in which courts have consistently held that the Act applies to state and local agencies administering other federal housing programs, and it offered no justification for applying different rules to the LIHTC program.

Instead, HMFA appears to argue that its disregard of the "affirmatively furthering" requirement of federal law has been reviewed, and approved, by the courts. Id. This argument does not withstand scrutiny. The first case relied upon by HMFA for this proposition, Murnick v. New Jersey Housing & Mortgage Finance Agency, 309 N.J. Super. 292 (App. Div. 1998), was dismissed as moot and, thus, resulted in no decision on the merits regarding HMFA's actions. In the second, Carter v. New Jersey Housing & Mortgage Finance Agency, No. 01-4182 (D.N.J. 2002), the court only found that the plaintiff had failed to allege a Fair Housing Act violation, not that the Fair Housing Act did not apply to HMFA. Id. (quoted at 34 N.J. Reg. 2418). In fact, HMFA has proffered no legal support for its rejection of the Fair Housing Act.

Just as the Fair Housing Act's "affirmatively furthering" requirement applies to state and local agencies administering other federal housing programs, so must it also apply to state

agencies administering the LIHTC program. Because HMFA failed to consider its obligation to affirmatively further fair housing when it created the QAP, amici curiae respectfully urge the Court to vacate HMFA's determination and remand this matter to the agency for further proceedings.[18]

[18] Amici take no position regarding whether New Jersey's Law Against Discrimination ("LAD") also compels HMFA to promote integrated housing. Amici note, however, that HMFA's contention that the LAD prohibits race conscious government action, 34 N.J. Reg. 2418, is without any legal basis. See Board of Educ. of Borough of Englewood Cliffs v. Board of Educ. of City of Englewood, 257 N.J. Super. 413, 468 (App. Div. 1992), aff'd 132 N.J. 327 (1993). Likewise, HMFA's argument that the Fair Housing Act bars government efforts to promote racial integration is without merit because the courts have consistently approved the use of race conscious criteria, including those regarding site selection, as a means toward satisfying the Fair Housing Act's "affirmatively furthering" requirement. See, e.g., Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970); Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973). See also Grutter v. Bollinger, -- U.S. --, 2003 WL 21433492 (2003).

## POINT III

### HMFA HAS FAILED TO COMPLY WITH THE MT. LAUREL DOCTRINE OF THE NEW JERSEY CONSTITUTION.

Although HMFA appears to acknowledge that the Mt. Laurel doctrine applies to its allocation of the state's housing tax credits, it fails to comply with that obligation. Instead, HMFA appears to argue that, because the QAP provides for at least some lower-income housing in suburban jurisdictions, it has satisfied the law. This cannot be so. As the Supreme Court has repeatedly stated, the basic test for Mt. Laurel compliance is whether the public entity "affirmatively affords a realistic opportunity for the construction of [the] fair share of the regional need for low and moderate income housing." Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 205 (1975) (hereinafter, "Mt. Laurel I"); accord, Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 208-09 (1983) (hereinafter, "Mt. Laurel II"). HMFA has failed to do so.

As an initial matter, it is uncertain whether HMFA acknowledges that the state constitutional standards set forth through the Mt. Laurel doctrine apply to the LIHTC allocation process.[19] Regardless, given the importance of the issue, amici urge the Court to use the opportunity presented by this matter to make clear that, indeed, the Mt. Laurel constitutional

[19] In its response to the comments on the QAP, HMFA apparently assumes that Mt. Laurel applies to its activities. 34 N.J. Reg. 2421 ("The QAP is designed to award tax credits to implement the Mount Laurel doctrine by financing the construction of new affordable rental housing where it is needed and will be feasible.").

obligation applies to the state's role in allocating its share of the LIHTC. As the Supreme Court has noted, "[i]t would make no sense at all to hold that the general welfare encompasses the provision of low and moderate income housing at the behest of municipalities, but not of state agencies." In re Egg Harbor Assocs. (Bayshore Centre), 94 N.J. 358, 367 (1983).

This conclusion was implicit in the first Mt. Laurel decision. There, the Supreme Court reasoned that the obligation to provide options for economically integrated housing is an obligation of the state, even when the state delegates authority in this area to its municipalities. Justice Hall wrote:

> It is elementary theory that 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. . . . It is required that, affirmatively, a zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare.

