Thursday, September 4, 2025

VIA E-MAIL (jpeasco@njhmfa.gov)
Mr. Jim Peasco, Senior Legal Research Analyst
New Jersey Housing and Mortgage Finance Agency
637 South Clinton Avenue
PO Box 18550
Trenton, New Jersey 08650-2085

RE: New Jersey Housing and Mortgage Finance Agency ("HMFA")
Proposed Rule Change: 57 N.J.R. 1470(a) amending the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26.1, et seq. ("UHAC")
Proposal Number: PRN 2025-086 ("Rule")
Submitted by: Community Associations Institute – New Jersey ("CAI-NJ")

Dear Mr. Peasco:

CAI-NJ is a non-profit organization dedicated to protecting and advancing the interests of common-interest communities ("**CICs**") in New Jersey and the 1.4 million residents that live in them. CAI-NJ's mission is to build better communities by providing education, resources, and advocacy for homeowners, community managers, and association board members. It works to ensure effective governance and management of CICs through professional standards and legislative support. CAI-NJ is currently the second largest CAI Chapter in the world, with approximately 3,000 members out of the more than 50,000 members worldwide.

CAI-NJ is supportive of Governor Murphy and his Administration's efforts to create more affordable housing units within New Jersey. Historically, CICs have been among the most **affordable forms of homeownership**. Their shared maintenance responsibilities, smaller lot and unit sizes, collective amenities, and efficient land use often result in **lower purchase prices** and **reduced upkeep costs** compared to single-family homes. This has made them an ideal entry point for **young buyers purchasing their first home**, for those during transition periods in their career and personal lives, and as a practical downsizing option for **retirees on fixed incomes** who want to remain in their hometowns without the burden of maintaining a large property. By offering both affordability and community amenities, these developments have long supported **housing accessibility across life stages**. In fact, the New Jersey Legislature has made statutory findings to this effect. *N.J.S.A.* 45:22A-45.1(c). It is therefore no surprise that many low- and moderate-income housing units constructed over the past 40 years have been within CICs. It would be unfair, therefore, to categorize the owners of the so-called "market rate" units within CICs as more affluent than those owning the affordable units. The deviation between the two is often minor.

Further, most CICs undertake services that mirror those of municipalities, such as road, sidewalk, and storm water system maintenance, thereby reducing the burden on local governmental entities. The costs of those governmental-like services are typically shared proportionately by all owners, both market-rate and affordable.

We are therefore very concerned that HMFA's proposed Rule changes will have a drastic impact on the "missing middle" within New Jersey and, in turn, will **substantially worsen the affordability issue in New Jersey**.[1] These Rule changes will cause the owners and residents of the middle income CIC units to significantly subsidize the affordable unit owners to a wildly disproportionate degree, despite all owners – market and affordable – enjoying the exact same benefits of amenities, insurance protection, management, building and infrastructure maintenance and upkeep, etc. This will result in associations making cost-cutting measures that will cause significant safety hazards, will increase the accounts receivable of CICs due to owners who cannot afford to pay the increased fees, will decrease property values across the state, and will make it more difficult for families to obtain mortgages to buy a home in New Jersey. In short, the increase in common expense assessments attributable to the proposed Rules will drive a share of those with middle income housing incomes to no longer be able to afford owning units in a community where they are forced to subsidize the proportional assessments of affordable housing unit owners. Because of this additional financial burden on middle-income households, it will force a decrease in market values due to the inability of lower-income housing households to secure mortgages sufficient to pay the current market value of middle-income housing. In turn, this deprives existing middle-income housing owners of the generational equity that real estate ownership is expected to provide.

