In Re New Jersey Housing and Mortgage Finance Agency Housing Affordability Controls, Special Adopted Amendments and Special Adopted New Rules	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-1247-24 On Appeal From: New Jersey Housing Mortgage Finance Agency CIVIL ACTION

BRIEF OF APPELLANTS IN SUPPORT OF APPEAL FROM FINAL AGENCY RULEMAKING BY THE NEW JERSEY HOUSING AND MORTGAGE FINANCE AGENCY

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PRELIMINARY STATEMENT

It is uncontroverted that Respondent Housing Mortgage Finance Agency ("HMFA") adopted rules overhauling New Jersey's uniform housing affordability controls (the "Rules" as hereafter defined) without any notice or comment and without the Rules stating any justification for failing to comply with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq. ("APA"). Appellants contend that the Rules are illegal and must be invalidated by this Court for several distinct reasons.

A proper interpretation of the applicable law confirms that notice and comment were required. N.J.S.A. 52:27D-313.3(b) is titled "UHAC Update" and requires the Rules to have been adopted in accordance with the APA. HMFA erroneously falls back upon N.J.S.A. 52:27D-321(f) because it contains an APA exception. But a proper application of the canons of statutory interpretation, including an evaluation of the statutes' titles and contents, reveals that the former provision applies and that APA compliance was required.

With the APA applying, it is clear that the Rules were not adopted in accordance with its formalities. The Rules did not follow notice and comment, did not accurately state the legal basis upon which they were promulgated, and did not constitute emergency rulemaking as required to not engage in notice or comment as HMFA did.

Even if an APA exception were considered to be applicable, Appellants contend that the exception violates procedural due process. Our courts have interpreted a constitutional dimension to administrative rulemaking. That dimension is violated by an exception that allows for rules without notice and comment to be adopted nine months after a law takes effect. As the appellate record reflects, the HMFA engaged in significant outreach and feedback with special interest groups including Fair Share Housing Center, but it underwent this process entirely to the exclusion of the municipalities including Appellants, that are the entities regulated by the Rules. There is an inherent unfairness that deprived Appellants, including Michael Ghassali as a Mayor, resident, and taxpayer, from having any opportunity to provide comments as the APA and our Constitution require.

These arguments are not asserted as a procedural hurdle, but rather, they are raised because Appellants have numerous good faith comments regarding infirmities in the Rules. The brief will outline numerous technical issues with HMFA's Rules that could have been remedied had the agency engaged in notice and comment.

For the foregoing reasons, the Rules should be invalidated.

PROCEDURAL HISTORY

On December 19, 2024, the HMFA adopted special amendments to N.J.A.C. 5:80-26.1, 26.2, 26.4 through 26.27 and Appendices A through Q, as well as special new rules to N.J.A.C. 5:80-26.3 and 26.28 ("Rules"). The Rules purport to be

effective "from the date of filing on December 19, 2024 until December 19, 2025, or such earlier date at which time the Agency amends, adopts, or readopts the rules pursuant to the [APA]." (Pa2).

On January 3, 2025, Appellants filed notice of appeal from the HMFA Rules with the Appellate Division. Appellants are comprised of twenty-six municipal corporations of the State of New Jersey and a New Jersey individual who is a resident and Mayor of one of the municipalities.

On January 3, 2025, Appellants sought emergent injunctive relief from this Court relevant to the HMFA Rules. On January 10, 2025, this Court denied Appellants' application in an Order on Motion (the "Order"), contending a stay must first be sought from the HMFA pursuant to Rule 2:9-7. (Pa204). In accordance with the Court's decision, on January 13, 2025, Appellants sought a stay of the Rules from the HMFA. On January 28, 2025, after conducting a hearing, the HMFA denied a stay of the Rules. (Pa220). Appellants sought permission to appeal the HMFA's decision on an emergent basis, which this Court denied on January 30, 2025.

On February 7, 2025, the Court entered a Scheduling Order, setting forth a briefing schedule. Pursuant to same, Appellants now submit the within brief, seeking to invalidate the HMFA's Rules until the HMFA engages in notice and comment as required by the applicable law.

STATEMENT OF FACTS

This appeal involves rulemaking that was promulgated by the HMFA pursuant to P.L. 2024, c. 2, which in relevant part codifies amendments to the Fair Housing Act, N.J.S.A. 52:27D-301 et al. ("FHA").

On December 19, 2024, the HMFA promulgated the Rules. It is uncontroverted that the HMFA did not comply with the procedural requirements of the APA including compliance with notice and comment. (Pa221).

The Law at N.J.S.A. 52:27D-313.3(b) is titled in relevant part "Uniform Housing Affordability Controls[] update" and required the HMFA to adopt the regulations in accordance with the APA by December 20, 2024.

The HMFA promulgated the instant Rules, which constitute a substantial overhaul to the previously-adopted Uniform Housing Affordability Controls ("UHAC") promulgated by the former Council on Affordable Housing. The Rules do not contain any reference to the statutory authority for their promulgation in the FHA, and they instead erroneously cite to the statutory authority contained in the HMFA's enabling statute at N.J.S.A. 55:14K-5g. (Pa1).

In response to the present litigation, the HMFA claimed it "adopted the interim UHAC regulations on December 20, 2024 [sic] in compliance with the Legislative mandate under N.J.S.A. 52:27d-321(f)." (Pa207). This statute is titled in relevant part "controls for maintenance of housing" and contains an exception allowing the

HMFA to promulgate regulations without adhering to the APA (the "APA Exception"). The Rules do not state that they were promulgated pursuant to said statute and the APA Exception, even though the APA mandates disclosure of such information.

In defending the Rules to this Court, the HMFA previously provided a certification from its Director of Policy and External Affairs, Jonathan Sternesky, DPA, dated January 8, 2025. (Pa221). The certification claims that the Law "directed NJHMFA to swiftly adopt the temporary regulations." (Pa222). It then attempts to justify the lack of notice and comment by explaining how the HMFA hosted numerous events, including virtual roundtables on May 23, 2024, May 30, 2024, June 14, 2024, and July 29, 2024. (Pa223-24). The HMFA also "conducted outreach and more than a dozen follow up meetings with numerous governmental and external stakeholders to review various proposed revisions to UHAC and obtain feedback." (Pa225).

In light of the HMFA's certification to this Court regarding its outreach activities, Appellants provide this Court with evidence that the HMFA engaged in a widespread effort conferring with special interest groups regarding the Rules, all to the exclusion of Appellants and any other party in New Jersey that would have liked to have participated in notice and comment.

The HMFA's need to move "swiftly" is belied by HMFA's over six (6) month coordination with special interest groups, prominent developer and business associations, and influential non-profits, such as the Fair Share Housing Center ("FSHC"). The HMFA not only granted exclusive access to these groups to work on HMFA Rule revisions (including "draft final" documents) but also assured them that their requested revisions would be incorporated. Notably, the HMFA did not afford Appellants these same exclusive opportunities, even though they are the parties most directly regulated by the subject regulations.

Beginning April 4, 2024, emails were exchanged between Jonathan Sternesky ("Sternesky"), Director for Policy and External Affairs at HMFA and Megan York ("York"), a Vice President at special interest group, Community, Grants, Planning and Housing ("CPG&H"). (Pa229). York stated she reached out to the HMFA "on behalf of the policy subcommittee of the Affordable Housing Professionals of New Jersey" ("AHPNJ") that, in York's words, represents "a broad spectrum of affordable housing administrators" to learn "more about how the administration aspects of A4 will be implemented since [they] are the front lines of Administrative Agent work in the State." She copied Marc Leckington, co-chair of the AHPNJ policy subcommittee, and asked Sternesky to be put in touch "with the best person to speak to." (Pa229).

On April 23, 2024, Sternesky emailed York regarding an "invitation from [the HMFA] to attend a round table discussion" in "mid-to-late May" on the topic of "new affordable housing legislation" and requested that York share the invitation with AHPNJ members. (Pa228). That round table between HMFA, CPG&H, and AHPNJ took place on or before June 3, 2024, because on that date, York emailed Sternesky thanking him for the HMFA's "roundtables on UHAC" and the HMFA's offer to "make suggestions to the UHAC revisions. [Leckington] and I have marked up the attached copy of UHAC with AHPNJ's preliminary edits to UHAC." (Pa227). York wrote of the urgency to get the HMFA the edits and expected to "have additional edits to the draft before the end of June." (Pa227).

Leckington indeed followed up with more revisions in a June 30, 2024, email to Sternesky, with York copied, writing that he was "enclosing AHPNJ's Policy Committee's final set of 'low-hanging fruit' revisions to UHAC." (Pa230). The revisions included in the June 30, 2024 email contained a redline of particular revisions that were sought.

Another example of the HMFA conferring with special interest groups comes from a June 7, 2024 email to the HMFA from Lara Schwager, founding principal of a boutique real estate advisory firm called LJS Consulting and Development In that email, titled "Topics for June 14th UHAC Follow-up", Schwager reveals that Executive Director Walter and Sternesky, "asked that we provide what we think may

be the top items for you to address….” during a call regarding amendments to the HMFA Rules. (Pa231-32).

Business associations also curried favor with the HMFA and took advantage of the HMFA’s exclusively interest-group-friendly approach to revising the HMFA Rules. In a July 12, 2024, email from Jeff Kolakowski (“Kolakowski”), of the New Jersey Builders Association (“NJBA”), titled “Comments on UHAC regulations” to Sternesky, the HMFA Executive Director, Melanie Walter (“Walter”), Barabara Schoor of Schoor Companies, and others, in which Kolakowski writes about how “NJBA stressed during our recent meeting” with the HMFA, for certain changes to Appellants’ authority under HMFA Rules that would lead to the “extinguishment of affordability controls on rental units” that were unfavorable to developer investments in affordable housing projects. (Pa233-34).

The aim of Kolakowski’s email to the HMFA was clear: change the HMFA Rules to favor developers and supposedly “facilitate capital investment in the rental community” by removing perceived obstacles such as municipality deed restriction affordability controls, and thereby, “create new municipal obligation for affordable units.” (Pa234). Sternesky forwarded this email to others at the HMFA including Ding and Annarelli, on July 15, 2024, writing simply, “FYI.” (Pa233). NJBA also submitted lengthy redlines of the UHAC regulations to the HMFA. It even included handwritten edits to deed restrictions that it demanded. (Pa318-21).

In yet another example of the HMFA's special-interest-group-driven changes to the HMFA Rules, Habitat for Humanity lobbied the HMFA to eliminate affordability controls that Habitat admits in its email are essential to maintaining the low-income housing inventory for municipalities. (Pa236). Emails reveal that on or around August 29, 2024, Sternesky held a presentation in Camden, New Jersey with Habitat for Humanity South Central Jersey representative, Lori Leonard ("Leonard"), in attendance. (Pa236).

On August 29, 2024, Leonard emailed Sternesky thanking him for the presentation and raised an issue, as follows:

> as we discussed, many Low and Moderate Income (LMI) buyers who are purchasing a home funded by the DCA AHTF face difficulties accessing mortgages and DPA assistance from the approved lenders. The main issue is the Uniform Housing Affordability Controls (UHAC) requirement, which mandates that affordability controls remain in place even after foreclosure. This stipulation prevents most lenders on the list from providing mortgages and DPA to LMI applicants. Consequently, NJHMFA is unable to offer affordable mortgage products to these buyers. While I understand the importance of affordability controls in maintaining the low-income housing inventory, it's essential to find a balance that also increases mortgage and DPA access for LMI earners. I believe further discussions on this topic could help us develop a sustainable solution that benefits both homebuyers and the community.
>
> (Pa236).

Sternesky forwarded this email to Ding, Annarelli, and others at HMFA stating, "Another comment for the records." (Pa236). Yet each New Jersey municipality was denied any invitation to participate in this record because the HMFA refused to engage in notice and comment.

A June 28, 2024 email from Leonard to Sternesky states, "I hope you are hanging in there in the midst of the frenetic pace of UHAC revisions! I have been working with the attorneys at Fair Share Housing to create language that (kinda) simplifies the implementation of our request." (Pa237). It included a letter to HMFA Executive Director Walter from Habitat to Humanity expressing that "[t]here are a few areas where New Jersey's rules and regulations make Habitat's ability to participate difficult, if not impossible. Habitat has adjusted its typical model from how it operates in other states to comply with New Jersey's requirements including revisions to our house pricing policy, income requirements, affirmative marketing, and selection criteria. It is becoming exceedingly more difficult to implement our program." (Pa238-41).

One of Habitat's "proposed revisions" included changes "that where organizations, like Habitat, bring the majority of resources into the affordable housing system, that those resources are in favor of the nonprofit in the lien" because, Habitat argues, "[i]n many of these cases the municipality has not done

anything to bring about these affordable homes other than changing zoning." (Pa239).

In an October 31, 2024 email to Sternesky, Kolakowski from the NJBA felt comfortable sharing that he was going to coordinate with "Adam", referring to Adam Gordon at the FSHC, "to also discuss what we draft" and other particular requests to include:

a. "What is the timing on you publishing the adoption notice? When do you need the final product to go to OAL? Do you need the typical weeks of lead time for it to be reviewed by OAL? Or does it become effective immediately and published later?"

b. Requests to calendar more "additional discussions" regarding more favorable language that the special interest group wanted and knew it could extract from the HMFA.

c. "Are the Appendices ready yet? We are most concerned about the Appendix E - form of deed restriction. It could have some implications on the extending deed restrictions section."

d. And NJBA even felt comfortable requesting language that would anticipate supposed future amendments to PILOT law when Kolakowski asked "Regarding the extension of controls, my folks are really struggling with the compensatory benefits particularly the lack of definition of preservation costs and the PILOT being restricted to only the affordable units. Do those details need to be worked out in the interim regs? I'd love to get that right especially on the 4th round projects where we don't really need to worry about preservation for 30 years. Your draft reg seems to be consistent with new PILOT law…. but the new PILOT law could of course be amended in the future (and some say its constitutionality can be challenged). If that's the case, don't want to see the 4th Round projects get locked in to a set of rules that won't work 30 or 40 years from now."

(Pa242).

Following another meeting with NJBA, Kolakowski would again reach out to the HMFA in a November 7, 2024 email hoping that it "might alter the [HMFA's] perspective a little" and informing the HMFA that Kolakowski reached out to a developer, Lennar, touted on its website as one of the nation's leading homebuilders, where Kolakowski includes a message from an unidentified Lennar representative stating to Kolakowski:

> You mention that it would be helpful if I highlighted our Hopewell Parc community to focus on a few details related to the affordable homes. Hopewell Parc is comprised of 1,077 homes, a mix of condos, apartments, stacked townhomes, townhomes and single family homes. The attached rendered site plan provides an overview of this beautiful community! There will be a total of 216 (20%) affordable homes. Just to give you some perspective, the first completed and occupied affordable building consists of 26 apartments, highlighted on the attached map in green. There are 6 more affordable apartment buildings on the horizon - highlighted in orange on another attached map, interspersed throughout the development. As you can see, the 7 affordable buildings come is 4 different building types. Those other 8 buildings with an orange cross hatch are buildings where affordable homes are interspersed with make rate homes, in some cases they are for sale and in other cases, for rent. Lennar, and we believe Hopewell, are very proud of this inclusionary community. We balanced our site design to work with the many environmental constraints to limit our development footprint, while balancing interspersing 216 affordable homes so they were phased in with a wide variety of building types and locations. This all came at great cost and effort as there were no sewer utilities available and no approvals in place when we started. We muscled through sewer and neighbor litigation and very challenging

> governmental approvals to get this community to move forward.
>
> (Pa243-44).

The HMFA also conferred closely with another key special interest group, the FSHC, who is a Defendant-Intervenor in litigation before the Law Division under Docket No. MER-L-1778-24, involving various challenges to the Law. On October 23, 2024, Sternesky provided the FSHC with a copy of "proposed UHAC language." He wrote that the document was a "confidential draft and should not be shared externally of the meeting attendees." (Pa249). As such, the FSHC was given preferential treatment to review the HMFA's proposed rules as compared to every other person that did not receive such an invitation – including Appellants.

Esmé Devenney from the FSHC emailed Sternesky on November 15, 2024, following Sternesky's discussion with the FSHC regarding the "latest with UHAC" where in Devenney states, "I just want to express how much we appreciate yours and everyone at HMFA's patience and diligence on this project. It's obvious to us you guys have been very thoughtful about your recommendations and we appreciate the time you've taken to listen and discuss with us and the various stakeholders." (Pa245-46).

