CHAPTER 93

SUBSTANTIVE RULES OF THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING FOR THE PERIOD BEGINNING JUNE 6, 1994

Authority

N.J.S.A. 52:27D–301 et seq., specifically 52:27D–307.

Source and Effective Date

R.1994 d.290, effective June 6, 1994.
See: 25 N.J.R. 5763(a), 26 N.J.R. 2300(a).

Executive Order No. 66(1978) Expiration Date

Chapter 93, Substantive Rules of the New Jersey Council on Affordable Housing for the Period beginning June 6, 1994, expires on June 6, 1999.

Law Review and Journal Commentaries

Ruling Could Trigger New *Mount Laurel* Skirmishes. Ann Snider, 146 N.J.L.J. No. 6, 477 (1996).

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SUBCHAPTER 1. GENERAL PROVISIONS

5:93–1.1 Short title; purpose; scope

(a) The provisions of this chapter shall be known as the "Substantive Rules of the New Jersey Council on Affordable Housing for the Period Beginning June 6, 1994."

(b) The purpose of this chapter will be the provision of criteria to be used by municipalities in addressing their constitutional obligation to provide a fair share of affordable housing for moderate and low income households.

(c) All municipalities within the jurisdiction of the Council are subject to evaluation, in accordance with the provisions of this chapter, for the period beginning on June 6, 1994.

5:93–1.2 Severability clause

If any part of this chapter shall be held invalid, the holding shall not affect the validity of remaining parts of these rules. If a part of these rules is held invalid in one or more of their applications, the rules shall remain in effect in all valid applications that are severable from the invalid application.

5:93–1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

"Accessory apartment" means a self-contained residential dwelling unit with a kitchen, sanitary facilities, sleeping quarters, and a private entrance, which is created within an existing home, or through the conversion of an existing attached accessory structure on the same site, or by an addition to an existing home or accessory building.

"Act" means the Fair Housing Act of 1985, P.L. 1985, c.222 (N.J.S.A. 52:27D–301 et seq.).

"Active recreation" means leisure time activities usually of a more formal nature and performed with others, often requiring equipment and taking place at prescribed places, sites or fields. Active recreation sites include swimming areas; playgrounds; tot lots; play fields; and tennis and other court game facilities. Active recreation shall not include areas designated for bike riding, hiking, walking and picnicking.

"Adjustment" means a modification and/or deferral of the municipal low and moderate income housing obligation, pursuant to N.J.S.A. 52:27D–307(c)(2) and N.J.A.C. 5:93–4.

"Agency" means the New Jersey Housing and Mortgage Finance Agency established by P.L. 1983, c.530 (N.J.S.A. 55:14K–1 et seq.).

"Affordable" means a sales price or rent within the means of a low or moderate income household as defined in N.J.A.C. 5:93–7.4.

"Alternative living arrangement" means a structure in which households live in distinct bedrooms, yet share kitchen and plumbing facilities, central heat and common areas. Alternative living arrangement includes, but is not limited to: transitional facilities for the homeless, Class A,B,C,D, and E boarding homes as regulated by the New Jersey Department of Community Affairs; residential health care facilities as regulated by the New Jersey Department of Health; group homes for the developmentally disabled and mentally ill as licensed and/or regulated by the New Jersey Department of Human Services; and congregate living arrangements.

"Approvable site" means a site that may be developed for low and moderate income housing in a manner consistent with the rules or regulations of all agencies with jurisdiction over the site. A site may be approvable although not currently zoned for low and moderate income housing.

"Authority" means the entity designated by the municipality for the purpose of monitoring the occupancy, resale and rental restrictions of low and moderate income housing units.

"Available site" means a site with clear title, free of encumbrances which preclude development for low and moderate income housing.

"Calculated need" means the low and moderate income housing obligation resulting from the procedures in N.J.A.C. 5:93–2. It is the result of subtracting reductions, prior cycle credits and the 20 percent cap from the precredited need. To the extent that the Council has knowledge of prior cycle credits and eligible reductions, these credits and reductions have been applied to the municipal housing obligation.

"Census subregion" means a geographic subdivision of the State as determined by the United States Bureau of the Census.

"Center" means a compact form of development with a core or node (focus of residential, commercial and service development) and a community development area that ranges in scale from an urban center to a regional center, town, village, and hamlet. This definition is in accord with and derived from the State Development and Redevelopment Plan.

"Certified household" means a household determined to be income eligible for a low or a moderate income housing unit by a municipal authority after the authority has verified the household's gross annual income, credit history and compared the household's family size to the occupancy requirements delineated in N.J.A.C. 5:93–9.1(b)14.

"Community capacity" means an estimate based on 20 percent of a municipality's existing 1993 housing stock, pursuant to N.J.A.C. 5:93–2.17.

"Conversion" means the conversion of existing commercial, industrial or residential structures for low and moderate income housing purposes.

"Council" means the New Jersey Council on Affordable Housing established under the Act and which has primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations in the State.

"DCA" means the New Jersey Department of Community Affairs.

"DEP" means the New Jersey Department of Environmental Protection.

"Developable site" means a site that has access to appropriate water and sewer infrastructure, and has received water consistency approvals from the DEP or its designated agent authorized by law to issue such approvals.

"Development fees" means money paid by an individual, person, partnership, association, company or corporation for the improvement of property as permitted in N.J.A.C. 5:93–8.

"DOT" means the New Jersey Department of Transportation.

"Durational adjustment" means a deferral of the municipal low and moderate income housing obligation based on the lack of infrastructure pursuant to N.J.S.A. 52:27D–307(c)(2) and N.J.A.C. 5:93–4.

"Environ" means that area of a municipality outside the development boundaries of a center. This definition is in accord with and derived from the State Development and Redevelopment Plan.

"Equalized assessed value" means the value of a property determined by the municipal tax assessor through a process designed to ensure that all property in the municipality is assessed at the same assessment ratio or ratios required by law. Estimates at the time of building permit may be obtained by the tax assessor utilizing estimates for construction cost. Final equalized assessed value will be determined at project completion by the municipal assessor.

"Exempt sales" means and shall include the transfer of ownership between husband and wife; the transfer of ownership between former spouses ordered as a result of a judicial decree of divorce or judicial separation, but not including sales to third parties; the transfer of ownership between family members as a result of inheritance; the transfer of ownership through an executor's deed to a class A beneficiary; and the transfer of ownership by court order.

"Fair market value" means the unrestricted price of a low or moderate income housing unit if sold at a current real estate market rate.

"Fair Share Plan" means that plan or proposal, which is in a form that may readily be converted into an ordinance, by which a municipality proposed to satisfy its obligation to create a realistic opportunity to meet its fair share of low and moderate income housing needs of its region and which details the affirmative measures the municipality proposes to undertake to achieve its fair share of low and moderate income housing, as provided in sections 9 and 14 of the Act, addresses the development regulations necessary to implement the housing element, and addresses the requirements of N.J.A.C. 5:93–7 through 11.

"Gross density" means the total number of dwelling units existing or permitted on a housing site divided by the total area of the tract. The result is expressed as dwelling units per acre.

"Gut rehabilitation" means those residential units or buildings that have either undergone substantial rehabilitation where the cost exceeds 50 percent of the physical value determined in accordance with per square foot construction cost guides such as W.S. Means and Company, and F.W. Dodge Company, or have had the electrical, plumbing and heating systems totally replaced.

"Head of household" means a person under whose name a housing unit is owned or rented.

"Household" means the person or persons occupying a housing unit.

"Housing element" means that portion of a municipality's master plan consisting of reports, statements, proposals, maps, diagrams and text designed to meet the municipality's fair share of its region's present and prospective housing needs, particularly with regard to low and moderate income housing and which contains at least those items identified in section 10 of the Act.

"Housing market area" means the geographic region from which it is likely that buyers or renters would be drawn for inclusionary development. The housing market area is the "housing region" as determined by the Council, in which an inclusionary development is located.

"Housing Region" means a geographic area, determined by the Council, of no less than two nor more than four contiguous, whole counties, which exhibit significant social, economic and income similarities and which constitute, to the greatest extent practicable, the Primary Metropolitan Statistical Areas (PMSA) as last defined by the United States Census Bureau.

"Inclusionary component" means the result of subtracting the rehabilitation component, credits (granted pursuant to N.J.A.C. 5:93–3), the impact of the 20 percent cap (pursuant to N.J.A.C. 5:93–2.16) and the impact of the 1,000 unit limitation (pursuant to N.J.A.C. 5:93–14) from the precredited need, provided the result shall not be less than zero. For a municipality that receives a vacant land adjustment pursuant to N.J.A.C. 5:93–4, the inclusionary component shall be initially synonymous with the realistic development potential.

"Inclusionary development" means a development containing low and moderate income units. This term includes, but is not necessarily limited to, new construction, the conversion of a non-residential structure to a residential structure and the creation of new low and moderate income units through the gut rehabilitation of a vacant residential structure.

"Indigenous need" means deficient housing units occupied by low and moderate income households within a municipality and is a component of present need. Municipal indigenous need, as a percentage of the total 1993 occupied housing stock, shall not exceed the percentage derived from dividing the deficient housing units occupied by low and moderate income households by the total 1993 occupied housing stock for the housing region in which the municipality is located.

"Initial occupancy" means the period beginning with the date on which the developer is granted permission by the local government to begin occupancy and ending on the date 95 percent occupancy is attained.

"Inventory" means that calculation undertaken by a municipality in accordance with the Fair Housing Act, N.J.S.A. 52:27D–329, in developing its housing element which accounts for its housing stock by age, condition, purchase or rental value, occupancy characteristics and type, including the number of units affordable to low and moderate income households in substandard housing capable of being rehabilitated, as provided for in section 10a of the Act.

"Judgment of repose" means a judgment issued by the Superior Court approving a municipality's plan to satisfy its fair share obligation.

"Landsat" means a satellite that maps land cover by interpreting spectral information reflected from the earth's surface.

"Low income housing" means housing affordable according to Federal Department of Housing and Urban Development or the standards included in this chapter for home ownership and rental costs, occupied or reserved for occupancy by households with a gross household income equal to 50 percent or less of the median gross household income for households of the same size within the housing region in which the housing is located, and which is subject to affordability controls promulgated by the Council.

"Low income tax credit" means an income tax credit granted for investing in a Federal program designed to produce low and moderate income rental units.

"Market rate units" means housing within an inclusionary development, not restricted to low and moderate income households, that may sell at any price determined by a willing seller and a willing buyer.

"Median aggregate household income above the floor" means the result of multiplying the number of households in the municipality as of 1990 by the 1989 municipal median household income above the floor.

"Median household income above the floor" means the result of subtracting the regional household floor income from the 1989 median municipal household income.