In proposed new Section *N.J.A.C.* 5:80-26.7(e), the HMFA proposes the following revisions:

> (e) The master deeds [of] **and declarations of covenants and restrictions for** affordable developments [shall provide no distinction] **may not distinguish** between [the] **restricted units and market-rate units in the calculation of any** condominium or homeowner association fees and special assessments **to be** paid by [low-and] **low- and** moderate-income purchasers and those **to be** paid by [market] **market-rate** purchasers. [Notwithstanding the foregoing sentence, condominium units] **Condominium or homeowner association fees and special assessments charged to affordable units shall be based on the common interest percentage and the full build-out budget. Affordable units in a condominium or homeowner association** subject to a municipal ordinance adopted before [October 1, 2001] **December 20, 2004**, which **ordinance** provides for condominium or homeowner association fees and/or assessments different from those provided for in this subsection [shall have such fees and assessments governed by said ordinance] **are governed by the ordinance. If the affordability controls on such units are extended by the municipality or by agreement between the municipality and the affordable homeowner, the existing fee structure will be maintained. Any increase to the**

[1] "Middle income" or "middle" housing is not coincident with the meaning of "moderate income" under HMFA Rules, rather it refers to housing affordable according to federal Department of Housing and Urban Development or other recognized standards for home ownership and rental costs and occupied or reserved for occupancy by households with a gross household income equal to or more than 80% but less than 120% of the median gross household income for households of the same size within the housing region in which the housing is located. "Moderate-income household" means a household with a household income more than 50 percent but less than or equal to 80 percent of the regional median income. *N.J.A.C.* 5:80-26.2.

> **homeowner association fee, condominium association fee, or amenity fee that would cause an owner of an affordable unit to exceed the housing costs specified in this subchapter is prohibited. If renovations or charges related to a special assessment do not impact or benefit affordable units, affordable unit owners may not be subject to the special assessment charge.**

We are hopeful that the HMFA will carefully consider the below comments to this proposed revision (the "**Rule**") and revise accordingly to achieve the goals of the New Jersey Fair Housing Act without adversely impacting other New Jerseyans.

1. **THE RULE WILL CAUSE SIGNFICANT FINANCIAL DAMAGE TO CICS AND WILL CREATE SIGNIFICANT SAFETY HAZARDS**.

The only way to comply with both the requirement that assessments "not be distinguished" between affordable and market units, and that affordable owners be "capped" on what they may be required to pay, would be to handcuff an association's ability to raise the capital necessary to operate without passing significant shortfalls onto the market owners. This would have adverse and devastating consequences.

The reality of the current market is that insurance premiums for CICs have rapidly increased due to various factors, most of which are beyond the control of individual CICs. Due to inflation and other factors, construction and repair costs have increased significantly over the last several years. It should also be noted that CICs may, from time to time, have extraordinary and unexpected needs to raise capital to repair defective construction or deal with emergency situations from increasingly frequent climatic disasters. In the aftermath of the tragedy of the Champlain Towers South collapse in Surfside, Florida, the New Jersey Legislature adopted laws requiring associations to raise assessments as high as necessary to reach a baseline funding model under its most recent capital reserve study. *N.J.S.A.* 45:22A-44.2. This Rule will place a considerable strain on associations already struggling to comply with the capital reserve funding requirements to ensure the structural integrity of all life safety features in a building. This will, in turn, do nothing more than inflate housing costs and deflate market values across the board in New Jersey.

Finally, any analogy to the rental market, in which landlords are required to pick up the shortfalls is misplaced. Unlike renters that are backstopped by a landlord for unexpected costs, in an association all of the funds must be derived from the homeowners, including those in affordable units. Under this Rule, rather than a commercial landlord being responsible, here other owners that may themselves be living paycheck-to-paycheck will be required to foot the bill.

Further, unlike many landlords in a rental setting, many associations perform what were previously viewed as solely governmental functions. This includes storm water management, road paving and maintenance, roadway snow removal, vehicular and parking enforcement, active recreation and passive recreation, and similar quasi-governmental services. To limit what an association may charge an affordable unit owner is analogous to limiting what a municipality may assess an affordable unit because an increase in taxes would increase housing costs beyond the original cost-of-housing

when the unit was bought. In the interim, affordable housing owners will still receive the benefit amenities and services that are not paying their share of.