Adam Gordon ("Gordon") at the FSHC profusely thanked Sternesky and the HMFA in an email on November 1, 2024, for "sharing the draft emergency rule changes to UHAC with us! We believe there is a tremendous amount of progress in

these rules and really appreciate in particular the reimagining of UHAC's occupancy standards ….” (Pa248). FSHC then provided the HMFA with a memo containing 6 pages of proposed revisions to the UHAC rules, containing significant detailed changes that were sought, and many of which were adopted by the HMFA. (Pa251-57).

On November 16, 2024, Jeff Kolakowski of NJBA sent an email to the HMFA advising there are “parts that are imperfect and may warrant some further discussion.” He then attaches a markup of the HMFA Rules that is 47 pages in length and contains a header titled “CONFIDENTIAL DRAFT-NOT FOR DISTRIBUTION.” (Pa269-317). The HMFA even went so far as to ensure they didn't miss any recommendations from special interest groups. On November 13, 2024, Nicholas Kikis, of the NJAA, lauded the HMFA for “the inclusion of the multifamily industry in these discussions, and, as I mentioned in the meeting, sharing ‘draft final’ documents and not just early stakeholder outreach, is an important step that can help catch some issues in advance of publication.” (Pa258).

On November 18, 2024, as the date was quickly approaching to have the final HMFA Rules complete, Sternesky emailed Leckington ahead of “today's meeting” providing the draft HMFA Rules to that point. (Pa265). Evidencing the HMFA's coordination with Leckington and CHP&H, Sternesky states, “most, if not all, of

your requests were made." (Pa265). Sternesky also asked that the document he provided be kept internal. (Pa265).

The HMFA Rules are a result of special interest groups' improper influence over the HMFA, such that special interest groups were made privy to an "internal" document while all of New Jersey's municipalities were excluded from the process. By having the opportunity to engage in this iterative process with purported stakeholders over a greater than six (6) month period, it is clear that there was no emergency that temporally prohibited the HMFA from engaging in notice and comment.

HMFA's choice to engage with purported stakeholders, while not engaging with parties such as the Appellant-Municipalities who are actually regulated by the regulations under review through notice and comment, further demonstrates the lack of process.

LEGAL ARGUMENT

I: THE LAW REQUIRED THE RULES TO BE ADOPTED IN ACCORDANCE WITH THE APA (Pa210-11).

The Law contains two statutory provisions that provide the HMFA with rulemaking authority. The section on point, N.J.S.A. 52:27D-313.3(b), is based upon a broad authorization to complete UHAC rulemaking subject to the APA, which constitutes the statutory authority for the underlying Rules. N.J.S.A. 52:27D-321(f) specifically addresses durational controls and allows such rulemaking without APA

compliance. The statutes must be read together, and because the Rules exceed the scope of the durational control exception, they were improperly promulgated without following the APA.

The Law at N.J.S.A. 52:27D-313.3 contains a statutory section titled "Adoption of transitional rules and regulations; implementation; affordable housing timeline; Uniform Housing Affordability Controls; update." It requires the HMFA to amend the UHAC regulations in compliance with the APA:

> The Executive Director of the New Jersey Housing and Mortgage Finance Agency, in consultation with the department, shall adopt, pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.), no later than nine months after the effective date of P.L.2024, c. 2 (C.52:27D-304.1 et al.), rules and regulations to update the Uniform Housing Affordability Controls as required pursuant to the "Fair Housing Act," P.L.1985, c. 222 (C.52:27D-301 et al.).
>
> [N.J.S.A. 52:27D-313.3(b)].

The subsection proceeds to recite certain terms that "shall" be included in the regulations to be promulgated:

> As part of updating the Uniform Housing Affordability Controls, the agency shall set rules establishing that, for the purpose of newly created low- and moderate-income rental units, a 40-year minimum deed restriction shall be required. For the purpose of for-sale units, a 30-year minimum deed restriction shall be required. For the purpose of housing units for which affordability controls are extended for a new term of affordability, a 30-year minimum deed restriction shall be required, provided that

> the minimum extension term may be limited to no less than 20 years as long as the original and extended terms, in combination, total at least 60 years. Any 100 percent affordable rental property shall have a right to extinguish a deed restriction regardless of original length, beginning 30 years following the start of the deed restriction, provided a refinancing or rehabilitation, or both, for the purpose of preservation is commenced and that a new deed restriction of at least 30 years is provided. A municipality shall be eligible to receive credits for all preserved units pursuant to this subsection, as long as the original and extended terms total at least 60 years, and this credit may be obtained at the time of preservation. All 100 percent affordable projects shall be eligible for any affordable housing preservation program administered by the State, beginning 30 years following the start of the deed restriction, regardless of original length of the deed restriction. Any State administered preservation program may allow a refinancing funding process to commence prior to the 30th year of the deed restriction when such refinancing or rehabilitation funding is needed to preserve affordable housing.
>
> [Ibid].

While the foregoing subsection (b) expressly requires the HMFA to comply with the APA in its rulemaking, the preceding subsection directed the Department of Community Affairs to promulgate "transitional rules and regulations" that could be made effective "[n]otwithstanding the provisions of the [APA]." N.J.S.A. 52:27D-313.3(a)(1). As such, the Legislature was well aware that it was making the HMFA's "Uniform Housing Affordability Controls[] update" subject to the APA. *See* Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 112 (2004) ("The canon of statutory

construction, *expressio unius est exclusio alterius*—expression of one thing suggests that exclusion of another left unmentioned—sheds some light on the interpretative analysis.").

A subsequent section in the Law, N.J.S.A. 52:27D-321, addresses "Affordable housing programs; establishment; purposes; assistance; controls for maintenance of housing; subsidiary corporations." It calls for the agency to "establish affordable housing programs to assist municipalities in meeting the obligation of developing communities to provide low- and moderate-income housing." It then contains a subsection (f), which states as follows:

> The agency [(HMFA)], in consultation with the department [(DCA)], shall establish requirements and controls to ensure the maintenance of housing assisted under P.L.1985, c. 222 (C.52:27D-301 et al.) as affordable to low- and moderate-income households for a period of not less than 40 years for newly created rental units, 30 years for for-sale units, and 30 years for housing units for which affordability controls are extended for a new term of affordability, provided that the minimum extension term may be limited to no less than 20 years as long as the original and extended terms, in combination, total at least 60 years. Any 100 percent affordable rental property shall have a right to extinguish a deed restriction regardless of original length, beginning 30 years following the start of the deed restriction, provided a refinancing or rehabilitation, or both, for the purpose of preservation is commenced and that a new deed restriction of at least 30 years is provided. A municipality shall be eligible to receive credits for all preserved units pursuant to this subsection, as long as the original and extended terms total at least 60 years, and this credit may be obtained at the time of preservation. All 100 percent affordable projects

shall be eligible for any affordable housing preservation program administered by the State, beginning 30 years following the start of the deed restriction, regardless of original length of the deed restriction. Any State administered preservation program may allow a refinancing funding process to commence prior to the 30th year of the deed restriction when such refinancing or rehabilitation funding is needed to preserve affordable housing. The agency may update or amend any controls previously adopted by the agency, in consultation with the Council on Affordable Housing, prior to the effective date of P.L.2024, c. 2 (C.52:27D-304.1 et al.), provided that the requirements and controls shall, at a minimum, be consistent with the controls as in effect immediately prior to the effective date of P.L.2024, c. 2 (C.52:27D-304.1 et al.), including, but not limited to, any requirements concerning bedroom distributions, affordability averages, and affirmative marketing. The controls may include, among others, requirements for recapture of assistance provided pursuant to P.L.1985, c. 222 (C.52:27D-301 et al.) or restrictions on return on equity in the event of failure to meet the requirements of the program. With respect to rental housing financed by the agency pursuant to P.L.1985, c. 222 (C.52:27D-301 et al.) or otherwise which promotes the provision or maintenance of low- and moderate-income housing, the agency may waive restrictions on return on equity required pursuant to P.L.1983, c. 530 (C.55:14K-1 et seq.) which is gained through the sale of the property or of any interest in the property or sale of any interest in the housing sponsor. The agency shall promulgate updated regulations no later than nine months following the effective date of P.L.2024, c. 2 (C.52:27D-304.1 et al.). All parties may continue to rely on regulations previously adopted by the agency pursuant to the authority provided by this section as in effect immediately prior to the effective date of P.L.2024, c. 2 (C.52:27D-304.1 et al.) until new rules and regulations are adopted by the agency. Notwithstanding the provisions of the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.) to the contrary, the agency, after

> consultation with department, may adopt, immediately, upon filing with the Office of Administrative Law, said regulations, which shall be effective for a period not to exceed one year from the date of the filing. The agency shall thereafter amend, adopt, or readopt the regulations in accordance with the requirements of P.L.1968, c. 410 (C.52:14B-1 et seq.).
>
> [N.J.S.A. 52:27D-321(f) (emphasis added)].

It is recognized that the promulgated regulations purport to be effective for one year, which connotes compliance with N.J.S.A. 52:27D-321(f). But such a contention is belied by an analysis of the foregoing statutes and the Rules' terms, which are broader than that provision.

The two statutes must be read *in pari materia*. "Statutes that deal with the same matter or subject should be read *in pari materia* and construed together as a "unitary and harmonious whole." Marino v. Marino, 200 N.J. 315, 330 (2009) (quotation omitted). "Statutes *in pari materia* are to be construed together when helpful in resolving doubts or uncertainties and the ascertainment of legislative intent." Ibid. (quotation omitted). In evaluating the two statutes, Section 313.3(b) begins with a broad authorization for the HMFA to conduct rulemaking "to update the Uniform Housing Affordability Controls as required pursuant to the 'Fair Housing Act,' P.L.1985, c. 222 (C.52:27D-301 et al.)." N.J.S.A. 52:27D-313.3(b).

In contrast, Section 321(f) begins by providing that the HMFA "shall establish requirements and controls to ensure the maintenance of housing assisted under

P.L.1985, c. 222 (C.52:27D-301 et al.) as affordable to low- and moderate-income households for a period of not less than" prescribed periods of years. N.J.S.A. 52:27D-321(f). The subsection then provides further details on such *durational controls* and allows for rulemaking pursuant to same. Read *in para materia*, any regulations specifically addressing the durational control issues may be considered promulgated pursuant to Section 321(f) and is subject to the APA exception, while those that are not specific to that particular issue and are part of the overall UHAC regulatory update are covered by the broader Section 313.3(b) authorization requiring notice and comment.

This statutory interpretation is also furthered by evaluating the statutes' titles. *See* State v. Hodde, 181 N.J. 375, 383 (2004) ("title is properly considered to ascertain legislative intent and resolve doubts in meaning"). Relevant to the rulemaking provisions, Section 313.3(b) broadly provides for a "Uniform Housing Affordability Controls[ ] update," while Section 321(f) is specific to "controls for maintenance of housing."

Reviewed in this light, the Rules exceed the limited scope of Section 321(f) and therefore were promulgated under Section 313.3(b) requiring notice and comment. The Rules constitute amendments to a chapter of rules that was previously held out as "Uniform Housing Affordability Controls," N.J.A.C. 5:80-26.1 et seq., which were promulgated by COAH in 2004. The HMFA took this set of rules, which

was 33 pages in length, and revised it to now be 192 pages in length. The Rules contain numerous provisions that exceed the durational control scope of Section 321(f) and therefore fall within Section 313.3(b) requiring rulemaking and constitute significant policy changes, a sample of which include:

- Setting forth a new procedure to calculate regional income limits. N.J.A.C. 5:80-26.3.

- Amending the affordability averages and bedroom distributions. N.J.A.C. 5:80-26.4.

- Expanding the applicability of the UHAC retroactively to units in municipalities that have received a compliance certification or are in the process of seeking compliance certification; that have a court-approved settlement agreement and/or judgment of compliance and repose; that have been or are the subject of exclusionary zoning litigation, including, but not limited to, builder's remedy litigation; and that received credit from the former Council on Affordable Housing. N.J.A.C. 5:80-26.1.

- Recognizing the Dispute Resolution Program and County-level housing judge created under the Law. N.J.A.C. 5:80-26.2.

- Adding various new definitions such as "household income," "housing region," "multifamily development," "New Jersey Housing Resource Center," "nonprofit," "price differential," "regional median income," "single-family development," "very-low-income household," "very-low-income unit," "veteran," and "veterans' preference." N.J.A.C. 5:80-26.2.

- Requiring municipalities to appoint a Municipal Housing Liaison who shall be responsible for oversight and/or administration of the affordable units created within the municipality, for ensuring that developers and administrative agents are marketing units in accordance with the provisions of N.J.A.C. 5:80-26.16, and for guaranteeing compliance with all provisions of N.J.S.A. 52:27D-321.3 through 321.6. N.J.A.C. 5:80-26.2; N.J.A.C. 5:80-26.16(a), (g)(1);

(Pa1-192)

While the Municipalities believe it is clear that these provisions exceed Section 321(f) and are governed by Section 313.3(b), they further contend that any ambiguity between the two sections must be reconciled in favor of requiring APA compliance, considering the public interest contained in notice and comment.[1] For these reasons, the Law required the Rules to be adopted in accordance with the APA, which did not occur, rendering them invalid.

II: THE HMFA'S RULES ARE INVALID BECAUSE THEY DID NOT SUBSTANTIALLY COMPLY WITH THE APA (Pa212-13).

It is undisputed that the HMFA promulgated the instant Rules without providing an opportunity for notice and comment as prescribed by the APA.

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[1] Public participation in agency rulemaking is the APA's primary goal. Formal rulemaking allows the agency to further the policy goals of legislation by developing coherent and rational codes of conduct so those concerned may know in advance all the rules of the game, so to speak, and may act with reasonable assurance. The purpose of the APA rulemaking procedures is to give those affected by the proposed rule an opportunity to participate in the process, both to ensure fairness and also to inform regulators of consequences which they may not have anticipated.

[Animal Prot. League of N.J. v. N.J. Fish & Game Council, 477 N.J. Super. 145, 158-59 (App. Div. 2023) (quotations omitted)].

Pursuant to N.J.S.A. 52:14B-4(a), the APA required the HMFA to provide at least thirty days' notice of its intended action, prepare for public distribution a statement summarizing the proposed rules, afford interested persons a reasonable opportunity to submit data, views, comments, or arguments, and conduct a public hearing on the proposed rules, among other requirements. The APA at N.J.S.A. 52:14B-4(a)(2) further required the HMFA to identify "the specific legal authority under which [the Rules'] adoption is authorized[.]"

N.J.S.A. 52:14B-4(d) specifically provides that a rule is not valid if it is not adopted in substantial compliance with the APA and that an action to invalidate same may be initiated within one year. Our courts have routinely invalidated rules for failure to be promulgated pursuant to the APA rulemaking. New Jersey Animal Rts. All. v. New Jersey Dep't of Env't Prot., 396 N.J. Super. 358, 372 (App. Div. 2007).

In the instant matter, the HMFA failed to substantially comply with the APA, rendering the Rules illegal and subject to invalidation. Specifically, the Appellant Municipalities did not receive notice of the proposed rules and, unlike select interest groups, were unable to provide comments and voice their concerns. The APA explicitly required the HMFA to afford all interested persons, including Appellants, a reasonable opportunity to submit data, views, comments, and arguments, and to consider all submissions prior to adoption of the Rules. *See* N.J.S.A. 52:14B-4(a)(3). The HMFA failed to substantially abide by this process, rendering the Rules invalid.

The HMFA, nonetheless, affirms that between May 23, 2024 and December 3, 2024, its staff "hosted numerous events in various formats and forums to provide representatives from all spheres of the affordable housing industry an opportunity to present their views as to the operation of the existing UHAC regulations and changes they would like to see made to them." (Pa223). The HMFA apparently hosted a meeting with the New Jersey League of Municipalities on November 20, 2024. Appellants have also identified a plethora of other activity by the HMFA with special interest groups. (Pa227-321). Appellants did not receive notice of such a meeting and were not invited to participate in any of the HMFA's outreach.

The HMFA also failed to identify the specific legal authority under which the Rules' adoption is authorized, as required by N.J.S.A. 52:14B-4(a)(2). In its January 28, 2025 decision, the HMFA claimed for the first time that N.J.S.A. 52:27D-321(f) authorized adoption of the Rules. (Pa207). Even if true, the Rules exceed the narrow scope of this APA exception, as discussed *supra*.