"Minority" means an individual who is a member of one of the following racial or ethnic groups:

1. Black: An individual having origins in any of the black racial groups of Africa, but not of Hispanic origin;

2. American Indian or Alaskan Native: An individual having origins in any of the original people of North America, and who maintains cultural identification through tribal affiliation or community recognition;

3. Hispanic: An individual of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin regardless of race; or

4. Asian or Pacific Islander: An individual having origin in any of the original peoples of the Far East, southeast Asia, and the Indian subcontinent or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands and Samoa.

"Moderate income housing" means housing affordable according to Federal Department of Housing and Urban Development or the standards in this chapter for home ownership and rental costs, occupied or reserved for occupancy by households with a gross household income in excess of 50 percent but less than 80 percent of the median gross household income for households of the same size within the housing region in which the housing is located, and which is subject to the Council affordability controls in this chapter.

"Multifamily unit" means a structure containing five or more dwelling units.

"Municipal estimated land capacity" means an estimate based on Landsat data, tax data and assumptions pertaining to density and set-asides used in developing the undeveloped land cap pursuant to N.J.A.C. 5:93–2.16 and assumptions pertaining to density and set-asides.

"Municipal need for new construction" means a calculation used to determine the 20 percent cap pursuant to N.J.A.C. 5:93–2.16.

"Municipal present need" means the sum of indigenous need and the municipal share of reallocated present need.

"Net density" means the total number of dwelling units within a designated portion of a tract divided by the total land area of the designated portion of the tract, including the open-space, roadways, parking areas and common facilities devoted exclusively to that portion of the tract. The result is expressed as dwelling units per acre.

"Non–conforming use" means a use or activity which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption, revision or amendment.

"Open-space" means any parcel or area of water or land essentially unimproved and set aside, dedicated, designated or reserved for public or private use or enjoyment or for the use and enjoyment of owners and occupants of land adjoining or neighboring such open space; provided that such areas may be improved with only those buildings, structures, streets and offstreet parking and other improvements that are designed to be incidental to the natural openness of the land.

"Overlay zone" means a zoned area of a municipality in which low and moderate income housing may be built as a matter of right in addition to another use. In approving such a zone, the Council may allow the existing use to continue and expand as a conforming use, but provide that when the prior use on the site is changed, the site shall produce low and moderate income housing or a development fee.

"Petition for Substantive Certification" means that petition which a municipality files, or is deemed to have filed, which engages the Council's mediation and review process.

"Planning area" means an area defined by a set of common criteria which focus on the degree and type of development or natural resources. Planning areas serve as organizing mechanisms for growth and development planning throughout the State. This definition is in accord with and derived from the State Development and Redevelopment Plan.

"Pre-credited need" means the municipal low and moderate income housing obligation resulting from subtracting filtering, residential conversion and spontaneous rehabilitation from the sum of indigenous need, reallocated present need, prior cycle prospective, prospective need and demolitions.

"Present need" means the sum of indigenous need and reallocated present need as determined by N.J.A.C. 5:93–2.5.

"Price differential" means the difference between the controlled unit sale price and the fair market value as determined at the date of a proposed contract of sale, after reasonable real estate broker fees have been paid.

"Priority" means a system of selecting applicants.

"Prior cycle credits" means credits granted by the Council for low and moderate income units constructed after April 1, 1980 as part of granting substantive certification for the 1987–1993 housing obligation. Prior cycle credits may be requested for eligible units, except for rehabilitated units, constructed between April 1, 1980 and December 15, 1986 in petitioning to address the 1987–1999 obligation.

"Prior cycle fair share" means the responsibility for low and moderate income housing established by the Council when the Council granted substantive certification for the 1987–1993 housing obligation.

"Prior cycle prospective need" means that portion of the 1987–1993 prospective need included in the 1987–1999 low and moderate income housing need calculations.

"Prospective need" means a projection of low and moderate housing needs based on development and growth which is reasonably likely to occur in a region or a municipality. See N.J.S.A 52:27D–304(j).

"Qualified non-profit" means an organization granted non-profit status in accordance with section 501(c)(3) of the Internal Revenue Service code.

"Realistic development potential" means the municipal obligation as calculated pursuant to N.J.A.C. 5:93–4.2(e).

"Reallocated present need" means that portion of a housing region's present need that is redistributed throughout the housing region.

"Receiving municipality" means, for purposes of a Regional Contribution Agreement (RCA), a municipality which agrees to assume a portion of another municipality's fair share obligation.

"Reduction" means a one for one deduction of precredited need based on a fair share plan to construct low and moderate income units, transfer low and moderate income units via a regional contribution agreement and/or zone for low and moderate income housing that implements a housing element that has been certified by the Council or the Superior Court. A reduction also includes bonus rental credits.

"Regional aggregate weighted median household income above the floor" means the result of adding the median aggregate household income above the floor for municipalities in the housing region.

"Regional household floor income" means 100 dollars less than the lowest municipal median household income in the housing region.

"Regional median household income above the floor" means the result of adding the median household income above the floor for each municipality in the housing region.

"Rehabilitated unit" means a previously deficient housing unit which has undergone significant renovation to meet municipal or other applicable housing code standards as further described in N.J.A.C. 5:93–5.2(b).

"Rehabilitation component" means the result of subtracting spontaneous rehabilitation from indigenous need. For a municipality where filtering and conversions exceed reallocated present, prior cycle prospective need, prospective need and demolitions, the rehabilitation component equals calculated need.

"Repayment clause" means the obligation of a seller exercising a repayment option to pay 95 percent of the price differential to a municipality at closing for use in the municipal housing plan.

"Repayment option" means the option of a seller of a low or moderate income unit to sell a unit pursuant to N.J.A.C. 5:93–12.7 at fair market value subject to compliance with the terms of a repayment clause.

"Resolution of Participation" means a resolution adopted by a municipality in which the municipality chooses to prepare a fair share plan and housing element in accordance with the Act.

"Section 8 income limits" means a schedule of income limits that define 50 percent and 80 percent of median income by household size. When used herein, Section 8 income limits shall refer to the "uncapped" schedule as published by the Council, in accordance with its rules.

"Sending municipality" means for purposes of a RCA, a municipality which transfers a portion of its fair share obligation to another willing municipality.

"Senior citizen" means a person who is 62 years of age or older.

"Set-aside" means the percentage of housing units devoted to low and moderate income households within an inclusionary development.

"State Development and Redevelopment Plan (SDRP)" means the State plan for development promulgated by the State Planning Commission pursuant to P.L. 1985, c.398 (N.J.S.A. 52:18A–196 et seq.).

"Substandard housing unit" means a housing unit with health and safety code violations that require the repair or replacement of a major system. A major system includes a roof, plumbing (including wells), heating, electricity, sanitary plumbing (including septic systems) and/or a load bearing structural system.

"Substantial compliance" means a municipality has actually constructed or issued building permits for at least 70 percent of the new units that were part of the municipal 1987–1993 housing obligation.

"Substantive certification" means a determination by the Council approving a municipality's housing element and fair share plan in accordance with the provisions of the Act and the rules and criteria as set forth in this chapter. A grant of substantive certification shall be valid for a period of six years in accordance with the terms and conditions contained therein, in accordance with N.J.S.A. 52:27D–322.

"Suitable site" means a site that is adjacent to compatible land uses, has access to appropriate streets and is consistent with the environmental policies delineated in N.J.A.C. 5:93–4.

"Surrogate" means a census indicator of deficient housing used in the calculation of present need as defined in N.J.A.C. 5:93–2.

"Survey" means that independent determination of need undertaken by a municipality in preparing its housing element, which is developed and produced in a manner and in such form as is required by this chapter.

"Target group" means identifiable organizations that may aid in attracting low and moderate income households to inclusionary developments. Examples of target groups include: public housing authorities, non-profit organizations, departments of aging, Section 8 programs, religious organizations, urban community action groups and personnel departments of local employers.

"Total need" means the sum of present and prospective need.

"Utility allowance" means those expenses that are in addition to the base rent, such as heat, electricity and cooking fuel that are included in the 30 percent utility allowance as outlined in the lease.

"Vacant land" means undeveloped and unused land area.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

SUBCHAPTER 2. MUNICIPAL DETERMINATION OF PRESENT AND PROSPECTIVE NEED

5:93–2.1 General provisions

(a) Municipal present need and prospective need shall be calculated by summing municipal indigenous need and the municipal share of the appropriate housing region's reallocated present need and prospective need. The resulting total shall be modified by: prior-cycle prospective need; secondary sources of supply and demand; reduction for 1987–1993 housing activities; prior-cycle credits; and the 20–percent cap (see Appendix A, incorporated herein by reference). The end product of this process is the determination of municipal calculated need. This is the figure municipalities shall address in their housing elements. An example for a hypothetical municipality in the Southwest Region (Region 5)—Johnsonville—is provided to illustrate each of the individual calculations. The following flow diagram summarizes the sequence of calculations en route to the determination of calculated need.

FLOW DIAGRAM FOR THE CALCULATION OF LOW– AND MODERATE–INCOME HOUSING NEED

Using the Johnsonville Example

INDIGENOUS NEED 33	+	REALLOCATED PRESENT NEED 95	=	PRESENT NEED 128		
PRESENT NEED 128	+	PROSPECTIVE NEED 568	=	TOTAL NEED 695		
TOTAL NEED 695	+	PRIOR–CYCLE PROSPECTIVE NEED 248	+	DEMOLITIONS 9		
(–) FILTERING 89	(–)	RESIDENTIAL CONVERSION 16	(–)	SPONTANEOUS REHABILITATION 8	=	PRE–CREDITED NEED 839
(–) REDUCTION	(–)	PRIOR–CYCLE	(–)	20%	=	CALCULATED

	CREDITS	CAP	NEED *
439	101	0	299

* Prior-cycle vacant land adjustment communities are indicated by "VL" even though their number is calculated. This indicates that although there is not much vacant land left in these communities, the affordable housing number may be met in other ways and is retained as part of overall Calculated Need.

(b) Exhibit 1 in the Technical Appendix A provides municipal-specific base data that may be employed to determine municipal Present and Prospective Need. Data for a hypothetical municipality, "Johnsonville," precedes the municipal base data for illustrative purposes in both Exhibits 1 and 3. Exhibit 2 in Appendix A duplicates the base data for each housing region that is presented in Columns A through L herein. Exhibit 3 is included for the convenience of the user of this guide. It provides a variety of data for each community, often from the 1990 Census, which would otherwise have to be researched in the process of undertaking this calculation.