Mt. Laurel I, 67 N.J. at 174-75 (emphasis added). Because the zoning authority of the state's municipalities emanates solely from the state itself, id.; Mt. Laurel II, 456 N.J. at 415, the Constitution's command that municipalities must provide realistic opportunities for the development of lower income housing must apply as fully to the state itself. By making clear Mt. Laurel's application to the administration of the LIHTC program by HMFA, this Court will provide guidance to the

agency, as well as the public, during future funding cycles of this vital program.

Although HMFA seems to acknowledges the relevance and importance of the Mt. Laurel doctrine, the steps it takes toward meeting this constitutional obligation are, in fact, quite limited. In essence, HMFA's effort in the 2002 QAP amounts to providing a limited number of points for projects that further a COAH-certified or court-approved fair share obligation within the estimated 20% of the tax credit allocation provided to suburban areas. The results of the 2002 QAP are consistent with the effort: only three family housing projects in suburban jurisdictions were funded, one of which is Appellants'.[20] Far from embracing the Mt. Laurel doctrine as a core predicate in its allocation process, HMFA's position is straightforward: the QAP "implement[s] the Mt. Laurel doctrine by financing the construction of new affordable rental housing where it is needed and will be feasible." 34 N.J. Reg. 2421.

The QAP's Mt. Laurel shortcomings are reflected in the point system upon which it relies. As noted above at pp. 5-6, a project applying for the suburban/rural cycle of funding may receive six points if the project is part of a municipal housing plan certified by or pending before the Council on Affordable Housing ("COAH") or if it assists a municipality to comply voluntarily with its Mt. Laurel obligation, and five points if

[20] There is no evidence in the record regarding whether any of these projects actually serve to fulfill the fair share obligation of the municipalities in which they are located.

it fulfills a court-ordered Mt. Laurel obligation. N.J. Admin. Code tit. 5, § 80-33.17(a). In contrast, a project will receive fifteen points if it extends the compliance period to 30 years, § 80-33.16(a)(1)(i); ten points for conversion to a tenant ownership after the compliance period, § 80-33.16(a)(1)(ii); up to ten points if it includes commercial development, § 80-33.16(a)(4), and five points for fixed rate tax abatement for 15-year term, § 80-33.16(a)(4)(i).[21] What is noteworthy here, of course, is not that these latter priorities are not important or worth the point allocation provided, but simply that the QAP places a higher value on them than on a project that furthers actual satisfaction of a jurisdiction's Mt. Laurel obligation.

This is similarly reflected in HMFA's point system for the $2.1 million distributed in its Final Cycle, for which urban, suburban, and rural projects are all eligible. N.J. Admin. Code tit. 5, § 80-33.8(a). Initially, almost half ($1 million of the $2.1 million) is reserved for HOPE VI projects which are exclusively urban projects. § 80-33.8(a)(1). For the remaining allocation, the QAP awards eight points to any urban or HOPE VI (i.e., urban) project, § 80-33.20(a)(1), compared to the six or five points for projects meeting a COAH or court-ordered or voluntary Mt. Laurel obligation. § 80-33.20(a).

Despite apparently acknowledging the relevance of the Mt. Laurel doctrine, HMFA has failed to take significant steps

[21]Pursuant to § 80-33.17, the point system for the suburban/rural cycle incorporates all point categories of the urban cycle except the points awarded in the urban cycle for designated centers and endorsed plans..

toward meeting its "awesome constitutional obligation" to provide realistic lower income housing opportunities throughout the state. Mt. Laurel II, 92 N.J. at 260-61. By significantly limiting the availability of funds to projects that would explicitly further the Mt. Laurel doctrine and then providing limited weight to those projects which might do so, the QAP does very little to realize its potential to "affirmatively afford[] a realistic opportunity for the construction of [the] fair share of the regional need for low and moderate income housing." 67 N.J. at 205; accord, Mt. Laurel II, 92 N.J. at 208-09. This is insufficient. While HMFA has flexibility in developing its QAP, the Court, upon making clear that the Mt. Laurel doctrine applies, should order that HMFA meaningfully incorporate compliance into the state's distribution of its LIHTC resources.[22]

[22] Amici take no position with regard to other legal arguments advanced by appellants, including their claims that HMFA's actions constitute intentional discrimination in violation of the Equal Protection Clause of the 14th Amendment, the Fair Housing Act, and state law, or that HMFA's actions violate New Jersey constitutional standards applicable to school segregation.