Additionally, the HMFA did not pursue emergency rulemaking, as the Rules do not comport with N.J.S.A. 52:14B-3(c). The HMFA cannot establish, and has not alleged, that "an imminent peril to the public health, safety, or welfare" prompted adoption of the Rules, and an agency cannot create an emergency through an unreasonable delay of its own creation. *See* Animal Protection Legue, 477 N.J. Super. at 165. Even if that was the case, the Governor was required to concur in

writing that an imminent peril existed, which did not occur. Notably, emergency rulemaking can only be effective for sixty days, unless each house of the Legislature passes a resolution authorizing a sixty-day extension. N.J.S.A. 52:14B-4(c). But under no circumstances, can emergency rulemaking be effective for more than 120 days. Id. The subject Rules were not promulgated through emergency rulemaking and do not comply with the time limit of emergency rules, as they are effective for one year.

Because the HMFA did not substantially comply with the APA's notice and comment requirements and no emergency rulemaking occurred, the Rules were promulgated in violation of the APA.

III: THE ABSENCE OF ANY RULEMAKING CONSTITUTES A VIOLATION OF DUE PROCESS (NOT RAISED BELOW).[2]

The HMFA's failure to comply with any rulemaking violated Appellants' due process rights. In New Jersey, the process of administrative rulemaking is

[2] Consistent with Rule 4:5-1, Appellants advise this Court that they have filed a motion for leave to amend their complaint in the Law Division under Docket No. MER-L-1778-24 to assert two counts (the "Counts") relative to the HMFA Rulemaking. Appellants contend that it would be prudent for the Appellate Division to invoke its original jurisdiction to consider the due process dimension to the Rules as well as potential equitable relief under the Law as a result of same. Rule 2:10-5. Given that Appellants lack the ability to compel the Appellate Division to invoke its original jurisdiction, as well as the seeming reluctance of this Court to do so as reflected in the Order, Appellants seek to file such claims in the Law Division to protect their rights. Appellants would invite an order of this Court exercising original jurisdiction over the Counts in this docket.

inextricably intertwined with the concept of Constitutional Due Process, both under the United States and New Jersey Constitutions. As such, it is imperative in the promulgation of administrative rules that a state agency inform the public of its rulemaking, provide an opportunity for public comment, and otherwise operate in a transparent manner. Failure to implement the APA's rulemaking procedures leaves "the public and any affected or interested parties . . . without any firm knowledge of the factors that the agency would deem relevant and that might influence its ultimate decision" and deprives the public of "no meaningful opportunity to shape the criteria that ultimately affected their interests." Crema v. N.J. Dep't of Envtl. Prot., 94 N.J. 286, 302 (1983).

In Holmdel Builders Ass'n v. Holmdel, 121 N.J. 550 (1990), our Supreme Court held in part that agency rulemaking is reasonably required in order to fulfill the legislative purpose of the Fair Housing Act with respect to inclusionary-zoning measures. In so doing, the Court remarked about rulemaking:

> [a]dministrative rulemaking serves the interests of fairness and due process. Administrative agencies should inform the public and, through rules, 'articulate the standards and principles that govern their discretionary decision in as much detail as possible.' Rulemaking is also important to assure the faithful effectuation of the legislative mandate.
>
> Id. at 578 (internal citations omitted).

More recently, in Grimes v. N.J. Dep't of Corr., 452 N.J. Super. 396, 399 (App. Div. 2017), the Appellate Division considered an inmate's challenge to a final decision of the New Jersey Department of Corrections, which reiterated its informal policy prohibiting inmates from making phone calls to cell phones and other non-traditional telephone service numbers. In reversing the Department of Corrections' decision, the Appellate Division reiterated the Supreme Court's decision in Holmdel Builders Ass'n, supra, stating that:

> Importantly, compliance with the APA procedures serves the interests of "fairness and due process." Compliance requires notice and an opportunity to present pertinent information, and compliance also requires an articulation of the basis, standards and principles informing the exercise of the Commissioner's discretion
>
> Id. at 407 (citations omitted).

Therefore, it is well established that the APA rulemaking procedures aim to provide those affected by the proposed rule an opportunity to participate in the process to ensure fairness and to inform regulators of consequences which they may not otherwise anticipate. In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 369 N.J. Super. 2, 43 (App. Div. 2004), certif. denied, 182 N.J. 141 (2004). As such, for administrative rules to be valid under the APA, an agency must promulgate them in a way that satisfies the strictures of due process, namely, notice to the public and an opportunity for the public to provide comment

and input. Due process in this regard also furthers the vital public policy goal of fairness and transparency in government, particularly where governmental action has significant economic and social impacts.

This is the case even when an agency's action is not subject to the formal notice and comment requirements of the APA. As our Supreme Court indicated in In re Dep't. of Insurance's Order Nos. A89-119 & A90-125, 129 N.J. 365 (1992):

> Not every action of an agency, including informal action, need then be subject to the formal notice and comment requirements of N.J.S.A. 52:14B-4….However, the fact that that agency action is not subject to the strict requirements of N.J.S.A. 52:14B-4 does not mean that no process is required….The agency may tailor the procedures to the necessities of the circumstances and shorten the comment periods as it deems reasonable.
>
> Id. at 382.

Thus, in New Jersey, an agency has a constitutional obligation to provide some type of process when promulgating the Rules. It is unconstitutional for the Legislature to have authorized and the HMFA to have promulgated regulations using a process that denies the Municipalities – as well as the people of New Jersey writ large – with any opportunity to comment. This due process violation[3] is particularly

[3] The New Jersey Constitution's general welfare clause has been interpreted to protect principles of due process. Doe v. Poritz, 142 N.J. 1, 99 (1995). To the extent respondents may contend that appellant municipalities lack constitutional standing,

concerning as these Rules are not promulgated to address a short-term emergency but rather are adopted to govern the Fourth Round process that lasts ten years.

IV: THE MUNICIPALITIES WOULD HAVE RAISED VARIOUS CONCERNS ABOUT THE RULES HAD THE HMFA ENGAGED IN NOTICE AND COMMENT (Pa215-20).

Due to the absence of any rulemaking process, Appellants were unable to comment on provisions that they believe are erroneous and problematic. Some of the potential comments they could have offered include the following:

- The Rules have been adopted on a one-year basis, but they must adopt a Housing Element and Fair Share Plan by June 30, 2025 to govern the ten-year Fourth Round period. This requires negotiations with developers over the next five months to craft mechanisms in accordance with the Rules. What happens if the Rules are modified during the pendency of the Fourth Round?

- The Rules state that they apply to all units "regardless of the date on which the units were created," N.J.A.C. 5:80-26.1, which means that they govern First, Second, and Third Round compliance that may remain ongoing. This would necessarily cover projects that may have land use board approvals with construction that may be ongoing or about to start, all pursuant to settlement agreements already approved by Superior Court. The Rules should only have prospective effect; the retroactivity is both ultra vires and highly problematic. (The provision

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the Court does not allow such "procedural frustrations" from preventing adjudication on the merits. In re Congressional Districts by the N.J. Redistricting Comm'n, 249 N.J. 561, 570 (2022). Additionally, appellants include Michael Ghassali, a citizen of New Jersey who also happens to serve as a Mayor of a municipality, and an individual that is not a municipal corporation. He is aggrieved and injured as he was denied the opportunity to provide the HMFA with comments about the regulations either in his capacity as Mayor, the head of a municipality that is adversely regulated by the Rules, as well as a citizen and taxpayer whose community is directly and adversely impacted by the Rules' terms including increased taxpayer costs.

relating to retroactivity at N.J.A.C. 5:80-26.5 is limited to that "subchapter" and therefore does not govern the Rules at large).

- The Rules' definition of "multifamily development" appears to classify single-family detached subdivisions as multifamily, presenting numerous concerns as relating to consistency with municipal planning and potentially the Hotel Multiple Dwelling Law. *See* N.J.A.C. 5:80-26.2.

- The Rules' treatment of single-family development "as one scattered-site affordable development," N.J.A.C. 5:80-26.4(a), is unmanageable as such development may involve different developers and development occurring at different times.

- A non-material deviation from the municipal housing element and fair share plan requires written approval from the Division of Local Planning Services in the Department of Community Affairs, and a material deviation requires written approval from the Dispute Resolution Program or a county-level housing judge, which is an ultra vires process under the Law. *See* N.J.A.C. 5:80-26.4(l).

- The Rules set forth terms governing "assisted living facilities" at N.J.A.C. 5:80-26.4(j), which is directly contradicted by N.J.S.A. 5:80-26.4(k) (stating that the provisions of N.J.A.C. 5:80-26.4 do not apply to assisted living residences).

- The Rules require that bedroom distributions be met "in the aggregate," but a municipality is hampered by this provision, as developments are built over time. N.J.A.C. 5:80-26.4(l). As such, the requirements should be considered on a development-by-development basis, which is consistent with past practice regarding bedroom distribution.

- The Rules' requirement that restricted units be of the same unit type as market-rate units within the same building would prohibit the Municipalities and developers from pursuing innovative designs that they used to satisfy the Third Round. *See* N.J.A.C. 5:80-26.5(b)(2)(vii).

- The Rules' requirement that restricted units be "of at least the same size as the most common market-rate unit(s) of the same type and bedroom

count within the same development" is problematic as it has the potential to be cost generative or decrease the quality of the market rate units. N.J.A.C. 5:80-26.5(b)(2)(viii).

- The Rules contain numerous cross-references to N.J.A.C. 5:99 which cannot be identified.

- To extend affordability controls, the Rules require a municipality to either purchase the restricted unit and convey it to a very-low-, low-, or moderate-income purchaser at a price not to exceed the maximum allowable restricted sale price; or compensate a homeowner no less than $20,000. N.J.A.C. 5:80-26.6(h)(3)(ii). Such compensation has never been required as a component of affordable housing.

- The Rules state that they apply to all affordable units **except** units qualifying for Low-Income Housing Tax Credit, National Housing Trust Fund, etc. N.J.A.C. 5:80-26.1. Community residences, commonly referred to as group homes, have been a mechanism widely utilized by communities in creating affordable housing. It is unclear from the rules if group homes fall under the term "supportive housing" referred to in the Rules. The Rules require the number of bedrooms to equal the number of affordable housing units within supportive housing developments. N.J.A.C. 5:80-26.4(f). For group homes that are not exempt from the Rules pursuant to N.J.A.C. 5:80-26.1 due to their funding, it is impossible for said group home to meet the number of bedrooms must equal the number of affordable units' requirement of N.J.A.C. 5:80-26.4(f). Furthermore, this specific requirement will preclude innovative projects non-profit entities and affordable developers have constructed to house individuals with special needs unless the project receives the funding outlined in N.J.A.C. 5:80-26.1.

The HMFA's actions, however, prevented the Municipalities from their constitutional and statutory right to participate in this rulemaking process, requiring invalidation of the Rules. Even more concerning, the Municipalities were denied any

opportunity to present these valid concerns about the Rules, all while the HMFA entertained special interest groups and facilitated their comments.

The HMFA's allegations that the Law required it "to swiftly adopt the temporary regulations" is unavailing. (Pa222). Governor Phil Murphy signed the Law on March 20, 2024 and Sections -321(f) and -313.3(b) did not require the HMFA to promulgate the Rules until December 20, 2024. The HMFA had nine months to issue amended controls. Nine months was sufficient time to provide 30 days' notice of its intended action, as required by N.J.S.A. 52:14B-4(a)(1), and 15 days' notice of a hearing on the proposed rules, as required by N.J.S.A. 52:14B-4(a)(3). The HMFA circumvented this statutorily mandated process and instead opted to engage with interested parties other than Appellants, three weeks after P.L. 2024, c.2 was signed into Law.

Beginning on April 4, 2024, as outlined in the Statement of Facts, *supra*, the HMFA engaged in significant back-and-forth with special interest groups. This included evaluating lengthy submissions from select organizations that provided comments to specific provisions in the Rules. FSHC, for example, was provided exclusive access to the draft emergency rules. (Pa248). In response, FSHC provided the HMFA with a memorandum, outlining proposed revisions to the UHAC regulations, many of which the HMFA unilaterally reviewed and adopted. (Pa251-57).

The HMFA has already defended the Rules to this Court in emergent briefing by explaining how the agency held "roundtables" with special interest groups. (Pa223-24). Specifically, between May 23, 2024 and December 3, 2024, the HMFA hosted four virtual events allegedly "attended by numerous municipal administrative agents." (Pa223). Between October 25, 2024 and December 3, 2024, the HMFA also "conducted outreach and more than a dozen follow up meetings with numerous governmental and external stakeholders." (Pa225). Although the HMFA failed to identify the municipal corporations it interacted with, it certainly did not include Appellants.

As demonstrated by the HMFA's actions, nine months was plenty of time to provide 30 days' notice of the proposed rules and receive comments from interested parties, as required under the APA. Even if nine months was not enough time to engage in notice and comment as intended by the Legislature, it is unclear why the HMFA did not reach out to Appellants and solicit their feedback, as it did with other arguably less interested parties. Given the lack of process and transparency, Appellants were unable to voice their concerns and comment on the proposed Rules, requiring invalidation of same until such time as the HMFA engages in proper notice and comment.

V: THE COURT SHOULD INVALIDATE THE RULES PENDING PROPER RULEMAKING (NOT RAISED BELOW).

The Rules are riddled with inconsistencies, poorly conceived new policy, and mandates that may harm the quality of new affordable housing units. The public interest would be furthered by pausing the Law and requiring an APA-compliant rulemaking process to proceed, rather than forcing New Jersey's municipalities to comply with the Rules. This would not only benefit Appellants but also protect low- to moderate- income households that may be negatively impacted by the unintended consequences of the poorly conceived Rules.

Furthermore, the Law was structured with the HMFA (and DCA had it done so) having to promulgate rules within nine months of the Law's adoption, which was December 20, 2024. This timing demonstrates that the Legislature intended New Jersey's municipalities to be apprised of the regulations that would govern the Fourth Round of Mount Laurel obligations. Because that did not occur here, the Court should invalidate the Rules to provide Appellants the protections afforded to them under the APA and to further the legislative intent imbedded in N.J.S.A 52:27D-313.3(b).

CONCLUSION

For the foregoing reasons, this Court should invalidate the HMFA's Rules for failure to comply with the Administrative Procedures Act, as well as any corollary relief that it may deem appropriate.

Respectfully Submitted,

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Dated: April 9, 2025

IN RE NEW JERSEY HOUSING AND MORTGAGE FINANCE AGENCY HOUSING AFFORDABILITY CONTROLS, SPECIAL ADOPTED AMENDMENTS AND SPECIAL ADOPTED NEW RULES	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1247-24 Civil Action ON APPEAL FROM RULEMAKING BY THE NEW JERSEY HOUSING MORTGAGE FINANCE AGENCY

BRIEF ON BEHALF OF THE NEW JERSEY HOUSING AND MORTGAGE FINANCE AGENCY

SUBMITTED: **June 9, 2025**

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PRELIMINARY STATEMENT

New Jersey enacted landmark amendments to the Fair Housing Act, L. 2024, c. 2 (the Act), in March 2024, the most significant legislative effort in decades to ensure an efficient and administrable system for securing municipal compliance with Mount Laurel obligations. Since October, most of these same Appellants have sought extraordinary relief enjoining the Act in its entirety under a panoply of theories, requests that the Law Division, this Court, and our Supreme Court have all soundly rejected. In the latest effort to disrupt implementation of the Act, Appellants argue that one-year specially adopted updates to the Uniform Housing Affordability Controls (UHAC) issued by the Housing and Mortgage Finance Agency (HMFA) were adopted in violation of the Administrative Procedure Act (APA), and further that the section of the Act that authorized this interim rulemaking violates due process. But these theories, too, fail under settled precedent and principles of statutory interpretation.

HMFA promulgated these interim rules pursuant to a provision of the Act that expressly permits this process, authorizing HMFA to "update or amend any controls previously adopted" in collaboration with the now-defunct Council on Affordable Housing (COAH); to do so within "nine months" of the Act's effective date; and to do so "[n]otwithstanding the provisions of the [APA]," to be followed by final rules promulgated through notice and comment. HMFA is

following that instruction precisely: it specially adopted immediate rules that will sunset by December 20, 2025, and it will shortly propose a final rule that it will promulgate via notice and comment by that date. And in doing so, HMFA is following the Legislature's plain intent, confirmed by other statutory references to one-year transitional rules to be followed by notice-and-comment rulemaking, as well as the APA's own incorporation of such exceptions. At a minimum, HMFA's interpretation of the Act falls well within the deference it receives, and Appellants' contrary contentions rest on a series of misapplications of interpretive principles to the statutory framework.

Appellants' claim that the Legislature's own authorization of interim rulemaking violates due process fares no better. For one, municipalities lack standing to bring this type of due process claim against their creator State. And in any event, Appellants' novel claim clashes with precedent, including the heightened deference owed to the Legislature in implementing Mount Laurel—indeed, Appellants' theory would cast doubt on countless other statutes that provide for interim rulemaking using similar statutory language.