(c) Selected municipalities receiving State aid (urban aid cities) pursuant to P.L. 1978, c.14 (N.J.S.A. 52:270–178 et seq.) as refined by the criteria in N.J.A.C. 5:93–2.3(b) shall calculate municipal calculated need as per the procedures delineated in N.J.A.C. 5:93–2.17.

5:93–2.2 Indigenous need—1993

(a) Indigenous need in a municipality is actual or capped deficient housing occupied by low- and moderate-income households as further defined in N.J.A.C. 5:93–1.3. Municipal indigenous need shall be determined from the total of deficient housing units occupied by low- and moderate-income households for the U.S. Census subregion in which the municipality is located. The data, derived from a multiple-index approach, are not available at the municipal level. To determine the municipal share of need from the U.S. Census subregion total, it is necessary to employ a single-index approach using surrogates of deficient housing available at both the municipal and U.S. Census subregion level. To calculate municipal indigenous need:

1. Locate the appropriate municipality in Exhibit 1 in Appendix A. Example: Johnsonville in Region 5 (Southwest).

2. Divide Column 2 (municipal single-index need) by Column 3 (subregional single-index need). The resulting percentage yields the municipal share of the U.S. Census subregion's total of deficient housing units occupied by low- and moderate-income households.

Example:

$$\frac{\text{Johnsonville single index need (Column 2)}}{\text{Subregional single index need (Column 3)}} = 410 \div 4544 = .090$$

(Municipal Share of Regional Need)

3. Multiply the result of the quotient obtained in (a)2 above by the number in Column 1 (subregional multiple index need).

Example:

Subregional Multiple Index Need (Column 1)		Municipal Share of Regional Need		
364	×	.090	=	33

This is the count of estimated low- and moderate-income deficient units in a municipality.

4. Column A from Appendix A, Exhibit 2, reproduced below displays the percentage for each housing region that is obtained by dividing the actual deficient housing units occupied by low- and moderate-income households in the region by the estimated total of 1993 occupied housing units in the region.

TABLE 1
(COLUMN A, FROM APPENDIX A, EXHIBIT 2)
1993 REGIONAL AVERAGE PERCENT
DEFICIENT HOUSING

Region	Percent Deficient
1. Northeast	.0290
2. Northwest	.0250
3. West Central	.0180
4. East Central	.0120
5. Southwest	.0150
6. South–Southwest	.0220

Multiply this percentage by the municipal projection of 1993 occupied housing stock in Exhibit 1, Column 4.

Example:

Johnsonville Total 1993 * Occupied Housing Estimate (Column 4)		Region 5 Percentage of Low- and Moderate-Income Deficiency (Column A)		
12,695	×	.015	=	190

* Estimate as of July 1, 1993

5. Municipal Indigenous Need shall be the smaller number resulting from the calculations in (a)3 and 4 above.

Example: Johnsonville's Indigenous Need = 33.

6. If the calculation in (a)3 above is larger than (a)4 above, the difference between the two shall be distributed throughout the housing region as Reallocated Present Need as per N.J.A.C. 5:93–2.3 and 5:93–2.4. The results of this calculation are displayed for each housing region in Column B.

(b) Municipal indigenous need may also be determined through a survey of the municipality's housing stock as indicated in Appendix C incorporated herein by reference, when such survey is deemed adequate and accepted by the Council for identifying deficient housing units occupied by low- or moderate-income households.

5. Divide 1993 municipal median household income above the floor (unweighted) by the 1993 summed regional median household income above the floor (unweighted) for the housing region in which the municipality is located (see Table F, Column 4) to obtain the municipal share of regional household income above the floor (unweighted).

Example:

Johnsonville's 1993 Household Income (Unweighted) (above the floor) (Step 2 above)		1993 Aggregate Household Income (Unweighted) (above the floor) (Region 5) (Column L)		Johnsonville's Share of 1993 Aggregate Household Income (Unweighted) (above the floor)
$36,912	÷	$2,557,328	=	.01443

6. Multiply the weighted share of regional income times two and add it to the unweighted share. Divide this sum by three. Multiply the result by the spontaneous rehabilitation projections for the housing region in which the municipality is located (see Table F, Column 1). This yields the reduction to municipal total need (plus prior-cycle prospective need) due to spontaneous rehabilitation unless the result exceeds the indigenous need. In cases where the result exceeds the indigenous need, the reduction due to spontaneous rehabilitation shall equal the indigenous need. Example:

Johnsonville's Weighted Share of 1993 Aggregate Household Income × 2 (Step 4 above)		Johnsonville's Unweighted Share of 1993 Aggregate Household Income (Step 5 above)		1993-1999 Region 5 Spontaneous Rehabilitation Estimate (Column I)
[(.04630 + .04630	+	.01443) ÷ 3]	×	236 = 8

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–2.13 Pre-credited need: 1987–1999

Pre-credited need is total need and prior-cycle prospective need modified by secondary sources of demand and supply.

Total Need		Prior–Cycle Prospective Need		Demolitions		Filtering
695	+	248	+	9	–	89

Residential Conversions		Spontaneous Rehabilitation		Pre–Credited Need
16	–	8	=	839

5:93–2.14 Reduction

(a) The Council shall allow a one-for-one reduction of cumulative 1987 to 1999 need for affordable housing activities undertaken from 1987 to 1993 as part of a COAH certified or court settlement plan. It is a reduction for units zoned for or transferred, whether or not the units have been constructed, pursuant to N.J.A.C. 5:93–3. The reduction also includes rental bonus credits.

(b) Information for the reduction is derived from the Council, court, and other records of affordable housing activity. This information is specific to individual municipalities and is contained in Appendix A, Exhibit 3, Column 7. Municipal need at this point is pre-credited need minus the reduction. A municipality cannot take a reduction that will bring municipal need number below zero.

Pre–Credited Need		Reduction (Exhibit 3—Column 7)		Municipal Need After Reduction
839	–	439	=	400

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–2.15 Prior-cycle credits

A one-for-one credit shall be granted for low- and moderate-income housing constructed between April 1, 1980 and December 15, 1986 that conforms to the criteria in N.J.A.C. 5:93–3.1 and 3.2. Municipal need at this point is precredited need after the reduction, minus prior-cycle credits. Prior–cycle credits cannot reduce a municipal need number below zero.

Municipal Need After Reduction		Pre-1987 Credits – (Exhibit 3-Col. 8)		Municipal Need After Pre-1987 Credits
400	–	101	=	299

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–2.16 Twenty-percent (20%) cap

(a) A cap of 20 percent of the estimated 1993 occupied housing stock (community capacity) cannot be exceeded by a municipality's need for new construction. The need for new construction is the precredited need minus the reductions, prior-cycle credits, and the rehabilitation components. This is based on the premise that if the affordable housing was provided as a 20–percent set-aside of inclusionary housing, and if the planned affordable housing was more than 20 percent of existing units, then the new affordable housing and accompanying market units would exceed the number of existing housing units in the community.

(b) Community capacity is determined by multiplying the estimated 1993 occupied housing in the municipality (Appendix A, Exhibit 1, Column 4) by 0.20 and comparing this to the municipal need for new construction.

1. If the community capacity is larger than municipal need for new construction, the 20–percent cap is zero. This is the case for the present example.

2. If community capacity is smaller than municipal need for new construction, the difference between community capacity and the municipal need for new construction is subtracted from the latter to yield the 20–percent cap. The 20–percent cap is the difference between community capacity and the municipal need for new construction. Municipal need at this point equals pre-credited need minus the reduction, minus prior-cycle credits, minus the 20–percent cap.

Johnsonville's 1993 Occupied Housing Estimate		Twenty Percent (20%)	=	Community Capacity
12,695 units	×	0.20	=	2,539 units
Municipal Need for New Construction		**Community Capacity**	=	**Twenty Percent (20%) Cap**
274		2,539	=	0
Municipal Need After Prior–Cycle Credit	–	**Twenty Percent (20% Cap)**	=	**Municipal Need After 20–Percent Cap**
299		0		299

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–2.17 Calculated need: 1987–1999

Municipal calculated need is the sum of total need, prior-cycle prospective need, and demolitions; minus filtering, conversion, and spontaneous rehabilitation, yielding, pre-credited need; minus the reduction, prior-cycle credits, and 20–percent cap (see Appendix A).

		plus		*plus*		
	Total Need		Prior-cycle Prospective Need		Demolitions	
	695	+	248	+	9	
minus		*minus*			*equals*	
	Filtering		Residential Conversion	Spontaneous Rehabilitation		Pre–Credited Need
—	89	—	16	— 8	=	839
minus		*minus*		*minus*	*equals*	
	Reduction		Prior–Cycle Credits	20% Cap		Calculated Need
—	439	—	101	— 0	=	299

5:93–2.18 Vacant land adjustment communities; prior cycle

Municipalities that received an adjustment from the courts or the Council due to undeveloped land in the first affordable housing cycle have received a calculated need number. However, the Council has developed a streamlined process for these communities to receive substantive certification. The calculated need is retained in the system as a goal for future affordable housing efforts as development and redevelopment occur in the community.

5:93–2.19 Calculation of indigenous need: selected urban aid cities

(a) Selected municipalities receiving state aid (urban aid cities) pursuant to P.L. 1978, c.14 (N.J.S.A. 52:270–178 et seq.) that are exempt from the distribution of reallocated present need and prospective need as described in N.J.A.C. 5:93–2.3 (see Appendix A), Attachment shall determine their indigenous need as indicated below:

1. Follow the procedures delineated in N.J.A.C. 5:93–2.2(a)1 to 3. These calculations yield the count of actual low- and moderate-income deficient units in the selected urban aid city. This estimate of low- and moderate-income deficient units may also be determined through a survey of the municipality's housing stock when such survey is deemed adequate and accepted by the Council for identifying deficient housing units occupied by low- or moderate-income households.

2. Modify the number calculated in (a)1 above as instructed in N.J.A.C. 5:93–2.9, 2.10, 2.11, and 2.12 (demolitions, filtering, residential conversions and spontaneous rehabilitation.)

3. Perform the calculation required in N.J.A.C. 5:93–2.2(a)4.

4. Municipal Indigenous Need (for Urban Aid Cities) shall be the smaller number resulting from the calculations in (a)2 and 3 above.

5. If the calculation in (a)2 above is larger than the calculation in (a)3 above, the difference between the two shall be distributed throughout the housing region as reallocated present need (see Appendix A).

6. No additional calculations need be made by these cities at this point.

5:93–2.20 Low- and moderate-income split

The municipal calculated need obligation shall be divided equally between low- and moderate-income households.

Example:

Johnsonville's total obligation of 299 units would include 150 low-income and 149 moderate-income units.

(An odd number is always split in favor of the low-income unit.)