2. **THE RULE EXCEEDS HMFA'S REGULATORY AUTHORITY.**

The HMFA cites to *N.J.S.A.* 52:27D-321(f) and *N.J.S.A.* 55:14K-5(g). These statutes are expressly specific on the authority vested with the HMFA and includes the following:

> 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, 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, 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, or restrictions on return on equity in the event of failure to meet the requirements of the program.

N.J.S.A. 52:27D-321(f).

Nowhere in this vesting authority does it authorize the HMFA to establish new Rules altering or capping a CIC's ability to assess its members, to alter the terms of existing master deeds and declarations, or to require innocent third party market rate owners to subsidize their affordable housing neighbors. Not only does it not contain such specific authority, but it also makes clear that the authority is limited to only those Rules that are "consistent with the controls as in effect immediately prior to the effective date of P.L.2024, c.2."

Administrative agencies cannot promulgate regulations that either exceed, contradict, or are inconsistent with state statute. *In re Agricultural, Aquacultural, and Horticultural Water Usage Certification Rules,* 410 N.J.Super. 209 (App. Div. 2009); *New Jersey Builders Ass'n v. Fenske*, 249 N.J.Super. 60 (App. Div. 1991).

The HMFA further points to *N.J.S.A.* 55:14K-5(g) as vesting authority, however that statute empowers the HMFA to adopt rules relative to public housing and discusses necessary consultations with public housing sponsors in connection with such rules. Clearly, this is inapplicable to the proposed Rule and the HMFA cannot rely upon authority vested under an entirely different statutory scheme. *See In re Agricultural, Aquacultural, and Horticultural Water Usage Certification Rules,* 410 N.J.Super. 209 (App. Div. 2009)(invalidating a DEP ordinance as *ultra vires* because it introduced concepts from the Freshwater Wetlands Protection Act into the enforcement of the Water Supply Management Act).

3. **THE RULE VIOLATES THE NJ CONDOMINIUM ACT.**

N.J.S.A. 46:8B-17 states: "The common expenses shall be charged to unit owners according to the percentage of their respective undivided interests in the common elements as set forth in the master deed and amendments thereto, or in such other proportions as may be provided in the master deed or by-laws." (emphasis added).

There are scores of CICs in New Jersey that do not base their assessments on each unit's common ownership interests. Many provide for uniform assessments regardless of the size of one's unit since they have the same access to amenities, services, and insurance coverage as all other owners. Other associations base their assessment proportionate to the square footages of the units, despite the ownership interests being calculated differently. The New Jersey Condominium Act authorizes associations assess based on various methodologies that are suitable to the property in question. The Rule contradicts the Legislature's intent under those statutory authorities.

As set forth above, the HMFA cannot adopt a rule that contradicts a state statute. Courts have noted that the alternative assessment methods provided for in the Condominium Act are "permitted, indeed, contemplated" by the Legislature. *See also Micheve, L.L.C. v. Wyndham Place at Freehold Ass'n*, 381 N.J.Super. 148 (App. Div. 2005)(holding that assessments imposed with a different allotment than prescribed in the master deed violates the Condominium Act).

4. **PROHIBITING ASSOCIATIONS FROM SPECIALLY ASSESSING AFFORDABLE OWNERS IS UNFAIR, INQUITABLE, AND VIOLATES THE CONDOMINIUM ACT**.

It is unclear what is meant by the following: "If renovations or charges related to a special assessment do not impact or benefit affordable units, affordable unit owners may not be subject to the special assessment charge." The term "special assessment" typically means a lump sum or installment assessment imposed outside of the regular budgetary process and is used to address shortfalls in the annual operating budget, to address unexpected expenses (such as higher snow removal expenses in a heavier-than-usual snow season), or to make emergent repairs to the common elements.