Last, and alternatively, even if the Court found that the interim rulemaking violated the APA, the proper remedy is not immediate invalidation of the interim rules, but rather to keep them in place pending cure by promulgation of the final rules via notice and comment—a process that will conclude by the end of 2025.

This Court should affirm the UHAC rules.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. The Act and Its Implementation.

In 1975, the Supreme Court held that municipalities have a constitutional duty to provide affordable housing and cannot avoid this duty through zoning restrictions. S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 67 N.J. 151, 187 (1975) (Mount Laurel I). To enforce Mount Laurel, the Legislature in 1985 enacted the Fair Housing Act, L. 1985, c. 222, which created an optional administrative process to facilitate compliance through COAH. See Hills Dev. Co. v. Twp. of Bernards, 103 N.J. 1, 23, 65 (1986). COAH was later declared "moribund," and courts again became "the forum of first instance for evaluating municipal compliance with Mount Laurel obligations." In re Adoption of N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 30 (2015).

In 2024, the Legislature passed and the Governor signed the Act, which builds on nearly a half-century of lessons learned in the Mount Laurel context. The Act abolishes COAH, creates a new voluntary Program in its place, codifies new substantive rules, and delegates regulatory responsibilities to administrative agencies like DCA and HMFA. E.g., N.J.S.A. 52:27D-304 to -304.3, -310 to -313, -321 to -321.6. The Act thus focuses on assisting municipalities with

[1] These related sections are combined for the Court's convenience.

determining their present and prospective fair share obligations, as well as providing an optional forum for municipalities to seek the same core benefits they used to be able to obtain via COAH: immunity from suits while they go through the process, and a presumption of validity if they achieve approval. N.J.S.A. 52:27D-304.1(b), (f), -304.2, -304.3. Over 400 municipalities have already submitted proposed obligations using that voluntary forum, 291 of which accepted DCA's suggested numbers and did not receive any challenges.[2]

Especially relevant here, the Act delegates oversight of the UHAC, N.J.A.C. 5:80-26.1 to -26.28—previously promulgated by COAH—to HMFA, in consultation with DCA. N.J.S.A. 52:27D-313.3(b), -321(f). These controls primarily serve to ensure that affordable housing units are in fact occupied by the people they are designed for: low- and moderate-income residents. N.J.A.C. 5:80.26.1. The Act authorizes HMFA and DCA to begin issuing regulations even before the Fourth Round begins on July 1, 2025, so that stakeholders have the benefit of regulatory guidance as they develop Fourth Round plans. For instance, N.J.S.A. 52:27D-313.3(a) directs the DCA Commissioner, in consultation with the Administrative Director of the Courts (ADC) and HMFA, to adopt certain "transitional rules and regulations" to implement the Act by

[2] See Michael J. Blee, J.A.D., "Responses to the April 22, 2025 Senate Budget and Appropriations Committee Hearing," May 7, 2025 at 8-9, tinyurl.com/y4emyhn6 (last visited June 9, 2025).

December 20, 2024, "[n]otwithstanding" contrary provisions of the APA, to be followed the next year by rules adopted "in accordance with the requirements of the [APA]." The following subsection authorizes updates to the UHAC on the same time frame "pursuant to" the APA, N.J.S.A. 52:27D-313.3(b), while N.J.S.A. 52:27D-321(f) specifically authorizes HMFA to "update or amend any controls previously adopted by the agency, in consultation with COAH," prior to the Act's effective date, provided that they are "consistent with" preexisting regulations. See also N.J.S.A. 52:27D-321(f) (noting such updated controls are permitted on topics "including, but not limited to" maintenance and preservation of housing, affordability averages, and marketing).

Soon after the Act's enactment on March 20, 2024, HMFA began to solicit feedback on the UHAC from stakeholders. (Aa221-26).[3] Between May 23 and July 29, HMFA held three roundtable discussions and a listening event with administrative agents, developers, trade organizations, housing advocates, municipal housing liaisons and governmental entities to receive feedback. (Aa223-25). Between October 7 and December 3, HMFA also held fifteen targeted discussions with stakeholders, two of which were with the League of Municipalities (League), of which Appellants are members. Ibid.; (Aa207).

[3] "Aa" refers to Appellants' appendix; "Ab" refers to their brief. "Ra" refers to Respondent's appendix.

Informed by that stakeholder feedback, on December 19, 2024, HMFA specially adopted the UHAC amendments in accordance with the Act. As the Act provides, these specially adopted interim rules will sunset by December 20, 2025, and in anticipation of its next mandated deadline, the HMFA will shortly issue a notice of rule proposal to readopt these UHAC rules. See (Ra120) (noting this action is on agenda for upcoming June 12 Board meeting); N.J.S.A. 52:27D-321(f). Consistent with the UHAC first promulgated by COAH, the interim UHAC primarily restricts who may occupy low- and moderate-income units to residents whose incomes match those income levels. N.J.A.C. 5:80-26.1. These interim rules also create "controls" on certain properties that receive credit under the Fair Housing Act (FHA), ibid.; and, critically, amend the UHAC to align with new mandates of the Act, e.g., id. at -26.6 (control periods), to account for downstream effects of the initial changes, e.g., id. at -26.4 (distributing very-low-income units to reflect distribution of affordable units as a whole), and to reduce the burden on administrative agents, e.g., ibid. (affordability averages and bedroom distributions); id. at -26.16 (affirmative marketing); id. at -26.17 (income verification).

B. Appellants' Challenges To The Act And Interim UHAC.

Most of the Appellants here filed suit in the Law Division, alleging that the Act is invalid under a host of constitutional theories. In October 2024, they

filed an order to show cause (OTSC) seeking to preliminarily enjoin the Act. On January 2, 2025, the Hon. Robert T. Lougy, A.J.S.C., denied Appellants' OTSC in its entirety. (Ra1-68). Judge Lougy emphasized the extraordinary relief sought, noting that the Act reflects the Legislature's effort to "transform the framework and processes by which municipalities meet their constitutional Mount Laurel obligation to provide realistic opportunities for low- and moderate-income housing." (Ra4). He recognized that the Act was intended to generate "affordable housing both more quickly and more cheaply by establishing appropriate Statewide policies" and to establish "a more effective, transparent, and enforceable system for determining and ensuring compliance with municipal obligations under Mount Laurel." (Ra12). And he stressed that enjoining the Act would not bring Appellants the relief they sought, since their Fourth Round Mount Laurel obligations would remain. (Ra24). He also denied their request to stay the underlying constitutional obligations. (Ra54-56).

The day after that decision, Appellants sought permission to file an emergent motion in this Court, seeking a stay of the Act under the same theories. Appellants also filed the instant notice of appeal from the interim UHAC, coupled with an application to file an emergent motion challenging the UHAC but again seeking the same relief: a stay of the Act. (Pa193-94). This Court granted the emergent applications, but denied both motions on January 10—

noting, as to the emergent motion challenging the UHAC, that Appellants had failed to first seek a stay with HMFA as required by Rule 2:9-7. (Pa202-04).

Appellants then filed a request for stay with HMFA, per Rule 2:9-7. HMFA convened a special Board meeting to hear the stay request on an expedited basis, and on January 28, 2025, issued a final agency decision denying the request, finding that Appellants had not established irreparable harm or a likelihood of success on the merits of their claim, and also responding to Appellants' specific concerns with the specially adopted rules. (Aa210-20). That denial became effective the same day when the Governor approved HMFA's meeting minutes on an expedited basis. Appellants then filed another emergent application, again seeking a stay of both the UHAC and the Act's statutory deadlines. This Court denied the application on January 30. (Ra107).

Meanwhile, Appellants filed an amended pleading and second OTSC in the Law Division, asserting, inter alia, a substantially identical procedural APA challenge to the UHAC—notwithstanding that this claim was pending in the instant appeal. (Ra74). Judge Lougy denied this OTSC on January 27, noting that Appellants had improperly asserted the claims against the UHAC without leave of court to amend and, in any event, they "cannot prevail on this" claim as the Law Division "does not have jurisdiction over their challenge to HMFA rulemaking." (Ra76-83, 101). Appellants responded with a motion for leave to

file another amended pleading with two counts alleging that HMFA's adoption of the UHAC without notice and comment violates procedural due process and the APA. (Ra112-15). Judge Lougy denied this motion on May 9, and Appellants filed a motion for leave to appeal which remains pending. (Ra109).

Briefing in this appeal continued. On March 27, 2025, Appellants filed their merits brief and appendix, and filed a corrected brief on April 9. Appellants opposed HMFA's request for a first 30-day extension, and also filed a motion to accelerate the appeal. On June 2, this Court granted HMFA's extension motion and denied the motion to accelerate. This brief follows.

ARGUMENTS

POINT I

THE ACT EXPRESSLY AUTHORIZES INTERIM UHAC RULES TO BE FOLLOWED BY NOTICE-AND-COMMENT RULEMAKING.

Appellants' claim that HMFA violated the APA by specially adopting these rules without notice-and-comment is premised on a misreading of the Act. Properly construed, the Act instead authorizes adoption of immediate interim rules, to be followed by notice-and-comment rulemaking within one year.

Among many other provisions in this landmark law, the Act permits HMFA to revise and update the UHAC. In Section 321, the Act makes clear that HMFA may "update or amend any controls" that the agency "previously

adopted" in collaboration with now-abolished COAH—"including, but not limited to" various requirements, such as those involving "affordability averages" and "affirmative marketing"—so long as these rules are consistent with certain basic features. N.J.S.A. 52:27D-321(f) (emphasis added). That same subsection directs HMFA to do so "no later than nine months following" the Act's enactment, and states that it may do so "[n]otwithstanding the provisions of the [APA]," so long as these interim rules are in effect only "for a period not to exceed one year from the date of filing," after which point the revised UHAC must be promulgated "in accordance with" the APA. Ibid.

That is exactly what HMFA did: it updated "controls" that it had "previously adopted" in collaboration with COAH on December 19, 2024, "for a period not to exceed one year," and will shortly issue rules for formal notice and comment in 2025, with those final rules going into effect, "in accordance with the APA," within "one year from the date of filing" the interim rules. See (Ra122). All of this tracks Section 321 plainly—even without the considerable deference to which HMFA's interpretation is entitled. See, e.g., Hargrove v. Sleepy's, LLC, 220 N.J. 289, 301-02 (2015).

Appellants contend that the regulations are invalid because they read another subsection of the Act, N.J.S.A. 52:27D-313.3(b), (Ab16-17), to require HMFA to go through notice and comment. But their reading of that provision

fails under hornbook interpretive rules. The goal in statutory interpretation is to effectuate legislative intent, and the best evidence of that intent is the law's text, read within the full context in which it is used. See Bozzi v. Jersey City, 248 N.J. 274, 283 (2021); DiProspero v. Penn, 183 N.J. 477, 492 (2005). As Appellants agree, (Ab20), that includes reading related provisions "in pari materia" and construing them to create a "unitary and harmonious whole." Marino v. Marino, 200 N.J. 315, 330 (2009) (citation omitted); see also N.J. Dep't of Envtl. Prot. v. Huber, 213 N.J. 338, 365 (2013) ("to discern and effectuate the Legislature's intent," courts examine "plain language … sensibly, in the context of the overall scheme in which the Legislature intended the provision to operate"). Courts also "take into account the interpretation and cognate enactments of the agency to which the Legislature has entrusted the statute's implementation," Huber, 213 N.J. at 365; indeed, they give such interpretations "great deference," in keeping with the agencies' "expertise" in evaluating the "issues that rulemaking invites," N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 549 (2012); see, e.g., In re Adoption of Uniform Housing Affordability Controls, 390 N.J. Super. 89, 104-05 (App. Div. 2007) (confirming this deference applies to HMFA's promulgation of the UHAC, "[g]iven the agency's experience in the affordable housing area").

Within the context of the overall Act, HMFA's reliance on Section 321(f) makes ample sense. After all, the FHA refers to the APA multiple times in the context of both DCA's and HMFA's rulemaking authority, but elsewhere provides clear authorization for interim rulemaking within nine months of the Act, followed by formal notice-and-comment rulemaking "in accordance with the [APA]" within one year, see, e.g., N.J.S.A. 52:27D-313.3(a)(1); id. at -321(i)(6)—consistent with what Section 321(f) says, and what HMFA did. Read in context and in light of this overarching scheme, Section 313.3(b) is not to the contrary. It reiterates that HMFA should adopt an updated UHAC, in consultation with DCA, reiterating the identical foundational requirements for those regulations that Section 321(f) recites. And while Section 313.3(b) says that HMFA should do so "pursuant to" the APA, that does not mean, read in context, that HMFA must do so via notice and comment. Rather, the APA itself incorporates "otherwise" applicable law, N.J.S.A. 52:14B-4(a), and acknowledges the possibility of transitional rules issued under "lesser time period[s]," N.J.S.A. 52:14B-3(b). The simplest way to harmonize Section 321(f) and Section 313.3(b), in other words, is to read the use of "pursuant to" to cross-reference the APA's own incorporation of other law, which in turn includes the more specific reference the FHA makes to "any controls previously adopted by" HMFA in consultation with DCA under N.J.S.A. 52:27D-321(f).

See, e.g., State v. Gomes, 253 N.J. 6, 28 (2023) ("a more specific statutory provision usually controls over a more general one").

Appellants similarly misconstrue Section 321(f) itself. For instance, they read Section 321(f) to refer to "durational controls" and thus only to permit interim rulemaking regarding durational controls. (Ab20-21). But a side-by-side comparison of the two provisions shows the error in their construction. Indeed, while Appellants quote at length the language about durational controls in Section 321(f), (Ab18-20), they overlook that this exact same language is used in Section 313.3(b)—nearly all of which is copied verbatim. In other words, neither subsection is plausibly read to be more focused on "durational controls" than the other. Instead, Section 321(f) is more specifically about controls "previously adopted by the agency, in consultation with [COAH]," N.J.S.A. 52:27D-321(f), which in turn means that it should control. As for Section 313.3(b), its general cross-reference is best read, harmoniously, to route back to the exception in subsection 321(f).[4]

[4] Appellants go further astray in seeking to rely on the titles of the two sections. Leaving aside that statutory titles "cannot control over the clear words of a law," State v. Munafo, 222 N.J. 480, 492 (2015), it is difficult to see how the juxtaposition between "Adoption of transitional rules and regulations; implementation; affordable housing timeline; Uniform Housing Affordability Controls; update" (Section 313.3(b)) and "Affordable housing programs; establishment; purposes; assistance; controls for maintenance of housing; subsidiary corporations" (Section 321(f)) can be meaningfully illuminating,

Appellants' construction would also disserve legislative intent in other ways. After all, the FHA as a whole seeks to "eliminate the lengthy and costly processes" that previously delayed the creation of affordable housing, N.J.S.A. 52:27D-302(n), and it would be odd for the FHA to single out updates to the preexisting UHAC for a more intensive process, when the Legislature allowed transitional rulemaking for other such updates. See N.J.S.A. 52:27D-313.3(a); cf. Gomes, 253 N.J. at 33 (courts interpret statutes consistent with "findings" and "clear legislative intent … to achieve their remedial purposes"). Likewise, it makes little sense that the Legislature would require HMFA to promulgate full notice-and-comment regulations within nine months, only to then immediately undertake a second full notice-and-comment process within a year—the course dictated by Appellants' construction. See (Ab21); see also (Aa212) (HMFA noting that "it would have been a practical impossibility for the Agency to have met [the nine-month] deadline if it had been required to" go through notice and comment). But requiring a full notice-and-comment rulemaking within one year of initial publication is logical when the statute is read to permit HMFA to proceed with specially adopted immediate regulations in the first instance.

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particularly as Section 313.3(a) addresses other transitional rules to be promulgated by DCA. And as for Appellants' claim that the length of the rules has expanded, (Ab21-22), Appellants overlook that the "192 pages" they count include different formatting, tracked changes, and lengthy exhibits—hardly an apples-to-apples comparison.

Nor does HMFA's construction of the Act—which is entitled to deference, see Hargrove, 220 N.J. at 301-02—disserve principles of transparency or public input. Contra (Ab28-29). The Legislature did not provide for transitional rulemaking in perpetuity; it simply permitted interim rules effective on adoption for one year, to be followed by notice and comment, a process that HMFA plans to commence at its June 12, 2025 Board meeting. (Ra120); contra (Ab29) (Appellants erroneously asserting that the interim UHAC will "govern the Fourth Round process that lasts ten years"). HMFA's construction wholly respects the principles on which the APA is founded, as well as the clear legislative intent in the Act.