SUBCHAPTER 3. CREDITS/REDUCTIONS

5:93–3.1 General

(a) The Fair Housing Act provides that the Council determine municipal fair share, after crediting on a one for one basis each current unit of low and moderate income housing of adequate standard, including any such housing constructed or acquired as part of a housing program specifically intended to provide housing for low and moderate income households. Given the approach the Council has developed for determining calculated need, the Council has determined that it is appropriate to allow credits for units constructed after April 1, 1980. Since it was not until December 15, 1986 that the Council established criteria for an eligible low and moderate income unit, the crediting criteria for housing units created between April 1, 1980 (the date of the census) and December 15, 1986 shall be different than the period subsequent to December 15, 1986.

(b) In determining calculated need, COAH has granted prior-cycle credits. These are credits that have been granted by the Council for the construction of low and moderate income units between April 1, 1980 and December 15, 1986. In determining calculated need, the Council has also provided a reduction to the municipal housing obligation based on the realistic opportunity a municipality created in response to its 1987–1993 housing need through regional contribution agreements, plans for new construction, rental bonus credits, or through its zoning powers. The source for this information includes data from the Council's records, county planning boards and Masters appointed by the court. To the extent that this information is incomplete or incorrect, the Council shall modify the calculated need, in accordance with this chapter.

(c) Municipalities shall not receive both a reduction and a credit for the same housing unit. The Council's intent with the reductions and the credits is to ensure that a municipality's obligation is lowered by one, or by a rental bonus credit provided: the municipality has created a realistic opportunity that resulted in a sound housing unit; or, if the unit has not yet materialized, the municipality continues to offer the realistic opportunity. A reduction shall be considered a credit when a low or moderate income unit is constructed (or in the case of a regional contribution agreement, the contract terms are honored) and appropriately restricted to a low or moderate income household.

(d) Unless otherwise stated, a municipality shall receive credits for housing activity prior to the date of the publication of its petition for substantive certification, provided such activity complies with criteria for credits in this subchapter. A municipality shall document eligible new construction with certificates of occupancy; eligible rehabilitation with final inspections; and transferred units with evidence of the required transfer of funds to the sending municipality.

(e) For units constructed after December 15, 1986, a municipality shall receive credits for housing activity that complies with the criteria in this subchapter and with the rules governing new construction, and transferred units (via a regional contribution agreement) between 1987–1993, in accordance with N.J.A.C. 5:92, a housing unit constructed under the auspices of a government funded, financed or otherwise assisted housing program designed specifically for households whose income does not exceed 80 percent of median shall also be eligible for a credit provided:

1. At least half of the units are affordable to households whose incomes do not exceed 50 percent of median income; and

2. The units are governed by controls on affordability that are substantially the same as those set forth in N.J.A.C. 5:92.

(f) A credit and/or a reduction in excess of the municipal precredited need shall be applied on a one for one basis or as a rental bonus credit against its future housing obligation.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–3.2 Credits for units constructed between April 1, 1980 and December 15, 1986

(a) A housing unit created and occupied between April 1, 1980 and December 15, 1986 is eligible for a one for one credit when it has been developed specifically for households whose income does not exceed 80 percent of median income and the unit is governed by controls on affordability that are the same as those set forth in N.J.A.C. 5:92–12 and Appendix E, incorporated herein by reference.

(b) A municipality may receive a one for one credit for each unit satisfying the following criteria:

1. The unit shall have been constructed between April 1, 1980 and December 15, 1986. The municipality shall document the date of construction with a certificate of occupancy date;

2. The unit shall have been certified to be in sound condition as a result of an exterior inspection performed by a licensed building inspector;

3. The unit is currently occupied by a low or moderate income household. The municipality shall document household income eligibility with a certification of household income in a form adopted by the Council. Such certification shall be signed by a head of household. It shall be reviewable only by the Council or its staff and shall not be a public record;

4. If the unit is a for-sale unit, at the time the municipality files its petition for substantive certification, the unit shall have a market value that is affordable to a moderate income household pursuant to the requirements of N.J.A.C. 5:93–7.4(a) and (e). The market value of each such unit shall be no greater than a sales price determined by averaging the reported actual sale prices of three comparable housing units from the municipality that can be documented as being arms length, closed sales transactions and which occurred within one year of the date of the filing of the petition. Documentation sources for such sales may include county tax records. TRW REDI Property Data or other such sources, or multi-list records.

i. When determining a sales price pursuant to N.J.A.C. 5:93–7.4(e) for purposes of this paragraph, "interest" shall be the average 30 year fixed mortgage rate generally available within 30 days of the date of the municipal petition for substantive certification.

ii. When determining a sales price pursuant to N.J.A.C. 5:93–7.4(e) for purposes of this paragraph, "homeowner or condominium fees" shall be the fees chargeable to each such applicable unit on the date of the municipal petition for substantive certification; and

5. If the unit is a rental unit, at the time the municipality files its petition for substantive certification, the unit shall have a monthly rent that is affordable to a moderate income household pursuant to the requirements of N.J.A.C. 5:93–7.4(a) and (f) and the rental must be an arms length transaction.

(c) The application shall be in such a form and contain such information as the Council may require. Such information may include a questionnaire on household composition and unit type, a worksheet to calculate household income, a certification, an exterior survey and a sheet for listing comparables for each eligible unit.

Amended by R.1996 d.24, effective January 2, 1996.

See: 27 N.J.R. 3873(a), 28 N.J.R. 143(b).

5:93–3.3 Credits for housing activity subsequent to December 15, 1986

(a) A municipality shall receive a one for one credit for every low or moderate income unit constructed within its borders or within a receiving municipality as a result of a regional contribution agreement that addresses its 1987–1993 housing need provided:

1. The unit has not been addressed in N.J.A.C. 5:93–2.14, Reduction; and

2. The unit complies with the criteria referenced in N.J.A.C. 5:93–3.1(e).

(b) A municipality shall also receive a rental bonus credit for every eligible unit of low and moderate income housing that meets the criteria in N.J.A.C. 5:93–5.14(d).

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–3.4 Rehabilitation subsequent to the 1990 census

(a) A municipality may receive credit for rehabilitation of low and moderate income substandard units performed subsequent to April 1, 1990.

(b) Units shall be eligible for crediting if:

1. They were rehabilitated up to the applicable code standard and that the average capital cost expended on rehabilitating the housing units was at least $8,000; and

2. The unit is currently occupied by the occupants who resided within the unit at the time of rehabilitation or by other eligible low or moderate income households.

(c) Credits for rehabilitation shall not exceed the rehabilitation component and shall only be credited against the rehabilitation component.

5:93–3.5 Reductions for unbuilt housing

(a) Where land has been zoned for low and moderate income housing, the Council shall review sites for suitability and determine if the previously zoned sites present a realistic opportunity for low and moderate income housing before granting a reduction. In its review, the Council shall include but not be limited to a consideration of environmental factors, the location of existing infrastructure and the likelihood of the current zoning to result in the creation of low and moderate income housing during the period of substantive certification. Such a review shall result in a determination of the appropriate reduction and may result in requirements for zoning amendments.

(b) For previously certified sites that remain undeveloped, a municipality may propose an alternative zoning density and set aside as the result of a developer agreement. The Council shall certify each form of zoning and calculate the higher yield in addressing the fair share obligation. If the alternative zoning is exercised and there are unmet units, the Council shall not require the municipality to zone additional sites unless there are compelling reasons. Unmet units shall be addressed in the Council's third fair share cycle.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–3.6 Reductions for substantial compliance

(a) A reduction of the 1987–1999 inclusionary component of the calculated need shall be granted according to the following schedule when the Council determines that a municipality has substantially complied with the terms of its substantive certification, and has actually created, within the municipality or issued building permits for a substantial percentage of the new units that were part of the new units that were part of the municipal 1987–1993 housing obligation within the period of substantive certification (as extended by a grant of interim substantive certification pursuant to N.J.A.C. 5:91–14.1(a)):

Percentage of Units Completed	Reduction
90+	20 percent
80–89	10 percent
70–79	5 percent

This reduction shall be based solely on the percentage of new low and moderate income units constructed within the municipality that received substantive certification or were the recipients of building permits. The percentage of units completed shall be determined by dividing the number of new low and moderate income units actually constructed or receiving building permits within the municipality by the number of low and moderate income units designated for construction within the municipality in the 1987–1993 fair share plan.

Example: If the municipal housing element and fair share plan that received substantive certification designated 100 units to be constructed in the municipality and another 75 units to be transferred to a receiving municipality via a regional contribution agreement, the reduction shall be based on the percentage of the 100 units that were to be constructed within the municipality that received substantive certification.

(b) The reduction in (a) above shall only be applied to the inclusionary component of the 1987–1999 calculated need, as determined by the Council. This reduction shall be applied to the remaining inclusionary component after the Council has accepted all other reductions and credits (including any rental bonus).

Example: A municipality has a 1987–1999 precredited need of 200. It had a 1987–1993 inclusionary component of 100. All 100 new units were actually constructed or received building permits within the municipality. The reduction for substantial compliance is 20 percent. The remaining calculated need is 100. However, the rehabilitation component is 20, leaving an inclusionary component of 80. The 20 percent reduction is applied to the 80 remaining new units, leaving an inclusionary component of 64.

New Rule, R.1994 d.563, effective November 7, 1994.
See: 26 N.J.R. 2514(a), 26 N.J.R. 4349(b).
Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

SUBCHAPTER 4. MUNICIPAL ADJUSTMENTS

5:93–4.1 Purpose and background

(a) Subchapters 2 and 3 delineate the criteria for determining the municipal housing obligation. However, there may be instances where a municipality can exhaust an entire resource (land, water or sewer) and still not be able to provide a realistic opportunity for addressing the need for low and moderate income housing as determined by the Council. This subchapter outlines standards and procedures for municipalities to demonstrate that the municipal response to its housing obligation is limited by the lack of land, water or sewer. The procedures in this subchapter shall not be used to reduce or defer the rehabilitation component.

(b) Where a municipality attempts to demonstrate that it does not have the capacity to address the housing obligation calculated by the Council, the municipality shall identify sites that are realistic for inclusionary development in order to calculate the realistic development potential of the community, in accordance with N.J.A.C. 5:93–4.2. Where the realistic development potential is less than the municipal calculated need minus any credits granted pursuant to N.J.A.C. 5:93–3.4, the municipality shall provide a response toward the obligation not addressed by the realistic development potential. Examples of such a requirement include, but are not necessarily limited to, a redevelopment ordinance, an ordinance permitting apartments in developed areas of the municipality and a mandatory development fee ordinance.

(c) With the concept of realistic development potential, the Council is recognizing that some sites are more realistic and/or appropriate than others for the location of inclusionary development. For example, some sites may lack infrastructure or be surrounded by incompatible land uses. However, these sites and others have the potential to develop or redevelop over time and, as such development takes place, the Council has determined that such sites shall contribute toward the housing obligation.