## POINT IV

**ON REMAND, HMFA MUST ENSURE THAT ITS QAP COMPLIES WITH ALL LEGAL STANDARDS, INCLUDING THE FEDERAL FAIR HOUSING ACT AND THE STATE CONSTITUTION'S MT. LAUREL MANDATE.**

The immediate issue before the Court is a narrow one: whether HMFA has applied the appropriate legal standards in developing its 2002 QAP. Amici believe that it has failed to do so and therefore that this Court should order HMFA to undertake the allocation of the LIHTC consistent with all relevant standards, including the Fair Housing Act's pro-integration mandate in 42 U.S.C. § 3608, and the state constitution's Mt. Laurel doctrine.

While a full-scale discussion of the specifics of a revised QAP is premature, amici believe it is appropriate to outline what, in their view, would provide a framework for a QAP that is legally compliant and furthers sound policy objectives. In doing so, amici are aware that radically different assertions have been and will be before the court on this issue. Most notably, amici do not believe that all, or even a disproportionate share, of LIHTC resources must be allocated to suburban areas.

Instead, amici assert that the following principles provide the basis for an appropriate QAP: 1) racial integration should be one major criterion taken into account in the allocation process, see 42 U.S.C. § 3608(d); Shannon, 436 F.2d at 820-21; 2) provision of family LIHTC housing in appropriate suburban

locations should be a priority and that "appropriate" suburban locations" means housing at locations that offer a meaningful opportunity for racial integration, see Fair Housing Act discussion above at 23-25, and seek to serve the broadest possible range of economic groups (in other words, that do not seek to serve only the highest of the income eligible population, see 26 U.S.C. § 42(m)(1)(B)(ii)(I)); 3) provision of housing in urban areas that furthers racial and economic integration and/or helps implement a meaningful neighborhood revitalization strategy should also be a priority, see 26 U.S.C. § 42(m)(1)(B)(ii)(III); 4) the allocation process should not disproportionately favor suburban over urban sites, see Fair Housing Act and Mt. Laurel discussions above; and 5) flexibility should be preserved to permit other projects addressing critical housing needs to be accommodated, see 26 U.S.C. § 42(m)(1)(B)(i).

In setting forth these principles, amici seek to emphasize three points. First, Congress has provided the state housing finance agencies such as HMFA with broad flexibility in creating a QAP. See 26 U.S.C. § 42(m)(1)(B)(i). As noted above, the statutory authorization for the LIHTC program provides only that a QAP must give preference to three types of projects: 1) those serving the lowest income tenants; 2) those serving qualified tenants for the longest time; and 3) those in a QCT and which contribute to a community revitalization plan. 26 U.S.C. § 42(m)(1)(B)(ii). Neither the statute nor the regulations or other guidance issued by the federal government set forth how

much preference must be afforded such projects, and certainly there are no limitations regarding other preferences that might be included in a QAP.

In such a context, other basic legal principles, most notably the federal Fair Housing Act and the Mt. Laurel doctrine, can and must inform the LIHTC allocation process. This is of special relevance given Congress' inclusion of the preference for projects that are both located in a QCT and contribute to a concerted community revitalization plan. 26 U.S.C. § 42(m)(1)(B)(ii)(III). Especially since most (but not all) areas in New Jersey that qualify as a QCT are urban, this preference reflects clear statutory support for use of LIHTCs in urban areas.

At the same time, however, this preference for projects in QCTs is just part of one of three specified by federal law; it is not absolute and can be outweighed by other factors; more importantly, it can and should be combined with other criteria that reflect necessary legal and policy standards. It is entirely consistent with federal statutory requirements, for example, to prioritize projects that meet the third statutory preference (for projects that are both in a QCT and advance a community revitalization plan) and that further racial and/or economic integration. It is also appropriate both legally and as a matter of policy to prioritize projects in urban areas that are part of a legitimate, soundly developed revitalization plan and that further racial and economic integration.