POINT II

THE ACT'S AUTHORIZATION OF INTERIM RULES WITHOUT NOTICE-AND-COMMENT DOES NOT VIOLATE DUE PROCESS.

Appellants seek to avoid the decisive impact of Section 321(f) by advancing a striking claim: that the Legislature violated due process by authorizing interim rules, to be followed by notice-and-comment rulemaking. (Ab26). That argument fails on multiple independent grounds.

As a threshold matter, this due process challenge is not a claim that the 26 municipal Appellants can raise at all, because they are subdivisions of the State, not "persons" entitled to assert procedural due process claims against the State.

See Newark v. New Jersey, 262 U.S. 192, 196 (1923); Stubaus v. Whitman, 339 N.J. Super. 38, 48-49 (App. Div. 2001). And while Appellants, in an effort to avoid this standing bar, added Mayor Ghassali and note that he is "an individual" who "happens to serve as a Mayor of" the lead appellant-municipality, (Ab29-30 n.3), that runs into a separate standing problem. Mr. Ghassali must himself have standing, which requires "a substantial likelihood of some harm visited upon [him]" if the interim rules are not invalidated, Jen Elec., Inc. v. Cnty. of Essex, 197 N.J. 627, 646 (2009). Yet Mr. Ghassali's claim to standing is essentially derivative of alleged harms to Montvale, a municipality that cannot itself bring such claims. See (Ab29-30 n.3) (emphasizing he is "aggrieved and injured" by being unable to comment "in his capacity as Mayor").

In any event, Appellants' due process theory is without merit. It is well-settled that interim rulemaking is permissible in certain instances, and is accordingly not a deprivation of due process—particularly when expressly authorized by statute. E.g., N.J.S.A. 34:1B-287(a) (Economic Recovery Act of 2020 requiring immediate adoption followed by notice and comment within 360 days); N.J.S.A. 2A:17-56.66 (requiring immediate adoption followed by notice and comment within 6 months); 57 N.J.R. 468(a) (Mar. 3, 2025) (special adoption of workplace safety standards without notice and comment, pursuant to statutory authority) see also In re DOI Order Nos. A89-119 & A90-125, 129

N.J. 365, 382 (1992) (confirming that "[n]ot every action of an agency, including informal action, need then be subject to the notice and comment requirements of" the APA). Appellants are especially hard-pressed to establish that a different process was constitutionally mandated for this rule, given the heightened deference owed to the Legislature in implementing the Mount Laurel doctrine, see Hills Dev. Co. v. Bernards, 103 N.J. 1, 24 (1986), and longstanding precedent holding that notice and an opportunity to be heard are generally not "constitutionally required" for generally applicable rules like the UHAC, see Philly's v. Byrne, 732 F.2d 87, 92 (7th Cir. 1984) (no due process violation where the statute applied across the board to all liquor stores in a precinct, as opposed to singling out sale of liquor at a particular store); see also United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 245-46 (1973) (distinguishing general rules from proceedings that "adjudicate disputed facts in particular cases," because the "across the board" nature of general rules protects against parties being singled out for arbitrary action); cf. Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982) (law of general applicability does not violate due process since the "legislative determination provides all the process that is due").

Indeed, the APA itself relaxes the notice-and-comment requirement in certain circumstances, see N.J.S.A. 52:14B-3 to -4—time-honored provisions that Appellants' novel theory would call into question. Appellants cite no

precedent supporting such a bold proposition, relying on cases in which agencies acted without express legislative direction. See (Ab27-29); Crema v. DEP, 94 N.J. 286, 298 (1983); Grimes v. DOC, 452 N.J. Super. 396, 399 (App. Div. 2017). Crema, for instance, did not involve interim rules at all—it held that because no statute or regulation authorized a "conceptual approval" that DEP had granted to a developer, DEP could afford itself that authority only through rulemaking, not via adjudication. 94 N.J. at 289-90, 298, 303. Grimes likewise reviewed a policy unsupported by any statutory authorization for the agency's informal process. See 452 N.J. Super. at 399. Those cases shed no light on what due process requires when an agency engages in interim rulemaking pursuant to the Legislature's express authorization or instructions.[5] Rather, the "legislative determination"—here, that the proper balance is struck by one year of interim rules, with formal rules promulgated at the end of that year via notice and comment—"provides all of the process that is due." Logan, 455 U.S. at 433.

Finally, it bears emphasizing that HMFA did not issue these interim rules in secret, or in a vacuum. HMFA began meeting with stakeholders regarding

[5] In re Adoption of 2003 Low Income Housing Tax Credit Qualified Allocation Plan, 369 N.J. Super. 2, 43-45 (App. Div. 2004), is also unhelpful to Appellants, as this Court upheld HMFA's regulation and rejected arguments that more formal process was required. In re DOI Orders is likewise inapposite, as the challenged agency orders were not "rules" in the first place and thus were not subject to the APA's notice-and-comment requirement. See 129 N.J. at 381-82.

the impending rules in May 2024, at roundtables in which it openly informed stakeholders that interim regulations would be issued. (Aa221-26). Those included two follow-up meetings with the League of Municipalities, in October and December. (Aa223-25; Pa207). Municipal interests were thus consistently represented in stakeholder engagement and had the opportunity to (and did) provide comment on the potential changes. And of course, Appellants will have every opportunity to comment once the formal rules are proposed in short order. Supra at 6.[6] Due process does not require more.

POINT III

ALTERNATIVELY, THE INTERIM RULES SHOULD BE KEPT IN PLACE PENDING ADOPTION OF THE FINAL RULE.

Alternatively, if this Court determines that interim rulemaking violated the APA, the proper remedy is not invalidation, see (Ab34-35), but rather to keep the interim rules in place pending cure by promulgation of the final rules

[6] While Appellants list several concerns they wish to submit comment on, (Ab30-32), many of these stem from their own misreading of the regulation, or take issue with changes authorized by the Act itself, as HMFA explained in its decision denying a stay. See (Aa215-20) (explaining, inter alia, that the interim rule does not apply "retroactiv[ely]," that Appellants misconstrue the term "multifamily development," and that other hypothetical concerns are not implicated by the rule). More importantly, Appellants will be able to comment on all of these issues when the final rules are proposed in short order.

via formal notice and comment—a process that HMFA has already begun and which will be completed by December 20, 2025. See N.J.S.A. 52:27D-321(f).

This Court has repeatedly followed that approach, including in cases Appellants cite. See (Ab28) (quoting Grimes, 452 N.J. Super. at 399, 407). As this Court explained, where the only infirmity found in a regulation is a lack of notice and comment, courts may "keep the [regulation] in place pending cure of the APA-violation by promulgation of a regulation in conformity with the APA," to avoid the "likely disruption of immediate invalidation." Grimes, 452 N.J. Super. at 401, 408; see also, e.g., E.B. v. Div. of Med. Assistance & Health Servs., 431 N.J. Super. 183, 210 (App. Div. 2013) (issuing "curative temporary remand" to agency to promulgate rule via formal rulemaking where it had commenced that process during pendency of the appeal, and leaving challenged rule "in full force and effect" to avoid creating a regulatory "void ... while the agency promulgates the proposed rules"); Mercer Cnty. Deer Alliance v. DEP, 349 N.J. Super. 440, 448 (App. Div. 2002) (confirming this authority "is well settled"); Hampton v. DOC, 336 N.J. Super. 520, 530-31 (App. Div. 2001); Bullet Hole, Inc. v. Dunbar, 335 N.J. Super. 562, 589-90 (App. Div. 2000).

That is the proper remedy for any technical violation here, particularly as "immediate invalidation would disserve the important institutional [and] public" interests at stake. Grimes, 452 N.J. Super. at 408. Indeed, if these transitional

rules were voided, this first year of Fourth Round planning would unfold against the backdrop of the UHAC which were last amended in 2004, 36 N.J.R. 5713-47 (Dec. 20, 2004), and thus lack necessary updates that the interim UHAC include. And because the rules will change regardless in December 2025, regulated parties would then have to adapt to that regulatory change after most municipalities have submitted their Fourth Round fair share plans, rather than at the outset of the Fourth Round. See N.J.S.A. 52:27D-304.1(f)(1), (f)(2)(a) (describing process for submission of housing element and fair share plans). That would prove disruptive for numerous non-party developers and municipalities and potentially delay construction of Fourth Round affordable housing units—the very uncertainty the Legislature intended to avoid. See N.J.S.A. 52:27D-302(n), -313.3(a), -321(f). In short, even if this Court finds that the interim UHAC were required to be adopted in conformity with the APA, the procedural defect is cured by maintaining the interim rules pending promulgation of the final rule through notice and comment.

CONCLUSION

This Court should affirm the UHAC regulations.

Respectfully submitted,

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Dated: June 9, 2025

In Re New Jersey Housing and Mortgage Finance Agency Housing Affordability Controls, Special Adopted Amendments and Special Adopted New Rules	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-1247-24 On Appeal From: New Jersey Housing Mortgage Finance Agency CIVIL ACTION

APPELLANTS' REPLY TO THE NEW JERSEY HOUSING AND MORTGAGE FINANCE AGENCY'S OPPOSITION AND IN FURTHER SUPPORT OF THE WITHIN APPEAL

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LEGAL ARGUMENT

I: Appellants Have Standing to Challenge the HMFA Rules.

As a preliminary matter, the HMFA assails the Appellants' right to standing. But this argument is entirely inconsistent with New Jersey's liberal approach to standing and our courts' adjudication of past administrative rulemaking challenges.

"New Jersey takes 'a liberal approach to standing to seek review of administrative actions.'" In re Issuance of Access Conforming Lot Permit No. A-17-N-N040-2007, 417 N.J. Super. 115, 126 (App. Div. 2010) (citations omitted). As a general matter, "our courts have considered the threshold for standing to be fairly low." Reaves v. Egg Harbor Tp., 277 N.J. Super. 360, 366 (Ch. Div. 1994). "Entitlement to sue requires a sufficient stake and real adverseness with respect to the subject matter of the litigation." N.J. State Chamber of Commerce v. N.J. Election Law Enf't Commerce, 82 N.J. 57, 67 (1980) (citations omitted). In the context of administrative action, standing "is available to the direct parties to that administrative action as well as any one who is affected or aggrieved in fact by that decision." In re Camden Cty., 170 N.J. 439, 446 (2002) (citations omitted).

"In addition to these considerations governing standing to sue, a plaintiff's particular interest in the litigation in certain circumstances need not be the sole determinant." N.J. State Chamber of Commerce, 82 N.J. at 68. "That interest may be accorded proportionately less significance where it coincides with a strong public

interest." Ibid. See Elizabeth Fed. Sav. & Loan Asso. v. Howell, 24 N.J. 488, 501-02 (1957) ("Without standing . . . , the Commissioner's action . . ., takes on a conclusive character to the possible great detriment of the people as a whole").

Given the public interest in matters related to HMFA regulations, this Court has "prefer[red] . . . to resolve the issue on its substantive merits," even where standing is "debatable." In re Tax Credit in re Pennrose Prosp., Inc., 346 N.J. Super. 479, 482 (App. Div. 2002). A "'slight private interest, added to and harmonizing with the public interest,' is sufficient to give standing." Elizabeth, 24 N.J. at 499, 503 (citations omitted). Our Supreme Court has held that "the existence of a financial interest that is affected directly by [an] agency action will confer standing on a governing body." In re Camden Cty., 170 N.J. at 163. It has also held that two mayors had standing to challenge rulemaking, where "the concerns of the public [were] weighty." N.J. State Chamber of Commerce, 82 N.J. at 64, 68-69.

Here, the Appellant municipalities are direct parties to the HMFA's regulations and Mayor Ghassali is aggrieved by the Rules, as an elected official, resident and taxpayer of a New Jersey municipality. These grounds alone are sufficient to satisfy standing. The professional and legal expenses incurred to comply with the HMFA Rules provide a distinct basis for standing. Given the great public interest at stake and New Jersey's low threshold for standing, Appellants submit they have a sufficient stake and real adverseness with respect to the HMFA Rules.

II: The HMFA Is Not Entitled to Judicial Deference on a Question of Law.

Although the HMFA contends it is entitled to great deference, (Sb11), the instant appeal involves the HMFA's construction of two statutory provisions—N.J.S.A. 52:27D-313.3(b) and N.J.S.A. 52:27D-321(f)—which is not entitled to deferential review. "Appellate courts . . . are not bound by an agency's interpretation of a strictly legal issue." G.S. v. Dep't of Human Servs., 157 N.J. 161, 170 (1999). See also Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affairs of Dep't of Law & Pub. Safety, 64 N.J. 85, 93 (1973) (the Court "is . . . in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue").

In the instant matter, the HMFA's interpretation of Sections -313.3(b) and -321(f) should be reviewed de novo. See Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011) ("Like all matters of law, we apply *de novo* review to an agency's interpretation of a statute or case law"); State Shorthand Reporting Servs. v. N.J. Dep't of Labor & Workforce Dev., 478 N.J. Super. 13, 21 (App. Div. 2024) (rejecting agency's interpretation of newly enacted statute where such interpretation would render the statute "meaningless"); In re Ackley, 2015 N.J. Super. Unpub. LEXIS 1990, at *5 (App. Div. Aug. 18, 2015) ("The question . . . under N.J.A.C. 4A:2-2.12(a) is one of first impression and we are not bound by the Commissioner's construction of the rule").

The principle of deference invoked by the HMFA "applies to policymaking and fact-finding, and to a lesser extent to statutory interpretation by an agency." In re Distribution of Liquid Assets upon Dissolution Reg'l High Sch. Dist. No. 1, 168 N.J. 1, 10-11 (2001) (citations omitted). But in any event, it "does not require abdication of the judiciary's role in assuring the agency's action properly comports with its legislative mandate." DiNapoli v. Bd. of Educ. of Tp. of Verona, 434 N.J. Super. 233, 236 (App. Div. 2014). Here, the Court should not permit the HMFA's "legal determination to stand if the court believes it to be error." In re Board's Main Extension Rules N.J.A.C. 14:3-8.1, 426 N.J. Super. 538, 548 (App. Div. 2012).

In short, this Court must conduct its own legal interpretation to reconcile the conflicting statutory provisions. As set forth in their merits brief, Appellants contend that the more specific statute, Section 313.3 that is titled in relevant part "Uniform Housing Affordability Controls, update", must govern.

III: N.J.S.A. 52:14B-4(A) Does Not Create a Non-APA Exception.

The HMFA claims "the simplest way to harmonize Section 321(f) and Section 313.3(b) . . . is to read the use of 'pursuant to' to cross reference the APA's own incorporation of other law." (Sb12). Although N.J.S.A. 52:14B-4(a) states that notice and comment is required "except as may be otherwise provided," this provision does not then create an APA exception pursuant to P.L. 2024, c.2.

The Court's "primary objective is to ascertain the intent of the Legislature by first looking at the plain words of the statute." DiProspero v. Penn, 183 N.J. 477, 492 (2005). "If the statute is clear and unambiguous on its face and allows for only one interpretation," the Court should "delve no deeper than the act's literal terms[.]" Lewis v. Bd. of Trs., Pub. Employees' Ret. Sys., 366 N.J. Super. 411, 415 (App. Div. 2004) (citations omitted). "Courts must also avoid interpretations that lead to absurd results." N.J. Republican State Comm. v. Murphy, 243 N.J. 574, 592 (2020).

The instant case presents an issue of statutory interpretation, insofar as this Court must determine if the Legislature intended that the UHAC regulations expressly required notice and comment under Section 313.3(b), as Appellants contend, or that an APA exception applies as provided under Section 321(f).

The Legislature evinced an express intent in Section 313.3(b) to have UHAC regulations adopted pursuant to notice and comment in accordance with the APA. The Legislature then provided differently in certain respects in Section 321(f). It would strain credulity for this Court to reconcile this issue of statutory interpretation by turning to another statute, the APA, and deciding that an exception contained in same somehow negates the Section 313.3(b) provision requiring notice and comment. This interpretation contradicts several canons of statutory interpretation. It would improperly render Section 313.3(b) surplusage and lead to the absurd result that an APA requirement is somehow negated by the APA itself. It would also violate

our case law promoting a public interest in notice and comment. See N.J. Animal Rights All. v. N.J. Dep't of Envtl. Prot., 396 N.J. Super. 358, 372 n.3 (App. Div. 2007) (where the substantial public interest in requiring notice and comment precluded the Court from excusing non-compliance, "even on an interim basis")

In the affordable housing context, our Supreme Court has found that the prior COAH rules "are subject to the Administrative Procedure Act" and "[a]bsent 'an imminent peril to the public health, safety, or welfare,' the APA requires public notice and an opportunity for comment before adoption of any rule." In re Plan for the Abolition of the Council on Affordable Hous., 214 N.J. 444, 451 (2013). Thus, it is reasonable for Appellants to demand compliance with the APA in the affordable housing space, and this Court should reject the HMFA's contentions.