(d) A municipality seeking an adjustment due to available land capacity shall base the number of units that may be restricted to senior citizens and the number of units that may be transferred via a regional contribution agreement on the realistic development potential. The realistic development potential shall equal the calculation pursuant to N.J.A.C. 5:93–4.2(e). If additional low and moderate income housing opportunities develop pursuant to N.J.A.C. 5:93–4.2(g) (describing the municipal response in addition to the realistic development potential), the municipality may seek a plan amendment, pursuant to N.J.A.C. 5:91–13 to age restrict or transfer more units, based on a demonstrated increased realistic development potential.

5:93–4.2 Lack of land

(a) Municipalities that request an adjustment due to available land capacity shall submit an existing land use map at an appropriate scale to display the land uses of each parcel within the municipality. Such a map shall display the following land uses: single family, two-to-four family, other multi-family, commercial, industrial, agricultural, parkland, other public uses, semipublic uses and vacant land.

(b) Municipalities that request an adjustment due to available land capacity shall submit an inventory of vacant parcels by lot and block that includes the acreage and owner of each lot.

(c) The Council shall review the existing land use map and inventory to determine which sites are most likely to develop for low and moderate income housing. All vacant sites shall initially be presumed to fall into this category. In addition, the Council may determine that other sites, that are devoted to a specific use which involves relatively low-density development would create an opportunity for affordable housing if inclusionary zoning was in place. Such sites include, but are not limited to: golf courses not owned by its members; farms in SDRP planning areas one, two and three; driving ranges; nurseries; and nonconforming uses. The Council may request a letter from the owner of sites that are not vacant indicating the site's availability for inclusionary development.

(d) Municipalities may present documentation that the Council shall use to eliminate a site or part of a site from the inventory of sites described in (c) above. Partial elimination of a site shall not necessarily eliminate an entire site as unsuitable. Municipalities may seek to eliminate sites from the inventory described in (c) above using the criteria set forth below. Municipalities shall submit transparent overlays drawn to the same scale as the existing land use map depicting those sites which the municipality maintains are inappropriate for development.

1. Agricultural lands shall be excluded when the development rights to these lands have been purchased or restricted by covenant.

2. Environmentally sensitive lands shall be excluded as follows:

i. Within the areas of the State regulated by the Pinelands Commission, Division of Coastal Resources of the DEP and the Hackensack Meadowlands Development Commission of DCA, the Council shall adhere to the policies delineated in The Pinelands Comprehensive Management Plan, N.J.A.C. 7:50; the Coastal Permit Program Rules, N.J.A.C. 7:7–1; Coastal Resource and Development Rules, N.J.A.C. 7:7E–1; and the Zoning Regulations of the Hackensack Meadowlands District, N.J.A.C. 19:4.

ii. In areas of the State not regulated by the Pinelands Commission, the Division of Coastal Resources and the Hackensack Meadowlands Development Commission, municipalities may exclude as potential sites for low and moderate income housing: inland wetlands as delineated on the New Jersey Freshwater Wetlands Maps, or when unavailable, the U.S. Fish and Wildlife Service National Wetlands Inventory; or as delineated on-site by the U.S. Army Corps of Engineers or DEP, whichever agency has jurisdiction; when on-site delineation is required by the Council; flood hazard areas as defined in N.J.A.C. 7:13; and sites with slopes in excess of 15 percent, as determined from the U.S.G.S. Topographic Quadrangles, which render a site unsuitable for low and moderate income housing. In cases where part of a site is unsuitable for low and moderate income housing because of flood hazard areas or inland wetlands, the Council shall not permit low and moderate income housing to be constructed on that unsuitable part of the site; provided however, that this rule shall

not prohibit construction of low and moderate income housing on the remainder of the site. In the case of slopes in excess of 15 percent, a municipality may regulate inclusionary development through a steep slope ordinance, provided the ordinance also regulates non-inclusionary developments in a consistent manner. The Council reserves the right to exclude sites in whole or in part when excessive slopes threaten the viability of an inclusionary development.

iii. Where the Legislature adopts legislation that requires the mapping of other natural resources and provides a mechanism for their regulation, the Council shall include such resources in its criteria and guidelines for municipal adjustment.

3. Historic and architecturally important sites may be excluded as follows:

i. Municipalities may apply to exempt a buffer area to protect sites listed on the State Register of Historic Places. The Council shall forward such request to the Office of New Jersey Heritage for a recommendation pertaining to the appropriateness and size of a buffer.

ii. Upon receipt of the Office of New Jersey Heritage's recommendation, the Council shall determine if any part of a site should be eliminated from the inventory described in (c) above.

iii. Within historic districts, a municipality may regulate low and moderate income housing to the same extent it regulates all other development.

4. Active recreational lands may be excluded as follows:

i. Municipalities may reserve three percent of their total developed and developable acreage for active municipal recreation and exclude this acreage from consideration as potential sites for low and moderate income housing. However, all sites designated for active recreation must be designated for recreational purposes in the municipal master plan. In determining developable acreage, municipalities shall calculate their total vacant and undeveloped lands and deduct from that total number the lands excluded by the Council's rules regarding historic and architecturally important sites, agricultural lands and environmentally sensitive lands. Municipalities shall also exclude from this calculation of total vacant and undeveloped lands, those owned by nonprofit organizations, counties and the State or Federal government when such lands are precluded from development at the time of substantive certification. Municipalities shall submit appropriate documentation demonstrating that such active recreational lands are precluded from development. Existing active municipal recreation areas shall be subtracted from the three percent calculation of total developed and developable acreage to determine additional land that may be reserved for active municipal recreation.

ii. Sites designated for active recreation must be purchased and limited to active recreational purposes within one year of substantive certification. Sites that are not purchased and limited to active recreational purposes shall, if determined necessary by the Council, be zoned to permit inclusionary development.

5. Conservation, parklands and open space lands may be excluded as follows:

i. Any land designated on a master plan of a municipality as being dedicated or which is dedicated by easement or otherwise, for purposes of conservation, parklands or open space and which is owned by a county, municipality or tax-exempt, nonprofit organization.

ii. If less than three percent of the municipality's total land area is designated for conservation, parklands or open space, the municipality may reserve up to three percent of its total land area for such purposes. However, the acquisition of such sites must be initiated by the municipality within one year of substantive certification. Sites that are not purchased and limited to conservation, parklands or open space within that timeframe shall, if determined necessary by the Council, be zoned to permit inclusionary development.

iii. If sites designated for conservation, parklands or open space no longer serve those purposes and subsequently become available for residential or nonresidential development, these sites shall have an affordable housing obligation, if determined necessary by the Council.

6. Individual sites that the Council determines are not suitable for low and moderate income housing may also be eliminated from the inventory described in (c) above.

(e) The Council shall consider sites, or parts thereof, not specifically eliminated from the inventory described in (c) above, for inclusionary development. The Council shall consider the character of the area surrounding each site and the need to provide housing for low and moderate income households in establishing densities and set-asides for each site, or part thereof, remaining in the inventory. The minimum presumptive density shall be six units per acre and the maximum presumptive set-aside shall be 20 percent. The density and set-aside of each site shall be summed to determine the realistic development potential of each municipality. Example: Lowmod Borough has three suitable sites. The sites are 10 acres, five acres and one acre. The larger sites may accommodate eight units/acre. The one acre site may accommodate six units/acre. All sites are assigned a 20 percent set-aside. The realistic development potential equals 25 low and moderate income units.

10 acres × 8 units/acre × .2 =	16
5 acres × 8 units/acre × .2 =	8
1 acre × 6 units/acre × .2 =	1
	25

A municipality that received an adjustment due to lack of vacant land in addressing its 1987–1993 need obligation shall be presumed to have addressed its realistic development potential, provided the municipality continues to implement the terms of its previous substantive certification.

(f) The municipality may address its realistic development potential through any activity approved by the Council, pursuant to N.J.A.C. 5:92–5. The municipality need not incorporate into its housing element and fair share plan all sites used to calculate the realistic development potential if the municipality can devise an acceptable means of addressing its realistic development potential. The realistic development potential shall not vary with the strategy and implementation techniques employed by the municipality.

(g) If the realistic development potential described in (e) above is less than the municipal calculated need minus credits, pursuant to N.J.A.C. 5:93–3.4, the Council shall review the existing municipal land use map for areas that may develop or redevelop. Examples of such areas include, but are not limited to: a private club owned by its members; publicly owned land; downtown mixed use areas; high density residential areas surrounding the downtown; areas with a large aging housing stock appropriate for accessory apartments; and properties that may be subdivided and support additional development. After such an analysis, the Council may require at least a combination of the following in an effort to address the housing obligation:

1. Zoning amendments that permit apartments or accessory apartments;

2. Overlay zoning requiring inclusionary development or the imposition of a development fee consistent with N.J.A.C. 5:93–8; in approving an overlay zone, the Council may allow the existing use to continue and expand as a conforming use, but provide that where the prior use on the site is changed, the site shall produce low and moderate income housing or a development fee; or

3. Zoning amendments that impose a development fee consistent with N.J.A.C. 5:93–8.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).
Amended by R.1996 d.238, effective May 20, 1996.
See: 28 N.J.R. 221(a), 28 N.J.R. 2595(a).
In (d)4 specified "active" recreational lands and in (d)5 provided for exclusion of conservation, parklands and open space lands.

5:93–4.3 Lack of water and sewer

(a) When a community has sufficient land, but insufficient water and/or sewer to support inclusionary development, the Council shall review each possible site for inclusionary development to determine if it is realistic for the site to receive the required water and/or sewer during the period of substantive certification. The Council shall require sufficient information to determine the site's prospects of receiving infrastructure, and the site's prospects of inclusion in a 208 plan amendment, developed in accordance with the rules of the DEP. If the site had been zoned for inclusionary development, the Council shall consider how long the site had been zoned and if the developer had filed a development application.

(b) If the Council determines that a site may receive water and/or sewer during the period of substantive certification, it shall require the site to be zoned for inclusionary development, or, if the site had already been zoned for inclusionary development, it shall require the continuation of that zoning. If the Council determines that a site may not receive water and/or sewer during the period of substantive certification, the Council shall not require inclusionary zoning, but may require overlay zoning requiring inclusionary development (if water and sewer become available) and/or the imposition of a development fee consistent with N.J.A.C. 5:93–8.