At best, clarity is needed on what constitutes an "impact" or "benefit." By virtue of being an owner in a CIC, all expenditures by an association validly authorized by its master deed or declaration impact and benefit all owners.[2] For example, if there was a single condominium complex that consisted of several buildings, with affordable units clustered in a particular building, would that result in a scenario where if a complex wide roof replacement is being performed, affordable units would only be

[2] See *Fox v. Kings Grant Maint. Ass'n, Inc.*, 167 N.J. 208, 770 A.2d 707 (2001), wherein the New Jersey Supreme Court confirmed the intent of the New Jersey Condominium Act in holding that "Because an individual who purchases a condominium unit receives a proportionate undivided interest in the condominium community's common elements the control of common elements is indivisible, and the right of any unit owner to use the common elements is a right in common with all other unit owners. …The result is that the unit owner has a fee simple title to and enjoys exclusive ownership of his or her individual unit while retaining an undivided interest as a tenant in common in the facilities used by all of the other unit owners." Thus, when each unit owner has an ownership interest is all common elements each owner benefits when those common elements are maintained, repaired, and replaced by the CIC.

required to contribute to the building where they are located, while other owners must contribute their share to all of the roofs? This would result in an extreme inequity to the market rate owners, many of whom themselves may be living on fixed incomes. It would also result in a complicated situation wherein every expenditure would have to be scrutinized to determine what "benefit" the affordable units are receiving other than maintaining their interest in the common elements, which is contrary to basic principles of common ownership, and will likely lead to costly litigation filed routinely challenging special assessments, burdening our courts and causing unnecessary cost increases to associations. This is inconsistent with the terms of the Condominium Act and no provision of P.L.2024, c.2, evidences a legislative intent to amend the Condominium Act nor does it provide that the regulatory authority granted permits an administrative agency to supersede other laws.

5. **THE RULE VIOLATES THE CONTRACT CLAUSE**.

There is no express language in the Rule or otherwise in the proposed UHAC revisions that limits these revisions to newly created CICs. In fact, by expressly referencing associations constructed subject to an ordinance existing prior to December 20, 2004, it appears that HMFA's intent is for this Rule to apply to existing CICs as well.

The governing documents of a CIC are contracts between the purchaser of a condominium unit and the association. In many instances, the express language of the master deed or declaration was approved by the Department of Community Affairs and the municipality in which the CIC is situated as a condition of its approval. In communities in which affordable units are subject to lower assessments for the initial duration of its affordability controls, the market-rate owners in those associations purchased their units with the knowledge that they were required to subsidize those assessments for the affordable housing units for a limited duration.

What the Rule suggests here is that a municipality can pay an affordable unit owner thousands of dollars to extend the affordability controls on that unit for upwards of another thirty (30) years and by doing so, it would require the market-rate owners to continue subsidizing those affordable owners for another thirty (30) years without consideration to the market owners and without recertification of the owners of the affordable unit owners. That is not fair, equitable, or legal as it violates the Contracts Clauses of both the US and NJ Constitutions, as this Rule fails to satisfy the three-part test established in *Berg v. Christie,* 225 *N.J.* 245 (2016), as it is not "reasonable and necessary".

6. **THE RULE VIOLATES THE PROHIBITION ON SPECIAL LEGISLATION UNDER ARTICLE IV, § 7, ¶ 9 AND UNIFORM RULES OF TAXATION UNDER ARTICLE VIII, § 1 OF THE NEW JERSEY CONSTITUTION**

The New Jersey Constitution provides in Article IV, § 7, ¶ 9, that the legislature may not pass special legislation relating to taxation or exemption therefrom. The imposition of an obligation on market owners residing in CICs to subsidize the cost of maintaining common elements owned by affordable owners is a tax imposed by the State even though the imposition on owners of market units goes directly to the benefit of affordable owners, rather than to the State and then to the affordable owners. As pointed out above, nothing contained in P.L.2024, c.2, authorizes the imposition of a charge, however denominated, on owners of market units in CICs. What the legislature cannot do without offending the New Jersey Constitution, an administrative agency may not do.

Further, Article VIII, § 1 of the State Constitution provides that property shall be assessed for taxes under general laws, and by uniform Rules, according to its true value. Here, however, under the proposed Rule, the State imposes a charge or tax only on owners of market units in CICs.