IV: P.L. 2024, C.2's Authorization of Interim Regulations Without Notice and Comment Violates Due Process.

First, the HMFA argues that "interim rulemaking is permissible in certain instances and is accordingly not a deprivation of due process—particularly when expressly authorized by statute." (Sb16). Although the HMFA cites N.J.S.A 34:1B-287(a) and N.J.S.A. 2A:17-56.66 to support this contention, it fails to identify a corresponding opinion holding that the absence of notice and comment does not violate due process. The existence of certain statutes allowing for interim rulemaking does not make them constitutionally valid, especially given that nothing in the Mount Laurel doctrine supports eliminating due process.

But even if evaluated, a closer evaluation of these provisions further reveals the pitfalls in the HMFA's arguments. Although N.J.S.A 34:1B-287(a) authorizes interim rulemaking notwithstanding the requirements of the APA, it restricts such authority to certain provisions of the Economy Recovery Act of 2020—Sections 9 through 19. N.J.S.A 34:1B-274(a) and N.J.S.A. 34:1B-369 require rulemaking in accordance with the APA limited to Sections 2 through 8 and 102 through 105, respectively. Unlike the Economy Recovery Act of 2020, P.L. 2024, c.2 has two conflicting statutory provisions that are not expressly limited to certain sections of the Law. The second statutory provision cited by the HMFA, N.J.S.A. 2A:17-56.66, authorizes interim rulemaking for a period not to exceed six months, whereas Section -321(f) authorizes interim rulemaking for 12 months. Thus, the temporal authorization is not the same.

In re Dep't of Insurance's Order Nos. A89-119 & A90-125, 129 N.J. 365, 382 (1992) is similarly unavailing. There, State Farm argued that administrative orders establishing maximum flex rates were "rules" within the meaning of the APA and were therefore subject to notice and comment. Id. at 380. The Court "agree[d with the State] that statutory notice and comment [was] not required for the annual orders." Ibid. In this context, the Court enunciated the standalone sentence cited by the HMFA, that "[n]ot every action of an agency, including informal action, need then be subject to the formal notice and comment requirements of N.J.S.A. 52:14B-

4." Ibid. Our Supreme Court then confirmed that at least some process is required for administrative action: "the fact that the agency is not subject to the strict requirements of N.J.S.A. 52:14B-4 does not mean that no process is required." Ibid. "The agency may tailor the procedures to the necessities of the circumstances and shorten the comment periods as it deems reasonable." Ibid. Therefore, In re Dep't of Insurance's Order Nos. A89-119 & A90-125 supports Appellants' position.

The HMFA also relies on federal caselaw to argue that notice and an opportunity to be heard is not constitutionally required for "generally applicable rules like the UHAC." (Sb17). But this argument contravenes the APA, which defines "rules" subject to notice and comment as "agency statement[s] of **general applicability** and continuing effect." N.J.S.A. 52:14B-2 (emphasis added). The cases cited by the HMFA nevertheless are inapplicable. Philly's v. Byrne, 732 F.2d 87 (7th Cir. 1984) involved a Section 1983 suit challenging the operation of a local-option liquor law; United States v. Fla. E. C. R. Co., 410 U.S. 224 (1973) reaffirmed that the phrase "after hearing" in Section 1(14)(a) of the Interstate Commerce Act is not the equivalent to notice and comment under the federal APA; and Logan v. Zimmerman Brush Co., 455 U.S. 422, 442-43 (1982) found a violation of due process under a generally applicable law because "claimants with identical claims, despite equal diligence in presenting them, would be treated differently, depending on whether the Commission itself neglected to convene a hearing within the

prescribed period." Id. at 443. As such, these cases do not advance the proposition that interim rulemaking without notice and comment does not violate due process.

Although the HMFA claims "the APA itself relaxes the notice-and-comment requirement in certain circumstances," (Sb17), this argument is misleading. N.J.S.A. 52:14B-3 prescribes "[a]dditional requirements for rule-making," separate from notice and comment. These additional requirements are inapplicable in certain circumstances, such as when the rulemaking is "subject to a specific statutory authorization requiring promulgation in a lesser time period." N.J.S.A. 52:14B-3(b). While N.J.S.A. 52:14B-4(b)-(c) authorize rulemaking without notice and comment when the rule prescribes the organization of an agency or when the administrative agency finds that an imminent peril requires rule adoption in less than 30 days' notice, these circumstances are not present here.

V: The HMFA Improperly Relied on Private Parties' Comments to Satisfy the APA's Notice and Comment Requirement.

The HMFA completely overlooks Appellants' as-applied challenge, asserting it "did not issue these interim rules in secret, or in a vacuum." (Sb18). In May 2024, it held roundtables with stakeholders and in October and December 2024, it conducted two meetings with the League of Municipalities. (Sb18-19). As such, the HMFA represents "Municipal interests were thus consistently represented in stakeholder engagement and had the opportunity to (and did) provide comment on the potential changes." (Sb19). To be clear, Appellants did not receive notice or

participate in any of the meetings conducted by the HMFA. Even if they did, it defies logic to claim that a New Jersey nonprofit corporation represented the interests of each of New Jersey's over 500 political subdivisions, each themselves body politics, as a matter of law.

Moreover, our Supreme Court has explicitly rejected the HMFA's position that an agency's reliance on private parties' comments satisfies the agency's notice and comment obligation under the APA. In re Provision of Basic Generation Serv. for Period Beginning June 1 2008, 205 N.J. 339 (2011). This case involved a challenge to the Board of Public Utilities's ("BPU") failure to comply with the APA's notice and comment obligations before taking administrative action. Id. at 343. The Court concluded that "the means chosen by the BPU for promulgating its rule-type order were insufficient to meet even a lower threshold of process -- specifically a minimum level of notice and opportunity for comment -- for those affected." Id. at 352.

> We hold that in the muddled circumstances that transpired, the duty to provide clear notice that would enable a meaningful opportunity for comment is incumbent on the agency itself. **The BPU was not entitled to rely on the comments of private parties to satisfy its basic administrative law obligation to act with transparency through the provision of prior notice and opportunity for comment.**
>
> [Id. at 344 (emphasis added)].

Here, the Court should similarly reject the HMFA's impermissible attempt to rely on private comments from selected stakeholders and municipal representatives to excuse its obligations under the APA. In accordance with Supreme Court precedent, the Court should reject the HMFA's unlawful attempt to rely on private comments to issue rulemaking without notice and comment to all interested parties.

VI: The Court Should Invalidate the Rules Pending Notice and Comment.

The proper remedy in this matter is immediate invalidation of the Rules, pending notice and an opportunity for comment. The HMFA argues the regulations should be kept in place until promulgation of the final rules, a process that "will be completed by December 20, 2025." (Sb19-20). It contends "'immediate invalidation would disserve the important institutional [and] public' interests at stake," citing Grimes v. N.J. Dep't of Corr., 452 N.J. Super. 396, 408 (App. Div. 2017) (Sb20).

But Grimes's concerns regarding immediate invalidation are not present here. There, the New Jersey Department of Corrections informally adopted a policy prohibiting inmates to place phone calls to cellular, business and non-traditional telephone service numbers for security reasons." Id. at 399. Immediate invalidation of the calling policy "would [have left] a void and create a sudden disruption detrimental to important interests to inmates, DOC and the public." The other cases cited by the HMFA also seek to prevent a regulatory void and disruption of essential services. Unlike these cases, the subject Rules do not concern essential services.

New Jersey courts have vacated rulemaking that was promulgated in violation of the APA and due process. In In re Provision of Basic Generation Serv. for Period Beginning June 1 2008, our Supreme Court, "as a matter of due process," "vacate[d] the decision authorizing the pass-through of costs to ratepayers pending a new BPU proceeding addressing the subject." 205 N.J. at 362. The "matter [was] remanded to the BPU to commence the process anew, in order to provide the regulated parties and the public with notice and an opportunity to comment on the proposed pass-through of increased energy supplier costs." Ibid.; see also In re Grant of Third Round Substantive Certification to Pennsville Twp., 2007 N.J. Super. Unpub. LEXIS 1844, at *6, 8 (App. Div. Jan. 25, 2007) ("require[ing] that COAH suspend application of the June 14, 2006 LITC policy change pending the initiation and completion of the APA rule-making process" as "municipalities and developers [were] entitled to notice and an opportunity to comment").

The HMFA paradoxically argues that because the Rules will change in December 2025, "regulated parties would have then to adapt to that regulatory change after most municipalities have submitted their Fourth Round fair share plans, rather than at the outset of the Fourth Round." (Sb21 (emphasis in original)). To evaluate this argument, Appellants wrote Respondent's counsel and counsel to the State of New Jersey, Administrative Director of the Courts, and members of the Affordable Housing Dispute Resolution Program, inquiring about the process by

which a municipality can avail itself of the new rules that include notice and comment.[1] No response has been received as of the date of this filing. Unless and until the Appellants and the rest of New Jersey's municipalities receive any such guidance, they are forced to operate under the illegal rules that they challenge and without any stated mechanism to complete a housing element and fair share plan (that is due by June 30, 2025 under the Law) with the benefit of the actually legally adopted rulemaking when that occurs – with Respondents indicating in December.

The HMFA also contends a stay "would prove disruptive for numerous non-party developers and municipalities and potentially delay construction of Fourth Round affordable housing units." (Sb21). Essentially, the HMFA agrees with Appellants that re-adaption to new regulations in the next new months will prove disruptive and cause unnecessary delay, "the very uncertainty the Legislature intended to avoid." (Sb21). But this alone proves why the Rules should be vacated pending proper notice and comment, which is necessary to prevent the detrimental effect of New Jersey having to determine affordable housing for the next ten years, all based upon a set of illegal rules.

[1] The HMFA provided notice of this formal rulemaking on June 13, 2025. Some of the provisions appear more favorable to New Jersey's municipalities than those contained in the emergency rulemaking under review.

CONCLUSION

For the foregoing reasons, the Court should invalidate the HMFA Rules pending promulgation of new controls in compliance with the Administrative Procedure Act and P.L. 2024, c. 2.

Respectfully submitted,

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In re New Jersey Housing and Mortgage Finance Agency Housing Affordability.	Superior Court of New Jersey Appellate Division Docket No. A-1247-24 On Appeal From: New Jersey Housing and Mortgage Finance Agency **CIVIL ACTION** **(Mount Laurel)**

AMICUS CURIAE BRIEF OF FAIR SHARE HOUSING CENTER IN RESPONSE TO THE APPELLANTS' BRIEF SEEKING TO INVALIDATE HMFA RULEMAKING

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PRELIMINARY STATEMENT

The Appellants in this matter have made clear from the date of the passage of P.L. 2024, c.2, that they intend to delay the implementation of this monumental legislation, and New Jersey's constitutional requirements concerning affordable housing in any way they can achieve. The claims brought in this case have no more merit than the claims these same parties brought before the trial court and earlier appeals and have now been rejected by both courts, repeatedly.

These Appellants have made it clear that they disagree with the decision by 73 legislators of both parties, including the Speaker and the Senate President who sponsored the bill, and the Governor to pass this legislation. Furthermore, Appellants have repeatedly expressed their disagreement with having to comply with their constitutional obligations for the Fourth Round, which indisputably begins July 1, 2025, and have sought through both the political process and through the courts to halt the process for years to come.

In furtherance of the unyielding attempts to delay the process in any manner they can achieve, the Appellants have also attacked different elements of the statute, including the requirements to update the Uniform Housing Affordability Controls here.

The Appellants' arguments must fail because the Legislature clearly intended for the HMFA to adopt interim UHAC rules followed by a formal rulemaking process and did so with good reason. Additionally, the Appellants' attempts to bootstrap this challenge with the process playing out before the Affordable Housing Dispute Resolution Program must be rejected.

The court should reject the Appellants' attempts to stymie the process underway to construct more affordable homes in New Jersey and to delay the regulations that will ensure that New Jersey's working families have access to those homes.

FSHC'S STATEMENT OF INTEREST AS PROPOSED *AMICUS CURIAE*

FSHC is a non-profit organization that represents the interests of lower-income New Jerseyans by advocating for affordable housing and racially- and economically-integrated communities, particularly through enforcement of the Mount Laurel doctrine. FSHC has been engaged in this work over the half century since the New Jersey Supreme Court first decided Mount Laurel I in 1975. See S. Burlington Cty. NAACP v. Mount Laurel, 67 N.J. 151 (1975) (Mount Laurel I). The Supreme Court has explicitly recognized FSHC's essential role in protecting the interests of lower-income people to secure affordable housing, designating it a key interested party in Mount Laurel declaratory judgment proceedings. See Mount Laurel IV, 221 N.J. at 23.

As proposed *amicus curiae*, FSHC seeks to assist this court in understanding the historical and legal context in which the case arises and to give voice to the lower-income people whose rights are implicitly at the center of this case.

STATEMENT OF FACTS & PROCEDURAL HISTORY[1]

A. The Legislature Enacted P.L. 2024, c.2, Answering the Judiciary's Call to Amend the New Jersey Fair Housing Act after the Council on Affordable Housing Failed to Effectuate its Duties and was Declared "moribund."

In successive Mount Laurel cases, the Supreme Court has repeatedly called on the Legislature to act and expressed strong deference to the Legislature's action. In Hills Dev. Co. v. Bernards, 103 N.J. 1, 21 (1986), the Court upheld the Fair Housing Act of 1985 (FHA), reversing several trial court decisions below, and finding "particularly strong deference owed to the Legislature relative to this extraordinary legislation." After the Council on Affordable Housing (COAH) became "moribund," the Court in three successive decisions strongly invited the elected branches to amend the FHA, emphasizing broad deference and the lack of a "straightjacket" in advancing changes. In re Adoption of N.J.A.C. 5:96, 215 N.J. 578, 586 (2013); In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1, 6 (2015) (Mount Laurel IV); In re Decl. Judgment Actions., 227 N.J. 508, 531 (2017) (Mount Laurel V).

[1] The statement of facts and procedural history are combined because they are inextricably intertwined.

In enacting P.L. 2024, c.2, the Legislature answered the New Jersey Supreme Court's call for alternative approaches to implementing the Mount Laurel doctrine. The legislation is the first comprehensive legislative response to the Mount Laurel doctrine since 1985.

The Legislature, in accordance with its desire to "eliminate the lengthy and costly processes. . . that have characterized both the Council on Affordable Housing and court-led system." N.J.S.A. 52:27D-302(n), rebalanced the obligations under the law under all three branches. The Legislature provided "appropriate standards are established by the Legislature to be applied throughout the State, including more clarity on calculation on fair share affordable housing obligations," to reduce significantly the amount of interpretation needed from the other branches. N.J.S.A. 52:27D-302(n). The Legislature assigned to the Department of Community Affairs (DCA) and the Housing and Mortgage Finance Agency (HMFA) certain rulemaking and guidance functions, including DCA initially calculating fair share obligations and HMFA updating its previously promulgated Uniform Housing Affordability Controls. The Legislature assigned the role of resolving disputes as to fair share obligations or municipal plans to the judicial branch, consistent with the Judiciary's traditional function in resolving disputes between parties.

The statute allows municipalities to choose one of three routes: (1) adopt a binding resolution, including calculation of the municipal fair share number, to enter

the new Affordable Housing Dispute Resolution Program (hereinafter, the "Program") no later than January 31, 2025; (2) file a declaratory judgment action as has been allowed since even before the original FHA and that became the predominant means of voluntary compliance after Mount Laurel IV; or (3) wait to be sued in exclusionary zoning litigation. N.J.S.A. 52:27D- 304.1(f)(1)(b). All of these means of resolving disputes over a municipality's fair share obligation and plan are bound by the new, far more specific standards under P.L. 2024, c.2., and thus leave a far smaller scope of potential issues to adjudicate than the post-Mount Laurel IV landscape.

B. The Uniform Housing Affordability Controls implement the New Jersey Fair Housing Act by governing how affordable homes in New Jersey are created and administered.

P.L. 2024, c.2, required New Jersey's Housing Mortgage Finance Agency ("HMFA") to update the Uniform Housing Affordability Controls ("UHAC") "no later than nine months following the effective date of P.L.2024, c.2." N.J.S.A. 52:27D-321(f); accord N.J.S.A. 52:27D-313.3. The HMFA promulgated rules on December 19, 2024, within the nine-month deadline.