(c) The lack of adequate capacity, in and of itself, shall constitute a durational adjustment of the municipal housing obligation. The requirement to address the municipal housing obligation shall be deferred until adequate water and/or sewer are made available. In order to provide water and/or sewer on sites the Council determines are realistic for inclusionary development, municipalities shall adhere to the following:

1. Notwithstanding the lack of adequate water and/or sewer at the time a municipality petitions for substantive certification, the municipality shall reserve and set aside new water and/or sewer capacity, when it becomes available, for low and moderate income housing, on a priority basis;

2. Municipal officials shall endorse all applications to the DEP or its agent to provide water and/or sewer capacity. Such endorsements shall be simultaneously submitted to the Council.

3. Where the DEP or its designated agent approves a proposal to provide infrastructure to a site for the development of low and moderate income housing identified in the housing element, the municipality shall permit such development; and

4. Where a municipality has designated sites for low and moderate income housing that lack adequate water and/or sewer and where the DEP or its designated agent approves a proposal to provide water and/or sewer to a site other than those designated for the development of low and moderate income housing in the housing element, the municipality shall amend its housing element and fair share housing ordinance to permit development of such site for low and moderate income housing. The amended housing element and fair share housing ordinance shall be submitted to the Council within 90 days of the site's approval by the DEP or its agent. The Council may waive these requirements when it determines that the municipality has a plan that will provide water and/or

sewer to sufficient sites to address the municipal housing obligation within the substantive certification period.

(d) Municipalities may demonstrate that the cost of providing water and/or sewer to realistic sites identified in (a) and (b) above, is prohibitive by completing "The Costs of Providing Infrastructure" application provided by the Council (see Appendix D, incorporated herein by reference) and submit it to the Council for its review. The Council shall forward "The Costs of Providing Infrastructure" application to the DCA Division of Local Government Services for review. The Council shall consider the report of the Division of Local Government Services in determining whether to permit an adjustment due to prohibitive costs associated with providing water and/or sewer to inclusionary sites. Where the Council determines the cost associated with providing water and/or sewer to inclusionary sites is prohibitive, it shall limit the municipality's fiscal responsibility of providing water and/or sewer. However, notwithstanding any limits placed on the municipality's fiscal responsibility to provide water and/or sewer, the Council may require the municipality to designate and zone appropriate sites to accommodate the municipal housing obligation or to adopt other approaches consistent with N.J.A.C. 5:93–4.2(g). The municipality shall also adhere to the requirements outlined in (c)1 to 4 above.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–4.4 Application for grants

A municipality that has demonstrated that land, water and/or sewer limits its ability to address the municipal rehabilitation component may be required to address its rehabilitation component by submitting an application for Federal and/or State housing programs. Such a municipality shall be required to apply for a county, State and/or Federal grant if the Council determines that the success of such a grant application is realistic and necessary to address the rehabilitation component.

5:93–4.5 Waivers

(a) The Council shall entertain waiver requests by motion, in accordance with N.J.A.C. 5:91–12, from municipalities seeking relief from the following requirements:

1. The use of an entire resource (land, water, sewer) in addressing the municipal housing obligation; and

2. The requirement to impose development fees on all development within the municipality.

(b) The criteria for evaluating such a waiver request shall include one or more of the following:

1. Past inclusionary practices, measured by the following criteria: jobs to housing ratio; municipal median income as compared to regional median income; and the percentage of low and moderate income households in the municipality as compared to the percentage in the housing region;

2. A demonstration of hardship. To demonstrate hardship related to the imposition of development fees, the municipality shall, at a minimum, document that the imposition of development fees would retard necessary economic development within the municipality. To demonstrate hardship related to utilizing all available land, water and sewer capacity, the municipality shall (where applicable), at a minimum, document prospects for obtaining additional capacity and the public good realized by allowing competing land uses a reservation of the limited capacity; or

3. A demonstration that the municipality has actively pursued its municipal housing obligation by petitioning for certification prior to litigation.

SUBCHAPTER 5. PREPARING A HOUSING ELEMENT

5:93–5.1 Overview of a housing element

(a) Once a municipality has subtracted its credits (pursuant to N.J.A.C. 5:93–3) from its calculated need, and/or received an adjustment pursuant to N.J.A.C. 5:93–4, it shall develop a plan to address the municipal housing obligation. In addressing the need, a municipality may address its rehabilitation component through a rehabilitation program or by creating new units. The remaining portion of the municipal housing obligation may be addressed through a combination of techniques, including, but not necessarily limited to: municipally sponsored construction; inclusionary zoning; regional contribution agreements; alternative living arrangements; the creation of accessory apartments; the purchase of housing units that have never been occupied; the purchase of housing units that have been occupied; and the purchase of housing units that have been vacant for at least 18 months. (The Council has determined that if a housing unit has been vacant for 18 months or more, it is reasonable to conclude that such a unit is not "filtering down" to low and moderate income households and that encouraging the purchase of the unit for low and moderate income households may prevent the unit from deterioration or vandalism.) This subchapter shall discuss the standards and, in some cases, limitations, of each implementation technique. It shall outline standards for senior citizen housing and rental housing. This subchapter shall also discuss the status of sites included in the housing element that addressed the 1987–1993 municipal housing obligation.

(b) A municipality's housing element shall be designed to achieve the goal of providing affordable housing to meet present and prospective housing needs, with particular attention to low and moderate income housing. The housing element shall include the municipality's strategy for addressing its present and prospective housing needs and shall contain the following:

1. An inventory of the municipality's housing stock by age, condition, purchase or rental value, occupancy characteristics and type, including the number of units affordable to low and moderate income households and substandard housing capable of being rehabilitated;

2. A projection of the municipality's housing stock, including the probable future construction of low and moderate income housing, for the six years subsequent to the adoption of the housing element, taking into account, but not necessarily limited to, construction permits issued, approvals of applications for development and probable residential development of lands;

3. An analysis of the municipality's demographic characteristics, including, but not limited to, household size, income level and age;

4. An analysis of the existing and probable future employment characteristics of the municipality;

5. A determination of the municipality's present and prospective fair share for low and moderate income housing and its capacity to accommodate its present and prospective housing needs, including its fair share for low and moderate income housing;

6. If a development fee is imposed pursuant to N.J.A.C. 5:93–8, a copy of the spending plan as required in (c) below;

7. A consideration of the lands that are most appropriate for construction of low and moderate income housing and of the existing structures most appropriate for conversion to, or rehabilitation for, low and moderate income housing, including a consideration of lands of developers who have expressed a commitment to provide low and moderate income housing;

8. A map of all sites designated by the municipality for the production of low and moderate income housing and a listing of each site that includes its owner, acreage, lot and block;

9. The location and capacities of existing and proposed water and sewer lines and facilities relevant to the designated sites;

10. Copies of necessary applications for sewer service and water quality management plans submitted pursuant to Sections 201 and 208 of the Federal Clean Water Act, 33 U.S.C. § 1251, et seq.;

11. A copy of the most recently adopted municipal master plan and, where required, the immediately preceding, adopted master plan;

12. For each designated site, a copy of the New Jersey Freshwater Wetlands maps where available. When such maps are not available, municipalities shall provide appropriate copies of the National Wetlands Inventory maps provided by the U.S. Fish and Wildlife Service;

13. A copy of appropriate United States Geological Survey Topographic Quadrangles for designated sites; and

14. Any other documentation pertaining to the review of the municipal housing element as may be required by the Council.

(c) If a municipality intends to collect development fees, it shall prepare a plan to spend development fees that includes the following:

1. A projection of revenues anticipated from imposing fees on development, based on historic development activity;

2. A description of the administrative mechanism that the municipality will use to collect and distribute revenues;

3. A description of the anticipated use of all development fees;

4. A schedule for the creation or rehabilitation of housing units;

5. If the municipality envisions being responsible for public sector or non-profit construction of housing, a pro-forma statement of the anticipated costs and revenues associated with the development; and

6. The manner through which the municipality will address any expected or unexpected shortfall if the anticipated revenues from development fees are not sufficient to implement the plan.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–5.2 Rehabilitation

(a) Each municipality shall be provided with the Council's estimate for substandard units occupied by low and moderate income households. This estimate shall be the municipality's indigenous need, unless the municipality or an objector performs the Council's Structural Conditions Survey (see Appendix D, incorporated herein by reference). Where the municipality or objector performs the Structural Conditions Survey, the Council shall review the results of the data collected and shall modify the indigenous need if it determines a modification is warranted.

(b) The purpose of a rehabilitation program is to rehabilitate substandard housing units occupied by low and moderate income households. A substandard housing unit is defined as a unit with health and safety code violations that require the repair or replacement of a major system. A major system shall include a roof, plumbing (including wells), heating, electricity, sanitary plumbing (including septic systems) and/or a load bearing structural system. Upon rehabilitation, housing deficiencies shall be corrected and the house shall be brought up to code standard. The standard for evaluating rehabilitation activity shall be the local property maintenance code, or, if none is available, the BOCA Property Maintenance Code, in effect at the time of evaluation. The rehabilitation activity shall not include luxury improvements, the purchase of appliances (with the exception of stoves) or improvements that are strictly cosmetic.

(c) A municipality that chooses to rehabilitate units shall designate an entity to administer the rehabilitation program. The municipality may designate an employee to administer the program or may enter into an agreement for a governmental agency or private consultant to administer all or some of the program.

(d) The municipality shall prepare a marketing plan for its rehabilitation program, subject to the Council's approval. The rehabilitation program shall be marketed through a

combination of some, though not necessarily all, of the following: brochures; posters in prominent locations; cable television and radio announcements; notices included in utility bills; notices in municipal tax bills; notices included in municipal publications; and informational meetings with welfare organizations, urban action community groups, personnel departments of local employers, social workers, civic and religious leaders, senior citizen groups and fraternal organizations.

(e) A municipality that chooses to administer a rehabilitation program shall maintain files on each program applicant. The files may be used in responding to monitoring requests and to protect the municipality against charges of irregularity. The files shall include:

1. The name of each applicant;

2. If the applicant is not approved, the reasons for the disapproval; and

3. If the applicant is approved:

i. Proof of income eligibility (Federal tax return);

ii. The initial inspection by the building inspector;

iii. Bids by contractors;

iv. The final contract to do the work;

v. Progress reports;

vi. A copy of the final inspection; and

vii. The lien on the property.

(f) Rental units may not be excluded from a municipal rehabilitation program.

(g) The Council shall require six year controls on affordability on owner-occupied units and 10 year controls on affordability on rental units. The controls on affordability may be in the form of a lien filed with the appropriate property's deed. Rents in rehabilitated units may increase annually based on the standards in N.J.A.C. 5:93–9.15.