Second, a particularly distressing aspect of HMFA's response is its refusal to acknowledge the value, as well as the legal necessity, of collecting information and establishing standards to ensure that it does not promote racial segregation. See 34 N.J. Reg. 2419 ("[T]he Agency is aware of no express mandate in applicable law that requires it to collect such data or adopt the proposed site selection restriction.") As explained above at pp. 18-27, there is no basis to HMFA's assertion that, as it allocates LIHTC resources, it is exempt from the requirements regarding site selection that govern public entities administering federally funded housing programs. As the Third Circuit's landmark decision in Shannon v. HUD still commands, "the Agency must utilize some institutionalized method whereby, in considering site selection 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." Shannon, 436 F.2d at 821.

In reinforcing the importance of data collection and site selection standards, amici do not seek a standard that preordains the outcome of the allocation process. The Third Circuit's words in Shannon are equally relevant in this regard:

> Nor are we suggesting that desegregation of housing is the only goal of the national housing policy. There will be instances when a pressing case may be made for the rebuilding of a racial ghetto. We hold only that the agency's judgment must be an informed one; one which weighs the alternatives and finds that the need for physical rehabilitation or additional

> minority housing at the site outweighs the disadvantage of increasing or perpetuating racial concentration. [Shannon, 436 F.2d at 822.]

Moreover, it is relevant that urban housing can promote racial integration, and that suburban lower income housing frequently is not racially integrated nor promotes racial integration. Both as a matter of law and as a matter of policy, HMFA must institute an assessment mechanism that incorporates this sort of consideration.

Third, amici recognize that the problems inherent in both the ongoing efforts to rebuild New Jersey's urban areas and the continued dramatic levels of residential segregation in the state cannot be solved in the context of a single housing program, even one as significant as the LIHTC. This is especially true of the underlying challenge taken on by the Court in its Mt. Laurel cases: ensuring that every municipality affirmatively provides a realistic opportunity for the construction of its fair share of the regional need for lower income housing. As reflected in the continuing challenges which hinder realization of this constitutional mandate, the creation of lower income housing in many suburban municipalities requires conscious and explicit undertakings.

Ultimately, however, all such challenges require leadership, political will, a coordinated approach across a range of programs, and the commitment of resources. While the full extent of what is needed exceeds what is strictly raised in this proceeding, the issue here is whether the state's

allocation of its LIHTC resources will help address, rather than ignore or even exacerbate, the broader challenges faced by the state and its low-income and minority residents. Both as a matter of law and as policy, it is necessary for the QAP to do so.

Accordingly, the QAP can and should be better refined to address the needs of both urban and suburban areas, and, in so doing, better serve low income New Jerseyans and fulfill its obligations under state and federal law.

## POINT V

### AMICI'S CONCERN ABOUT ONGOING PRESENCE IN THIS LITIGATION OF DEVELOPERS WHICH HAVE RECEIVED LIHTC FUNDS.

As a last point, amici note that one unfortunate byproduct of this litigation has been a potential threat to the ongoing viability of the tax credit program. The companion case to this one involves as defendants a number of individual developers in urban areas who received LIHTC funds from HMFA pursuant to the 2002 QAP. The consequences of the naming of individual developers as defendants has potentially enormous negative ramifications for the LIHTC program. While amici understand that there may be a need to include these defendants to ensure that the case remains viable for judicial resolution, we continue to urge all parties to resolve those issues and allow the current action, in which HMFA is the sole defendant, to be the exclusive one in which the very important legal issues raised are resolved. Amici would support, and recommend, a court-initiated effort to bring the parties together for this purpose.

## CONCLUSION

In promulgating the QAP, HMFA has failed to abide by the requirement of the Fair Housing Act that it promote racially integrated housing with its federally funded projects. Similarly, HMFA's QAP fails to comply with the mandates of the Constitution and laws of the State of New Jersey to promote economically integrated housing. Because HMFA has neglected its legal obligations in promulgating the QAP, this Court should order that HMFA allocate LIHTC resources consistent with all legal standards, including the federal Fair Housing Act's pro-integration mandate and the Mt. Laurel doctrine.

Respectfully submitted,

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