HMFA first adopted the UHAC regulations in 2001, then amended them in 2004, and has not updated them since prior to the passage of the new statute. UHAC ensures that affordable homes are created and administered in accordance with the mandates of the Mount Laurel doctrine and Fair Housing Act. The regulations ensure

that affordable homes are actually occupied by low- and moderate-income households and fairly marketed to low- and moderate-income families across each region in New Jersey. The regulations notably do not have any bearing on calculation of municipal fair share obligations.

As to the Procedural History in this matter, and the related matters brought by this group of appellants FSHC incorporates by reference the Procedural History and Statement of Facts in the June 9, 2025 submission submitted on behalf of the Respondents as it accurately describes these appellants' ongoing and unyielding attempts to stymie the Mount Laurel process for the last ten months.

LEGAL ARGUMENT

I. The Uniform Housing Affordability Controls Regulations are Critical to Lower-Income Households Having Access to Affordable Housing.

Since the beginning, it has been clear that simply building affordable housing was insufficient to ensure that New Jersey's working families have access to safe, decent affordable housing. There needs to be appropriate controls in place to ensure, among other things, that this housing: a) remains affordable for a long period of time, b) is administered properly as affordable housing, and c) that lower-income households have actual access to this housing.

Initially, this was attempted by having courts making ad hoc and, at times, unspecific demands of developers as part of judgments of compliance in builders

remedy cases to, for instance, record deed restrictions and post advertisements in places most likely to attract lower-income homebuyers.

Later, after the passing of the Fair Housing Act of 1985 and the creation of the Council on Affordable Housing ("COAH"), saw the first attempts to create regulations to deal with some of the issues relating to administering affordable housing. These rules were also scattershot and incomplete. At this time, there were also differing agencies promulgating different rules for the various programs they oversaw. For instance, along with COAH's regulations attempting to deal with general Mount Laurel affordable housing, there were also regulations created by the New Jersey Housing and Mortgage Finance Agency ("HMFA") designed to oversee the various programs funded by HMFA. There were also different rules created by the Department of Community Affairs ("DCA") implemented to oversee the programs run by DCA.

This situation of having a variety of different rules and regulations depending upon which programs were involved ultimately led to confusion, redundancy, and more difficulty in accessing housing or lower-income households. This state of affairs led to the creation of a uniform set of regulations to be first created in 2001. 33 N.J.R. 3432-3444 (October 1, 2001). The UHAC rules were adopted jointly by COAH, HMFA, and DCA.

These regulations were a godsend for New Jersey's working families. The regulations required, among other things, a uniform affirmative marketing process, uniform deed restrictions, and clear guidance on important items such as rents and annual rent increases. 36 N.J.R. 5713-47 (December 20, 2004). These regulations were updated in 2004 and anticipated to be updated periodically. (Id.)

The updates ceased when COAH stopped functioning properly. As the regulations were jointly adopted by COAH, DCA, and HMFA, they could not be updated further once COAH became "moribund." In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1,6 (2015) (Mount Laurel IV). Thus, the UHAC regulations were not updated in any way between December 20, 2004 and December 19, 2024 when the interim rules that are the subject of this appeal were adopted.

During this twenty-year period there were many statutory changes that were never incorporated into the UHAC regulations. For example, in 2008 the Fair Housing Act was amended to significantly alter the requirements around very low-income housing. (P.L. 2008, c. 46.) Previously, as incorporated into the 2004 UHAC rules, very low-income households were defined as "households earning no more than 35% of median income" and developers were required to provide "at least 10 percent of all low- and moderate-income units" as very low-income units. (36 N.J.R. 5713-47 (December 20, 2004).) In 2008, the FHA was amended to redefine very low-income households as those earning no more than 30% of median income. (P.L.

2008, c. 46.) This amendment also adjusted the requirement from 10 percent to 13 percent how many units were required to be available to very low-income households. (Id.)

Another major legislative change occurred in 2021 when the Fair Housing Act was amended to require all affordable homes to be advertised on the New Jersey Housing Resource Center, an internet website and phone system operated by the HMFA that provided a central hub of information for affordable housing units statewide. (P.L. 2020, c. 51.) Prior to this legislative change there was no requirement that affordable homes needed to be advertised online. UHAC was also never amended to incorporate this legislative change.

In fact, UHAC was never amended to reflect any real and practical changes in the housing world between 2004 and 2024. For instance, a search of UHAC as it existed prior to December 19, 2024 reveals that the words "internet" or "social media" do not even appear in the regulations even once. This is despite the fact that most consumers now conduct most of their searches for housing online, almost to the exclusion of other media, such as newspapers and/or radio.

These are but two examples, of which there are many more, of the ways in which COAH's failures led to UHAC regulations that were completely out of date and in some sections unusable. This resulted in significant ramifications for lower-income households. Just using the example of searching for housing, families were

required to utilize outdated modes of information to get information about affordable homes that become available. Likewise, to the extent administrative agents did publish the information online, it was often on their own website and not in the central location of the Housing Resource Center as required by the statute. This led to families needing to search in some cases in a dozen different locations and websites to find housing when the statute required it all to be put into one place.

Thus, when the legislature was considering what became P.L. 2024, c.2, it is not surprising that it chose to: a) place responsibility of adopting UHAC amendments with one entity, HMFA, rather than the prior practice of having it jointly adopted by three different agencies, and b) require HMFA to do an initial round of updates to UHAC to quickly have updates completed before the end of 2024 followed by formal rulemaking in 2025.

In FSHC's view, the HMFA did just that. It updated the regulations to include all of the statutory amended that occurred between 2004 and 2024, and other relevant updates that were necessary to bring the regulations up to date and completed that work by the end of 2024.

Additionally, the Appellants' insistence that HMFA somehow erred by engaging with parties prior to publishing the interim rules is misplaced. While FSHC is unaware of the universe of stakeholders that HMFA engaged with, just examining the stakeholders the Appellants' and Respondents' have asserted appears

to be the appropriate parties. For instance, besides FSHC, a Supreme Court-designated party that unquestionably represents the interests of a major stakeholders, the protected class, the HMFA also engaged with many of the other major players. This includes the New Jersey Builders Association (Ab8), non-profit developers, such as Habitat for Humanity (Ab10), and representatives of administrative agents, the entities responsible for actually implementing UHAC (Ab6-7). It is also clear that the HMFA engaged with the League of Municipalities. (Rb19.) The Appellants' demands that this process must come grinding to a halt until all of their suggested revisions are accepted is inappropriate, especially when formal notice and comment rulemaking is already under way.

II. The Appellants' Arguments Lack Merit Because the UHAC Rules Are Valid and Permitted by Statute.

The Appellants' arguments fail whether reviewing the agency action or reviewing the statute for constitutional compliance.

1. Appellants cannot meet the high burden for court deference to agency action.

When reviewing agency actions:

> the judicial role is restricted to four inquiries: (1) whether the agency's decision offends the state or federal constitution; (2) whether the agency's action violates express or implied legislative policies; (3) whether the record contains substantial evidence to support the findings on which the agency based its action; and (4) whether in applying the legislative policies to facts, the agency clearly erred in reaching a conclusion that could

> not reasonably have been made on a showing of the relevant factors.
>
> [George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8 (1994).]

Accordingly, a court accords an administrative regulation a presumption of reasonableness and validity. In re Twp. Of Warren, 132 N.J. 1, 26 (1993). Indeed, "[c]ourts should act only in those rare circumstance when it is clear that the agency action is inconsistent with the legislative mandate." Williams v. Department of Human Services, 116 N.J. 102, 108 (1989). An agency's "grant of authority is to be liberally construed to enable the agency to accomplish the Legislature's goals." Barry v. Arrow Pontiac, 100 N.J. 57, 70–71 (1985) (citations omitted).

In reviewing a challenge that FSHC brought to an earlier version of UHAC in 2007, the Appellate Division underscored that litigants face a heavy burden when challenging agency rulemaking: "Our strong inclination, based on the principle that the coordinate branches of government should not encroach on each other's responsibilities, is to defer to agency action that is consistent with the legislative grant of power" In re Adoption of UHAC, 390 N.J. Super. 89, 100 (App. Div. 2007) (quoting Lower Main St. Associates v. N.J. Housing and Mortgage Finance Agency, 114 N.J. 226, 236 (1989)). That court noted that, in the Mount Laurel context, "deference to agency action is considered particularly applicable to a court's review

of administrative regulations adopted by COAH to implement the FHA," and then applied the line of cases about deference to COAH to affirm UHAC. Id. at 101.

Here, Appellants have not met the high burden that comes with challenging rulemaking. The Legislature specifically authorized "[n]otwithstanding the provisions of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.) to the contrary, the agency, after consultation with department, may adopt, immediately, upon filing with the Office of Administrative Law, said regulations, which shall be effective for a period not to exceed one year from the date of the filing." N.J.S.A. 52:27D-321(f). HMFA complied with that provision. Appellants attempt to obfuscate the import of this provision by arguing that it only applies to part, and not all, of the rules adopted, and certain portions of the rules are only covered by N.J.S.A. 52:27D-313(b). But the plain language of the statute shows otherwise for two reasons.

First, Appellants argue that N.J.S.A. 52:27D-321(f) is only about "the durational control scope" of affordability controls. (Ab15, 22.) Appellants fail to appreciate that section 321 is the original section from the FHA that granted HMFA its authority to promulgate UHAC. Thus, the 2001 and 2004 UHAC regulations relied upon this section broadly. Indeed, even the first sentence of Purpose and Applicability section of UHAC directly reference this authority ("This subchapter is designed to implement the New Jersey Fair Housing Act [N.J.S.A. 52:27D-301 et

seq.[])], by assuring that low-and moderate-income units created under the [FHA] are occupied by low- and moderate-income households for an appropriate period of time.") To put it another way, section 313(b) did not exist in any form in the prior FHA, and still HMFA had the authority, as affirmed by the Appellate Division in 2007, to promulgate UHAC. In re Adoption of UHAC, 390 N.J. Super. 89.

Second, the amendments to section 321(f) in P.L. 2024, c. 2 reinforce the broad scope of this provision. The statute states that it grants HMFA the authority to "update or amend any controls previously adopted by the agency, in consultation with the Council on Affordable Housing, prior to the effective date of P.L.2024, c.2 (C.52:27D-304.1 et al.)." N.J.S.A. 52:27D-321(f) (emphasis added). It then specifically describes as subject matter for the controls to be updated as "including, but not limited to, requirements concerning bedroom distributions, affordability averages, and affirmative marketing." Ibid. Appellants complain about literally every one of these specific examples provided by the Legislature as "provisions that exceed the durational control scope of Section 321(f)." (Ab22.) Appellants cite "[a]mending the affordability averages and bedroom distributions" and "ensuring that developers and administrative agents are marketing units" as examples of where HMFA has supposedly exceeded the scope of section 321(f). Appellants improperly ask this court to substitute their judgment for the plain language of the Legislature.

The statute's plain language allows HMFA to follow the process established by section 321(f) to amend any of the controls it previously promulgated.

Because the plain language of section 321(f) allows HMFA to follow the procedure it did, Appellants cannot meet their burden of showing the agency's action clearly frustrates the legislative mandate.

2. To the degree that there is any ambiguity in P.L. 2024, c.2, the HMFA's interpretation is entitled to deference with regard to its rulemaking and is consistent with the statute.

As noted above, section 321(f) plainly authorizes HMFA's action below. Under principles of agency deference and statutory interpretation, Appellants have not shown how section 313(b) invalidates the wording of section 321(f). To prevail Appellants need to show that "it is clear that the agency action is inconsistent with the legislative mandate." Williams v. Department of Human Services, 116 N.J. at 108. An agency's interpretation of its authorizing statute is "interpretation of the operative law is entitled to prevail, so long as it is not plainly unreasonable." Waksal v. Dr., Div. of Taxation, 215 N.J. 224, 231 (2013) (citation omitted).

Appellants do not carry their burden in their brief to show the agency's reading of section 321(f) and section 313(b) together is plainly unreasonable. First, the APA allows for the two provisions to be harmonized. Appellants rely on section 313(b)'s inclusion of a phrase that that the rules be adopted pursuant to the "'Administrative Procedure Act,' P.L. 1968, c.410 (C.52:14B-1 et seq.)" Within the APA, N.J.S.A.

52:1B-4 expressly requires an agency to follow the Administrative Procedure Act process "[p]rior to the adoption, amendment, or repeal of any rule, except as may be otherwise provided." (emphasis added). The provision "except as may be otherwise provided" includes N.J.S.A. 52:27D-321(f)'s more specific discussion of the process followed by HMFA here. At the very least, HMFA's interpretation of how to harmonize these two provisions cannot be considered "plainly unreasonable."

Relatedly, in canons of statutory interpretation, "a more specific statutory provision usually controls over a more general one." State v. Gomes, 253 N.J. 6, 28 (citations omitted). Section 321(f) lays out a more specific process for HMFA to update its regulations than the general reference in section 313(b). Notably, it still does require compliance with notice and comment rulemaking—but allows adoption of interim rules for a limited duration first. This more specific provision controls over the generic reference to the APA in section 313(b), which as noted above in turn references a process which by statute already provides for alternative statutory procedures such as that noted in section 321(f). Furthermore, the language in section 321(f) providing for adoption of rules immediately upon filing was added to the legislation later in the process than the language in section 313(b), suggesting the

Legislature understood that language as consistent with the general language in 313(b) rather than somehow obliterated by it. [2]

There is no fair reading of the statute that the HMFA's interpretation of these two provisions is "plainly unreasonable." Thus, Appellants argument that HMFA's action violates the statute has no merit.

3. Appellants cannot succeed on their constitutional claims because the Legislature is permitted to enable specific agency rulemaking procedures different than the default rules the Legislature previously set forth in the Administrative Procedure Act.

Appellants also argue that it is "unconstitutional for the Legislature to have authorized and the HMFA to have promulgated regulations using a process that denies the Municipalities. . . with any opportunity to comment." (Ab29.) Claims about a statute's unconstitutionality plainly belong in the Law Division. If somehow this court reaches this issue, Appellants still do not prevail.

The Legislature has time and time again provided for immediate effectiveness of rules upon adoption followed by full notice and comment under the APA, especially in major legislation. A search in Lexis for the statutory phrase used in section 321(f), "may adopt, immediately, upon filing with the Office of Administrative Law," yields over 100 results. See, e.g., School Funding Reform Act

[2] While the legislation in section 313(b) dates back to the prior session version of A4, which did not pass, the 321(f) language was only added in upon the reintroduction of A4 in the current session. Compare https://www.njleg.state.nj.us/bill-search/2022/A4/bill-text?f=A0500&n=4_I1 with https://www.njleg.state.nj.us/bill-search/2024/A4/bill-text?f=A0500&n=4_I1 (last accessed June 30, 2025).

of 2008, P.L. 2007, c. 360, §82 (in statute implementing Abbott, immediate adoption followed by notice and comment within 12 months); N.J.S.A. 34:1B-287 (immediate adoption followed by notice and comment within 360 days in Economic Recovery Act of 2020); N.J.S.A. 2A:17-56.66 (immediate adoption followed by notice and comment within 6 months in 1998 child support reform legislation). To claim that this commonplace practice is unconstitutional would upend longstanding practice and essentially constitutionalize the Administrative Procedure Act's timeframes. Nothing in the New Jersey Constitution supports such a result.

The only case that expressly challenged such a provision that FSHC has been able to find affirms such legislative language as providing sufficient authority to the agency to adopt the regulation "immediately." Asbury Park Bd. of Educ., 369 N.J. Super. at 489 (providing that similar language provided "express authority" to DOE for immediate adoption). Relatedly, the Supreme Court has held that "[n]ot every action of an agency, including informal action, need then be subject to the formal notice and comment requirements of N.J.S.A. 52:14B-4." In re Dep't of Insurance Order Nos. A89-119 & A90-125, 129 N.J. 365, 382 (1992). Flexible administrative processes are permitted "so long as the parties had adequate notice, a chance to know opposing evidence, and the opportunity to present evidence and argument in response, due process would fundamentally be satisfied." Board of Education of Plainfield v. Cooperman, 105 N.J. 587, 600 (1987). The Legislature's common

practice of authorizing time-limited immediate adoption, followed by a traditional notice and comment requirement, plainly meets this constitutional baseline.

III. Appellants cannot demonstrate any cognizable link between their obligations to submit a fair share plan June 30, 2025 and the Housing and Mortgage Finance Agency's adoption of updated regulations.