(h) A municipality that chooses to rehabilitate its rehabilitation component shall be responsible for funding its program. This requirement includes administrative and actual rehabilitation activities. A municipality shall provide $2,000 per unit of its rehabilitation component towards administration and $8,000 per unit for rehabilitation activity to total $10,000 per unit of its rehabilitation component. Given this requirement:

1. Municipalities shall provide sufficient dollars to fund one-third of the municipal rehabilitation component within one year of substantive certification. In each subsequent year of the substantive certification period, the municipality shall provide sufficient dollars to fund one-sixth of the municipal rehabilitation component.

2. Municipalities may rehabilitate substandard units that require less than $8,000 of work, provided they also rehabilitate substandard units that require more than $8,000 of work. Municipal rehabilitation activity shall average at least $8,000 per unit for each two year period of substantive certification.

3. The Council may waive part or all of the funding required for administration if there is an agreement with an agency to administer the program at reduced cost.

4. Municipalities that seek a waiver from the $8,000 rehabilitation standard may do so by presenting case studies documenting local housing conditions.

(i) Financing of rehabilitation programs shall be structured to encourage rehabilitation and continued occupancy. Low interest rates and forgivable loans are encouraged. Leveraging of private financing is also encouraged if the result is low interest loans that encourage rehabilitation. If a housing unit is sold prior to the end of the controls on affordability, at least part of the loan shall be recaptured and used to rehabilitate another housing unit.

(j) If the municipality structures a loan program to recapture money, recaptured money shall be used for another low and moderate income housing purpose or to repay a municipal bond issued to finance a low and moderate income housing activity.

(k) The municipality, as a condition of certification, shall develop a rehabilitation manual that complies with COAH's rules and summarizes the administration of the rehabilitation program. The manual shall include a copy of the lien to be used and shall describe:

1. The rehabilitation program's staff and their responsibilities;

2. Procedures for program marketing;

3. Eligible repairs and improvements;

4. The amount of money available for rehabilitation;

5. Financing terms;

6. Income qualification criteria;

7. Procedures for application intake;

8. Procedures for review and approval of work (such procedures should require interim inspection of work); and

9. The length of affordability controls.

(*l*) Municipalities that administer rehabilitation programs shall complete annual monitoring reports required by the Council (see N.J.A.C. 5:93–12). After reviewing the progress of rehabilitation activity, the Council may require technical assistance meetings to identify implementation techniques designed to increase rehabilitation activity. Failure to submit monitoring reports or respond to direction designed to increase rehabilitation activity may result in further Council action.

(m) A municipality receiving State aid pursuant to P.L. 1978, c.14 (N.J.S.A. 52:27D–178 et seq.) may seek a waiver from addressing its entire rehabilitation component in one six year period of substantive certification. A municipality seeking such a waiver shall demonstrate that it cannot rehabilitate the entire rehabilitation component in six years and/or that an extraordinary hardship exists, related to addressing the entire rehabilitation component in six years.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–5.3 New construction; site criteria and general requirements

(a) Municipalities may create new low and moderate *income units* within its borders by sponsoring their construction, with or without a non-profit corporation, or by zoning sites for inclusionary development.

(b) Municipalities shall designate sites that are available, suitable, developable and approvable, as defined in N.J.A.C. 5:93–1. In reviewing sites, the Council shall give priority to sites where infrastructure is available. All sites designated for low and moderate income housing shall receive approval for consistency review, as set forth in Section 208 of the Clean Water Act, 33 U.S.C. 1251 et seq., prior to substantive certification. Where a site is denied consistency review, the municipality shall apply for an amendment to its Section 208 plan to incorporate the denied site.

(c) For each site designated for new construction of low and moderate income units, the municipality shall provide the following minimum documentation:

1. A general description of each site to be used for inclusionary development, including, but not limited to, the following: acreage, current zoning, surrounding land uses, and street access. Maps shall be submitted showing the location of all sites;

2. A description of any environmental constraints, including steep slopes, wetlands and flood plain areas. The municipality shall include calculations of the amount of acreage that is environmentally constrained and any remaining buildable acreage. Documentation shall include the appropriate wetland and flood plain maps required pursuant to N.J.A.C. 5:93–5.1;

3. Information shall be submitted regarding location, size and capacity of lines and facilities within the service area, as well as the status of the 201/208 plans. Documentation shall include maps showing the location of the sewer and water facilities; and

4. For each site, the total number of housing units; the gross and net density of the proposed development; the total number of low and moderate income units; and the number of low and moderate income units that will be for sale and for rent.

(d) Municipalities shall structure plans for new construction, conversion and gut rehabilitation (including new construction, conversion and gut rehabilitation that is part of a regional contribution agreement) that conform to the Council's rules pertaining to bedroom mix, age restriction, price stratification, rental housing, controls on affordability and affirmative marketing.

(e) Unless otherwise permitted, the Council shall not provide credit for housing that is restricted in occupancy to any specific group.

5:93–5.4 New construction; conformance with the State Development and Redevelopment Plan (SDRP)

(a) In Planning Areas 1 and 2, as designated in the SDRP, the Council shall encourage inclusionary development within centers. However, municipalities may locate inclusionary developments within the environs as defined in the SDRP.

(b) In Planning Area 3, the Council shall encourage inclusionary development within centers. Where a municipality proposes an inclusionary site within Planning Area 3 outside of a center, the Council may permit such a site if infrastructure is available or can be easily extended from Planning Area 2.

(c) In Planning Areas 4 or 5, as designated in the SDRP, the Council shall require inclusionary development to be located in centers. Where the Council determines that a municipality has not created a realistic opportunity within the development boundaries of a center to accommodate that portion of the municipal inclusionary component that the municipality proposes to address within the municipality, the Council shall require the municipality to identify an expanded center(s) or a new center(s) and submit the expanded or new center(s) to the State Planning Commission for designation.

(d) In municipalities that are divided by more than one Planning Area, the following principles shall apply:

1. The Council shall encourage and may require the use of sites in Planning Areas 1 and 2 prior to approving inclusionary sites in Planning Areas 3, 4 and 5 that lack sufficient infrastructure;

2. The Council shall encourage and may require the use of sites within Planning Area 3 prior to approving inclusionary sites in Planning Areas 4 and 5 that would require the expansion of existing infrastructure; and

3. The Council shall encourage and may require the use of sites to which existing infrastructure can easily be extended prior to approving inclusionary sites that require the creation of new infrastructure in an area not presently serviced by infrastructure.

5:93–5.5 Municipally sponsored construction and gut rehabilitation

(a) A municipality may elect to provide low and moderate income units through a municipally sponsored construction program. A municipally sponsored construction program shall address four major areas of concern. It shall document that there is municipal control of the site(s); an administrative mechanism to construct the proposed housing; a funding plan and evidence of adequate funding capacity; and timetables for construction of the units. More specifically, the following minimum documentation shall be submitted.

1. The municipality shall demonstrate that it has control or has the ability to control the site(s). Control may be in the form of outright ownership or an option on the property;

2. An administrative mechanism shall be submitted for the development indicating who will income qualify applicants and administer the units once they are occupied. The municipality may contract with an outside agency to provide these functions, provided a written agreement between the administrative agency and the municipality is submitted to the Council.

3. The municipality shall submit detailed information demonstrating that it has adequate funding capabilities. The documentation shall include:

i. A pro forma statement for the project; and

ii. Evidence that the municipality has adequate and stable funding. If State or Federal funds will be used, the municipality shall provide documentation indicating the funding available to the municipality and any applications still pending. In the case where an application for outside funding is still pending, the municipality shall provide a stable alternative source, such as municipal bonding, in the event that the funding request is not approved. As outside funds become available, the municipality may reduce its reliance on municipal resources; and

4. A construction schedule, or timetable, shall be submitted for each step in the development process: including preparation of a site plan, granting of municipal approvals, applications for State and Federal permits, selection of a contractor and construction. The construction schedule shall provide for construction to begin within two years of substantive certification. The municipality shall indicate the entity responsible for monitoring the construction and overall development activity.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–5.6 Zoning for inclusionary development

(a) Municipalities that choose to provide zoning for inclusionary development shall select sites that conform to the criteria in N.J.A.C. 5:93–5.3 and shall submit the information required in N.J.A.C. 5:93–5.3.

(b) The Council's review of municipal plans to zone for inclusionary development shall include, but not necessarily be limited to: the existing densities surrounding the proposed inclusionary site; the need for a density bonus in order to produce low and moderate income housing; whether the site is approvable, available, developable and suitable pursuant to N.J.A.C. 5:93–1.3; the site's conformance with the State Development and Redevelopment Plan pursuant to N.J.A.C. 5:93–5.4; the existence of steep slopes, wetlands and floodplain areas on the site; the present ability of a developer to construct low and moderate income housing at a specific density; the length of time an inclusionary site has been zoned at a specific density and set-aside without being developed; and the number of inclusionary sites that have developed within the municipality at specific densities and set-asides.

1. When a municipality is receiving an adjustment pursuant to N.J.A.C. 5:93–4.2, the municipality shall be required to zone inclusionary sites at a minimum gross density of six (6) units per acre with a 20 percent set-aside.

2. In all other municipalities, when the review described in (b) indicates that such densities are appropriate, the Council shall require that a substantial percentage of inclusionary sites be zoned to allow market units within an inclusionary development to be constructed as single family detached units. For these sites, the Council shall generally favor a gross density of four units per acre with a 15 percent set-aside. Municipalities may also seek to zone sites for a gross density of five (5) units per acre with a 17.5 percent set-aside and six (6) units per acre or more with a 20 percent set-aside. The Council shall determine set-asides for densities between four (4) and five (5) and between five (5) and six (6) through a process of interpolation.

(c) The Council may require higher densities in circumstances including, but not limited to:

1. Where the existing zoning exceeds the density proposed by the municipality; or

2. When the Council determines that higher densities are required to provide an opportunity for inclusionary development in a specific municipality, based on the particular circumstances of that municipality.

(d) Municipalities zoning for inclusionary development shall require low and moderate income housing units to be built in accordance with the following schedule:

Minimum Percentage of Low and Moderate Income Units Completed	Percentage of Market Housing Units Completed
0	25
10	25 + 1 unit
50	50
75	75
100	90
	100

(e) The Council encourages a design of inclusionary developments that integrates the low and moderate income units with the market units.

Amended by R.1994 d.563, effective November 7, 1994.
See: 26 N.J.R. 2514(a), 26 N.J.R. 4349(b).

Case Notes

Market demand for particular type of housing must be considered in determining whether municipality has provided constitutionally-mandated "realistic" likelihood of production of affordable housing. Toll Bros., Inc. v. Township of West Windsor, 303 N.J.Super. 518, 697 A.2d 201 (L. 1997).

Settlement of *Mount Laurel* litigation which required developer to construct ten percent of all units to be affordable units, to pay $800,000 to municipality, and to construct affordable units within specific period of time irrespective of when construction of market-rate units was commenced was fair and reasonable.. East/West Venture v. Borough of Fort Lee, 286 N.J.Super. 311, 669 A.2d 260 (A.D.1996).