New Jersey State League of Municipalities v. Kimmelman, 105 N.J. 422 (1987), is instructive. In that case, the plaintiff challenged a state statute that prevented newly constructed single-family dwellings from being added to real property tax assessment list until certificate of occupancy had been issued and dwelling had actually been occupied. Our Supreme Court struck down the exemption of single-family dwellings from taxation because the exemption did not apply to all forms of property.

Here, it is the obverse. While the decision in Kimmelman found the legislation violated Article VIII, § 2 of New Jersey's Constitution, the proposed Rule violates Article VIII, § 1 by failing to impose a tax on all owners of property to support affordable housing. By the proposed Rule, the State would exempt all owners of property other than owners of market-rate units in CICs from subsidizing the cost of affordable housing.

7. **IF NOT AN UNLAWFUL TAX, THE RULE VIOLATIES THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, ¶ 20 OF THE NEW JERSEY CONSTITUTION.**

If it were determined that the Rule is not a State-imposed tax on market-rate unit owners in a CIC as argued in point 6 above, then it constitutes a taking by transferring money, the personal property of owners of market-value units to pay for the legal obligations of the owners of affordable housing whenever the proportional share of common expenses of a CIC as set forth in the master deed or declaration would cause the affordable owners to pay common expenses that causes their housing costs to exceed 28 or 33 percent (as proposed elsewhere in the Rules) of their income at the time they were approved to purchase an affordable unit.

Article 1, Paragraph 20 of the New Jersey Constitution is coextensive with the Takings Clause in the Fifth Amendment to the United States Constitution. (*Klumpp v. Borough of Avalon*, 202 N.J. 390, 405 (2010). The government may not take the property of a subset of the public – in this case market-rate owners – to cure a public-wide housing crisis ("As Justice Holmes noted, even 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' …**Those provisions prohibit '[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole**."). (Internal citations omitted and emphasis added). *Greenway Dev. Co. v. Borough of Paramus*, 163 N.J. 546, 553 (2000).

There can be no reasonable debate that New Jersey P.L .2024, c.2 addressed New Jersey's critical shortage of affordable housing and the failure of prior legislative efforts to respond to the Supreme Court's Mount Laurel mandate. In the recitals to that legislation, it is noted that:

The Legislature finds that:

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c. The interest of all citizens, including low- and moderate-income families in need of
affordable housing, and the needs of the workforce, would be best served by a comprehensive planning and implementation response to this constitutional obligation [as set forth in the Supreme Court's Mt. Laurel decision].

d. There are a number of essential ingredients to a comprehensive planning and
implementation response, including the establishment of reasonable fair share housing guidelines and standards, the initial determination of fair share by officials at the municipal level and the preparation of a municipal housing element, State review of the local fair share study and housing element, **and continuous State funding for low- and moderate-income housing to replace the federal housing subsidy programs which have been almost completely eliminated**. [Emphasis added.]

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h. The Supreme Court of New Jersey in its Mount Laurel decisions demands that
municipal land use regulations affirmatively afford a realistic opportunity for a variety and choice of housing including low- and moderate-cost housing, to meet the needs of people desiring to live there. While provision for the actual construction of that housing by municipalities is not required, they are encouraged but not mandated to expend their own resources to help provide low- and moderate-income housing.

These legislative findings make abundantly clear that the intent of the legislation under which the Rule was intended to address not only a public issue, but a constitutional issue as our Supreme Court first required 50 years ago in *Mt. Laurel I*. There can be no greater public need than the government complying with its constitutional obligations. Any attempt by the government to transfer a portion of its constitutional obligation to a subset of the New Jersey citizenry must be avoided as creating yet another governmental violation of the U.S. and N.J. Constitutions.