Appellants claim they are somehow harmed because they were "deprived the opportunity to provide comment" on HMFA's rulemaking, but then attempt to link that to participation before the Affordable Housing Dispute Resolution Program and filing a fair share plan by the June 30, 2025 deadline. If Appellants chose to participate in the process before the Affordable Housing Dispute Resolute Program outlined in P.L.2024 c.2., Appellants were merely required to submit their proposed fair share obligations for the Fourth Round by January 31, 2025 and after the obligations were definitively established to file a compliant fair share plan by June 30, 2025. P.L.2024 c.2.,'s provisions governing the optional fair share number and plan review before the Program are completely unrelated to the subject matter covered in UHAC.

The UHAC regulations address how affordable homes are to be created and administered in New Jersey to ensure ongoing affordability. The regulations govern deed restrictions, affirmative marketing, income qualification for residents, and the like. They have always applied to all affordable housing created pursuant to the Fair Housing Act, and do not apply differently whether a municipality chooses to file

with the Program, file a declaratory judgment action, or waits to be sued in exclusionary zoning litigation. See N.J.A.C. 5:80-26.1; see also In re Adoption of Uniform Housing Affordability Controls, 390 N.J. Super. 89, 95 (App. Div. 2007).

Furthermore, while Appellants suggest that the UHAC regulations need to be in a fixed form following notice and comment for the fair share methodology process and/or plan review process to proceed (Ab30), nothing in the statutory text nor the history of the regulations supports that theory. While, as discussed below further, the statute specifically authorizes the process for adoption HMFA used, even if it had not, to read into the legislation without any language saying as much that the entire Fourth Round would stop if one deadline were not met does not comport with basic principles of statutory interpretation. See DiProspero v. Penn, 183 N.J. 477, 492 (2005) (The court "cannot write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment.")

Additionally, the UHAC regulations and its antecedents since initially authorized pursuant to the original N.J.S.A. 52:27D-321 in 1985 have sometimes been amended at the start of Mount Laurel rounds, other times not. The regulations have also been repeatedly amended in the middle of rounds.[3] Once COAH and

[3] COAH first adopted rules on controls on affordability in July 1986 as part of its initial adoption of Substantive Rules, prior to the beginning of the First Mount Laurel Round on July 1, 1987. 18 N.J.R. 1540 (August 4, 1986). COAH then amended its rules on affordability controls three times throughout the First Round. 20 N.J.R. 3124 (December 19, 1988); 21 N.J.R. 635 (March 6, 1989); 22 N.J.R. 3364-3365 (November 5, 1990). COAH changed these rules four more times throughout and just after the Second Round. 26 N.J.R. 2300 (June 6, 1994); 27 N.J.R. 3340-3342 (September 5, 1995); 30 N.J.R. 209-217 (January 5, 1998); 32 N.J.R. 3359-3560 (October 2, 2000).

HMFA jointly decided to move this authority over to UHAC under HMFA, two years after the Third Round began HMFA adopted the initial UHAC. 33 N.J.R. 3432-3444 (October 1, 2001). HMFA then further updated UHAC five years after the Third Round began. 36 N.J.R. 5713-47 (December 20, 2004). Since that time, no updates have occurred to UHAC until last month, even as over 350 municipalities filed plans implementing Mount Laurel IV. This history further reinforces that UHAC need not be in one sole fixed and determined form prior to a municipality determining its fair share obligation and adopting a fair share plan, and it indeed has frequently been amended during rounds and in the case of the most recent post-2015 Third Round process not updated at all prior to or during that process. As discussed below further the statute specifically authorizes the process for adoption HMFA used, even if it had not, to read into the legislation absent specific language that the entire Fourth Round would stop if one deadline were not met does not comport with basic statutory interpretation. DiProspero v. Penn, 183 N.J. 477, 492 (2005) (Courts "cannot write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment.")

The Appellants' claims on this front are simply not based in the law.

CONCLUSION

The Court should reject the efforts of these Appellants to undermine the implementation of P.L. 2024, c.2. The HMFA's actions below were clearly

authorized by the statute and the Appellant's policy arguments for why the HMFA or the Legislature should have done something different must be denied. The Court should thus allow these critical regulations to continue to be utilized.

Respectfully submitted,

Joshua Bauers

Dated: June 30, 2025

Joshua D. Bauers, Esq.
Counsel to Fair Share Housing Center

In Re New Jersey Housing and Mortgage Finance Agency Housing Affordability Controls, Special Adopted Amendments and Special Adopted New Rules	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-1247-24 On Appeal From: New Jersey Housing Mortgage Finance Agency CIVIL ACTION

APPELLANTS' RESPONSE TO THE FAIR SHARE HOUSING CENTER'S *AMICUS* BRIEF

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LEGAL ARGUMENT

I. DESPITE THE ACCUSATIONS MADE AGAINST APPELLANTS' MOTIVES FOR INSTITUTING THIS ACTION, THE FSHC HAS ALSO CHALLENGED THE UHAC REGULATIONS IN THE PAST.

The Fair Share Housing Center ("FSHC") accuses Appellants of attempting to "stymie the process underway to construct more affordable homes in New Jersey and to delay the regulations that will ensure that New Jersey's working families have access to those homes." FSHC Br. 2. At the same time, the FSHC admits it challenged "an earlier version of UHAC." FSHC Br. 12.

In In re Adoption of UHAC, 390 N.J. Super. 89 (App. Div. 2007), the FSHC objected to a 2004 amendment to the Uniform Housing Affordability Controls ("UHAC"), arguing that the Housing and Mortgage Finance Agency ("HMFA") failed to meet its "obligation under the Mount Laurel doctrine." Id. at 99. There, the regulation at issue, N.J.A.C. 5:80-26, "establishe[d] affordability ranges for the provision of housing pursuant to the Mount Laurel doctrine." Id. at 91. The FSHC brought this challenge even though it received notice of the proposed regulation and submitted comments to the Council on Affordable Housing ("COAH") and the HMFA. Id. at 97. In fact, the HMFA received and answered several comments "urging the HMFA to adopt a lower affordability average." Id. at 98.

In the case at hand, the FSHC objects to Appellants' motives for pursuing the subject litigation through a litany of *ad hominem* attacks, even though Appellants are the regulated parties that did not receive notice of the subject HMFA Rules and were unable to provide comments. Any attempt by the FSHC to preach from a moral ground for challenges related to the UHAC regulations is meritless and plainly contradicted by its past legal battles to the UHAC regulations.

In the end, any party with standing has the right to appeal from agency rulemaking, and this Court's task is to determine whether the regulations are consonant with law. That is the judiciary's obligation as part of this call for judicial review. FSHC's attempts to characterize the intentions of the numerous Appellants in this matter are both baseless and legally irrelevant, and thus should be ignored by this Court.

II. THE HISTORY OF THE UHAC REGULATIONS IS IRRELEVANT TO THE NARROW ISSUE ON APPEAL.

The FSHC's claimed interest in the subject matter is to "assist this court in understanding the historical and legal context in which the case arises and give voice to the lower-income people whose rights are implicitly at the center of this case." FSHC Br. at 3. But the UHAC's history and any purported failures to amend it from 2004 to 2024 have no bearing on the narrow issue on appeal. In the case at hand, Appellants contend they were deprived of notice and comment, in violation of the Administrative Procedure Act ("APA") and P.L. 2024, c. 2 (the "Law"). Whether

the HMFA's failure to provide notice and an opportunity to comment requires invalidation of the Rules can and must be decided irrespective of UHAC's history. The fact that the State failed to promulgate UHAC regulations for a period does not in any way affect the analysis that this Court must conduct, which must inquire whether the subject regulations – adopted without notice and comment but with collusion with special interest groups including the FSHC – pass constitutional and legal muster. The claimed UHAC history does not have any applicability to the judicial inquiry at bar.

III. UNLIKE APPELLANTS, THE FSHC WAS GIVEN NOTICE AND AN OPPORTUNITY TO COMMENT ON THE SUBJECT RULES.

While the FSHC can tout the virtues of the nine-month provision that it claims authorized rulemaking without notice and comment, it does so having benefited from the alleged exception, as it received notice of the proposed rules and submitted substantive comments to the HMFA, while other parties such as Appellants had no such opportunity.

The record indicates that on October 23, 2024, the HMFA's Director for Policy and External Affairs, Jonathan Sternesky, emailed a copy of the "proposed UHAC language" to the FSHC. (Pa249). In his email, Sternesky wrote that the document was a "confidential draft and should not be shared externally of the meeting attendees." (Pa249).

On November 1, 2024, Adam Gordon profusely thanked Sternesky and the HMFA for "sharing the draft emergency rule changes to UHAC with [the FSHC]! [The FSHC] believe[d] there [was] a tremendous amount of progress in these rules and really appreciate[d] in particular the reimagining of UHAC's occupancy standards . . . . " (Pa248). The FSHC then submitted a memo containing 6 pages of proposed revisions to the UHAC Rules, containing significant detailed changes that the FSHC considered appropriate, many of which were ultimately adopted by the HMFA. (Pa251-257).

On November 15, 2024, following Sternesky's discussion with the FSHC on the "latest with UHAC," Esmé Devenney from FSHC emailed Sternesky, stating: "I just want to express how much we appreciate yours and everyone at HMFA's patience and diligence on this project. It's obvious to us you guys have been very thoughtful about your recommendations and we appreciate the time you've taken to listen and discuss with us and the various stakeholders." (Pa245-46).

Despite being the parties most directly regulated by the subject Rules, the HMFA did not afford Appellants these same exclusive opportunities. The FSHC's position relevant to the Rules presents a clear example of the constitutional infirmity created by the HMFA's interpretation of N.J.S.A. 52:27D-321(f) and N.J.S.A. 52:27D-313.3(b), and its decision to bypass notice and comment for interested parties while colluding with special interest groups like the FSHC.

IV. THE APA AND THIS COURT, NOT THE FSHC, SHOULD DICTATE WHO ARE THE "APPROPRIATE PARTIES" TO RECEIVE NOTICE AND COMMENT.

The FSHC attempts to justify the HMFA's engagement with some interested parties, arguing that "[w]hile the FSHC is unaware of the universe of stakeholders that HMFA engaged with, just examining the stakeholders the Appellants' and Respondents' have asserted appears to be the *appropriate parties*." FSHC Br. at 11 (emphasis added). According to the FSHC, the HMFA engaged with many of the "major players" such as the New Jersey Builders Association, Habitat for Humanity, "representatives of administrative agents," and the League of Municipalities. This so-called pool of *appropriate parties* certainly did not include the players directly regulated by the HMFA Rules—Appellants.

Pursuant to N.J.S.A. 52:14B-4(a)(1), prior to the adoption, amendment or repeal of any rule, the agency is required to provide at least 30 days' notice to those persons most likely to be affected by or interested in its intended action. This unquestionably included the New Jersey municipalities subject to the Rules including Appellants. As such, the HMFA cannot satisfy the APA's and our State Constitution's due process requirements by providing notice and comment to *appropriate parties*, as defined by the FSHC, while excluding those subject to the Rules. In other words, the FSHC's attempt to defend the special interest group

collusion that occurred is undermined by the APA's own requirements on parties to be noticed by rulemaking.

V. THE ORIGINAL FAIR HOUSING ACT, P.L. 1985, C. 222 REQUIRED RULEMAKING IN COMPLIANCE WITH THE APA.

According to the FSHC, "Appellants fail to appreciate that section 321 is the original section from the FHA that granted HMFA its authority to promulgate UHAC," given that "section 313(b) did not exist in any form in the prior FHA." FSHC Br. at 13-14. In response, Appellants contend that an attempt to reconcile statutory interpretation should place emphasis of a new section that the Legislature thought to establish that directly addresses the applicable standards for rulemaking, not amendments to a pre-existing provision.

Moreover, while the FSHC promotes the prior FHA terms, it bears noting that the FHA, as enacted by P.L. 1985, c. 222 and subsequently amended, never provided for any APA exception in any instance. P.L. 1985, c. 222 contained a single reference to the APA: "Within four months after the confirmation of the last member initially appointed to the council, or January 1, 1986, whichever is earlier, the council shall, in accordance with the 'Administrative Procedure Act,' P.L. 1968, c. 410 (C. 52:14B-1 et seq.), propose procedural rules." N.J.S.A. 52:27D-308, repealed by the Law. Subsequent amendments to the FHA also required rulemaking in compliance with the APA, as follows:

> N.J.S.A. 52:27D-307.5, repealed by the Law: The commissioner shall adopt and promulgate, in accordance with the provisions of the 'Administrative Procedure Act,' P.L.1968, c.410 (C.52:14B-1 et seq.), all rules and regulations necessary or expedient for the prompt and effective carrying out of the provisions and purposes of this act.
>
> N.J.S.A. 52:27D-311.2(b): The Commissioner of Community Affairs shall, on or before the first day of the seventh month next following the effective date of P.L. 2000, c. 126 (C. 52:13H-21 et al.) promulgate rules and regulations pursuant to the provisions of the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.) to effectuate the provisions of subsection a. of this section.
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> N.J.S.A. 52:27D-329.7(e): The commissioner shall promulgate rules and regulations, pursuant to the 'Administrative Procedure Act,' P.L. 1968, c.410 (C.52:14B-1 et seq.), to effectuate the purposes of P.L.2008, c.46 (C.52:27D-329.1 et al.)

Prior to the Law, no version of the FHA authorized rulemaking notwithstanding the requirements of the APA. There is no historical support in the FHA or the Mount Laurel doctrine indicative of the Legislature's intent to carve out an APA exception or our courts' approval of same. Consequently, the Law's creation of Section 313.3(b) (and nonexistence of this Section in the original FHA) does not support the applicability of Section 321(f) or the constitutionality of the subject APA exception therein.

VI. THE SUBJECT RULES ARE CONSTITUTIONALLY INFIRM.

The FSHC first contends that "[c]laims about a statute's unconstitutionality plainly belong in the Law Division." FSHC Br. 17. Yet, when Appellants attempted to plead this claim before the Law Division, the FSHC urged the trial court to dismiss the HMFA claims for lack of jurisdiction, as these claims properly belong in the Appellate Division—plainly contradicting its position before this Court. Indeed, throughout the subject litigation, the FSHC has taken paradoxical positions that have left Appellants with no forum to adjudicate their constitutional claims.

The FSHC further claims that even if this Court were to reach the constitutional issue, Appellants' constitutional claim fails because "[a] search in Lexis for the statutory phrase used in section 321(f) . . . yields over 100 results." FSHC Br. 17. In FSHC's view, so long as a lack of notice and comment by way of an APA exception is "a commonplace practice," it cannot be unconstitutional. This wide sweeping claim fails to reconcile the precise terms of APA exceptions and does not involve the instant as-applied challenge involving a nine-month exemption during which the subject agency engaged in widespread collusion with special interest groups. Viewed in that proper context, the Rules under review cannot be reconciled with the State Constitution's due process requirements.

As the FSHC admitted in its papers, "'so long as the parties had adequate notice, a chance to know opposing evidence, and the opportunity to present evidence and argument in response, due process would fundamentally be satisfied.'" FSHC

Br. 18 (quoting Board of Education of Plainfield v. Cooperman, 105 N.J. 587, 600 (1987). That is lacking here. Though the FSHC evidently received draft copies of the proposed UHAC language that were not made available to the public and was permitted to submit comments which were ultimately incorporated into the final Rules, Appellants were deprived of such opportunity.

The FSHC cites Asbury Park Bd. of Educ. v. N.J. Dep't of Educ., 369 N.J. Super. 481 (App. Div. 2004), asserting that this case "affirms such legislative language as providing sufficient authority to the agency to adopt the regulation 'immediately'" FSHC Br. at 18. The FSHC's reliance on Asbury Park is misplaced. There, the Appellate Division dealt with a challenge to the validity of regulations adopted by the Commissioner of Education regarding the amount of supplemental State aid to be disbursed to Abbott school districts in 2003-04. Asbury Park, 369 N.J. Super. at 483. The appellants argued that the regulations conflicted with a July 23, 2003 order of our Supreme Court. Ibid. In determining the validity of the regulations, this Court noted that its "sole responsibility [was] to determine whether the DOE regulations conform[ed] to the [Supreme] Court's order. Id. at 488. The Court did not decide the constitutional issue here, whether the absence of any rulemaking pursuant to notice and comment constitutes a violation of due process. There is also a distinction to be drawn between an exception for immediate rulemaking and for rulemaking after a nine-month period, which is sufficient time

for an agency to have followed the APA process. Therefore, Asbury Park is not instructive in this case.

CONCLUSION

For the foregoing reasons, the arguments advanced by the FSHC are meritless, and the Court should grant Appellants' requested relief in this appeal.

Respectfully submitted,

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