8. **THE RULE WILL ESCALATE TENSIONS BETWEEN MARKET AND AFFORDABLE OWNERS AND WILL CAUSE A NET NEGATIVE TO THE AFFORDABLE HOUSING INITIATIVES OF THIS ADMINISTRATION.**

In any community, a sense of unity and mutual respect is crucial for fostering long-term stability. The imposition of financial obligations on market-rate owners will fuel tensions between them and affordable housing owners. This division would not only undermine the spirit of collaboration but also create an 'us vs. them' mentality. Over time, this antagonism could erode the trust necessary to work together toward common goals, such as maintaining the affordability of the housing stock and supporting the goals of affordable housing initiatives. This Rule would ultimately undercut New Jersey's efforts to promote and sustain affordable housing in the state. By creating an adversarial relationship between affordable and market-rate owners, it will breed resentment towards affordable housing programs and policies. The Rule is direct attack on the very spirit of affordable housing – inclusivity and shared responsibility – making it harder to achieve the long-term housing goals the state has set.

9. **CICs AND MANAGEMENT COMPANIES ARE NOT EQUIPPED TO PERFORM THE CALCULATIONS REQUIRED TO COMPLY WITH THE RULE.**

The Rule places a limitation on increases to assessments if the increase will cause an owner of an affordable unit to exceed the housing costs specified in UHAC. Who is responsible for performing this calculation? CICs and their management companies have no experience whatsoever with such a task and would also require the affordable housing owners to submit sensitive financial information to their CIC on an annual basis. We expect that most management companies will refuse to take on the liability in performing a task in which they have no expertise or training. This also will not be a simple annual calculation. It will require an individual calculation for each unit, which will then require a very complex analysis of how many of an increase each unit could absorb, before passing on the shortfall to the market units. This administrative burden will add considerably to the association's common expenses, making housing even more expensive in New Jersey.

10. **THE RULE IS CONTRADICTORY AND VAGUE**.

The Rule is contradictory. In one part, it maintains the existing Rule that association fees and assessments are not distinguished between affordable units and market units, while in the balance of the provision establishes parameters which will make it impossible for such fees to be indistinguishable. The Rule is also vague. It provides no clarity on whether it is intended to apply to existing associations with existing master deeds and declarations or be prospectively applied only, and it provides no guidance as to what constitutes and "impact or benefit to affordable owners," and does not make clear whether the Rule supersedes the contractual language of existing master deeds and declarations, or whether an amendment to those documents are required. Vague laws deprive citizens of adequate notice of proscribed conduct and fail to provide officials with guidelines sufficient to prevent arbitrary and erratic enforcement. *State v. Borjas*, 436 N.J.Super. 375 (App. Div. 2014).

11. **IF THE RULE REQUIRES THAT EXISTING MASTER DEEDS AND DECLARATIONS BE AMENDED, THAT WOULD BE AN IMPOSSIBILITY.**

If it is not the HMFA's intent for the Rule to supersede the express language of master deeds and declarations, but rather to require associations to amend their documents to comply with the Rule, then that would be a virtual impossibility. Virtually all CICs require a supermajority of all owners to vote affirmatively to amend their governing documents, and many also require the approval of eligible mortgage holders within the association. To obtain a supermajority of owners to approve subsidizing a minority of homeowners will be unlikely to occur in most associations. While the law permits executive boards to amend their By-Laws to conform with new laws, it does not provide the same authority for the amendment of master deeds and declarations. *N.J.S.A.*45:22A-46d(5)(a).

12. **CONCLUSION.**

Considering the significant legal, administrative, and community challenges presented, implementation of the Rule in its current form would be detrimental to both the stability of CICs and the advancement of affordable housing in New Jersey. For these reasons, we strongly urge reconsideration and revision of the Rule to ensure that it is reasonable, equitable, clear, and administratively feasible – preserving both the integrity of our communities and the important mission of supporting affordable housing across the state.

Sincerely,

STEVEN MLENAK, ESQ.
President, CAI-NJ

MATTHEW EARLE, ESQ.
Chair, Legislative Action Committee, CAI-NJ

cc: All Via E-Mail
Angela Kavanaugh, CAI-NJ Executive Director
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