5:93–5.7 Regional contribution agreements

A municipality may address its housing obligation by entering into a regional contribution agreement in accordance with N.J.A.C. 5:93–6.

5:93–5.8 Alternative living arrangements

(a) Alternative living arrangements may be used to address a municipal housing obligation by entering into an agreement for the location of such a facility with the provider of the facility or by granting preliminary approval to a developer of an alternative living arrangement.

(b) The unit of credit for an alternative living arrangement shall be the bedroom.

(c) Alternative living arrangements reserved for senior citizens shall be included with the 25 percent that may be reserved for senior citizens pursuant to N.J.A.C. 5:93–5.13.

(d) Controls on affordability on alternative living arrangements shall remain in effect for at least 10 years. To be eligible for a rental bonus (pursuant to N.J.A.C. 5:93–5.14), controls on affordability shall remain in effect for at least 30 years.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–5.9 Accessory apartments

(a) Up to 10 accessory apartments may be used to address a municipal housing obligation. A municipality using an accessory apartment program shall:

1. Demonstrate that the housing stock lends itself to accessory apartments. The Council will favor a large (measured in square feet), older housing stock;

2. Provide at least $10,000 per unit to subsidize the creation of the accessory apartment;

3. Demonstrate that rents of accessory apartments will average 57.5 percent of median income, including utilities. The rent shall be based on the number of bedrooms in accordance with N.J.A.C. 5:93–7.4; and

4. Demonstrate that accessory apartments will be affirmatively marketed in accordance with N.J.A.C. 5:93–11.

(b) Accessory apartments shall be exempt from Council bedroom mix requirements (N.J.A.C. 5:93–7.3).

(c) Accessory apartments reserved for senior citizens shall be included with the 25 percent that may be reserved for senior citizens pursuant to N.J.A.C. 5:93–5.12.

(d) Controls on affordability on accessory apartments shall remain in effect for at least 10 years. To be eligible for a rental bonus (pursuant to N.J.A.C. 5:93–5.13), controls on affordability shall remain in effect for at least 30 years.

(e) The Council shall assess the municipality's accessory apartment program at the end of a two-year period from date of substantive certification and shall require any necessary changes to address a shortfall, including, but not limited to the zoning of an additional site.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–5.10 Purchase of housing units that have never been occupied and vacant housing units

(a) Purchasing housing units that have never been occupied and offering them in sound condition at affordable prices and/or rents to low and moderate income households may be used to address a municipal housing obligation. The sales price or rent of affordable units shall conform to the standards in N.J.A.C. 5:93–7.2 and 7.4. Municipalities that propose to purchase more than 30 percent but less than 100 percent of the market units in any one development and restrict them to low and moderate income households shall consider the impact of such a purchase on the value of the market units within the development. Municipalities shall also consider the impact of the purchase on the economic viability of any condominium or homeowners association.

(b) Purchasing housing units that have been vacant for at least 18 months and offering them in sound condition at affordable prices and/or rents to low and moderate income households may be used to address a municipal housing obligation. To be eligible, the municipality shall demonstrate to the Council's satisfaction, that the housing has been vacant for at least 18 months. The sales price or rent of the affordable units shall be consistent with the standards in N.J.A.C. 5:93–7.2 and 7.4.

(c) The Council shall review plans to purchase housing units that have never been occupied and housing units that the municipality has determined to be vacant for at least 18 months in a manner similar to its review of municipally sponsored construction, conversion and gut rehabilitation.

Affordable low and moderate income housing created pursuant to this section shall, as best as practicable, conform to the Council's bedroom mix rules (N.J.A.C. 5:93–7.3) and shall be affirmatively marketed pursuant to N.J.A.C. 5:93–11.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–5.11 Write–down/buy–down of previously owned units

(a) Writing–down or buying-down the cost of previously owned market rate units and offering them in sound condition at affordable prices to low and moderate income households may be used to address a municipal housing obligation. A municipality utilizing this program shall:

1. Propose up to 10 units but no more than 25 percent of a municipality's net inclusionary or new construction component;

2. Demonstrate that there are sufficient for-sale market rate units within the municipality on the multiple listing service for a viable program;

3. Provide at least $20,000 per unit to subsidize the cost of the buy-down unit;

4. Ensure that the sales prices shall conform to the standards in N.J.A.C. 5:93–7.4;

5. Demonstrate that at least half of the proposed units will be affordable to low income households and that the sales prices will be affordable to households earning an average 57.5 percent of median or the range of affordability will be accommodated elsewhere in the housing plan. The sale prices shall be based on the number of bedrooms in accordance with N.J.A.C. 5:93–7.4;

6. Demonstrate that the program and buy-down units will be affirmatively marketed in accordance with N.J.A.C. 5:93–11;

7. Be exempt from bedroom mix requirements pursuant to N.J.A.C. 5:93–7.3;

8. Place the 30–year deed restriction and mortgage lien on each unit as per Technical Appendix E, N.J.A.C. 5:93;

9. Designate an administrative agency that will:

i. Maintain an up-to-date inventory of units that meet the requirements of a buy-down program;

ii. Qualify and place income eligible households in low and moderate income units upon initial occupancy;

iii. Place income eligible households in low and moderate income units as they become available during the 30–year term of affordability controls;

iv. Enforce the terms of the deed restriction and mortgage lien;

v. Set up a separate interest bearing escrow account for the buy-down funds from each municipality; and

vi. Sponsor a home ownership counselling program and post purchase session for prospective purchasers; and

10. Encourage the dispersement of these units throughout the municipality;

(b) The Council shall assess the municipality's write–down/buy–down program at the end of a two-year period from date of substantive certification and the municipality shall prepare a plan to address any unmet units at that time.

New Rule, R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–5.12 Status of sites addressing the 1987–1993 municipal obligation

(a) Municipalities that received substantive certification for their 1987–1993 obligation based, in part, on the municipal choice to sponsor the construction of low and moderate income housing are responsible for constructing the low and moderate income housing. Failure of the community to satisfy the conditions of substantive certification and construct the housing shall not absolve the municipality from its responsibility.

(b) Sites zoned for inclusionary development in addressing the 1987–1993 housing obligation shall retain such zoning in the petition addressing a 1987–1999 fair share obligation if:

1. The site was subject to an agreement pursuant to the Council's mediation process or part of a negotiated settlement in court; or

2. The developer of the site has filed a development application with the municipality prior to the expiration of the 1987–1993 substantive certification period or the municipal petition for substantive certification whichever is later.

(c) A municipality may propose to eliminate a site under N.J.A.C. 5:93–5.12(b) if there is a 12–year petition and a signed agreement between the municipality and the affected property owner of the site on a new, proposed zoning.

(d) When petitioning to address a 12–year obligation, a municipality seeking to replace or delete a site used in addressing the 1987–1993 housing obligation that does not meet the criteria in (b) above shall provide notice at the time of petition to the owner of the site that the site is being replaced or deleted.

(e) A developer seeking an amendment to the density requirements of an inclusionary site shall follow the procedures set forth in N.J.A.C. 5:91–13. In submitting such requests, the developer shall demonstrate:

1. An ability to construct low and moderate income units within a defined period of time; and

2. A plan to address the low and moderate income units required of the site as a condition of substantive certification.

Recodified from 5:93–5.11 and amended by R.1995 d.491, effective September 5, 1995.

See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–5.13 Senior citizen housing

(a) Municipalities may restrict housing for senior citizens based on the following formulae:

1. For municipalities that have received substantive certification or a judgment of repose and are not seeking a vacant land adjustment:

senior citizen units = .25 (municipal precredited need – prior cycle credits – credits pursuant to N.J.A.C. 5:93–3.4 – the impact of the 20 percent cap – the impact of the 1,000 unit limitation pursuant to N.J.A.C. 5:93–14) – any units restricted to senior citizens in addressing the 1987–1993 housing obligation.

2. For municipalities that receive a vacant land adjustment:

senior citizen units = .25 (prior-cycle fair share + realistic development potential + rehabilitation component – credits pursuant to N.J.A.C. 5:93–3.4) – any units restricted to senior citizens in addressing the 1987–1993 housing obligation.

(Municipalities that have not received substantive certification or a judgment of repose shall have a prior-cycle fair share of zero for this calculation. Municipalities that received a vacant land adjustment with a previous substantive certification or judgment of repose shall have a realistic development potential of zero for this calculation.)

3. For municipalities that have never received substantive certification or a judgment or repose and are not seeking a vacant land adjustment:

senior citizen units = .25 (municipal precredited need – prior cycle credits – credits pursuant to N.J.A.C. 5:93–3.2 and 3.4 – the impact of the 20 percent cap – the impact of the 1,000 unit limitation pursuant to N.J.A.C. 5:93–14.)

(b) If the municipality is transferring or has transferred housing units via a regional contribution agreement, the maximum amount of age restricted units in the sending municipality shall not exceed 25 percent of the newly constructed low and moderate income units to be created in the sending municipality. Housing units transferred via a regional contribution agreement may include senior citizen housing units provided that the sum of the newly constructed senior citizen units created in the sending and receiving municipalities does not exceed the total permitted above. This restriction shall not apply to the rehabilitation of existing age restricted units in either the sending or receiving municipality.

(c) A receiving municipality may seek a waiver to restrict more low and moderate income units to senior citizens than permitted by (a) above. In reviewing such a request, the Council shall consider the municipality's past inclusionary practices, measured by objective criteria, such as: jobs to housing ratio; municipal median income as compared to the regional median income; and the percentage of low and moderate income households in the municipality as compared to the percentage in the housing region. The Council shall also consider the waiver request within the context of the objectives of the receiving municipality's project plan.

Recodified from 5:93–5.12 and amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–5.14 Rental housing

(a) In addressing the 1987–1999 housing need, every municipality shall have an obligation to create a realistic opportunity to construct rental units. For a municipality not receiving an adjustment pursuant to N.J.A.C. 5:93–4.2, the rental obligation shall equal .25 (municipal precredited need – prior cycle credits – impact of the 20 percent cap – the impact of the 1,000 unit limitation pursuant to N.J.A.C. 5:93–14 – the rehabilitation component) or .25 (calculated need – the impact of the 1000 unit limitation pursuant to N.J.A.C. 5:93–14 – the rehabilitation component). For a municipality that receives an adjustment pursuant to N.J.A.C. 5:93–4.2, the rental obligation shall equal 25 percent of the realistic development potential.

(b) Any rental obligation (pursuant to N.J.A.C. 5:92–14.4(a) and (b)) that was a condition of substantive certification in addressing the 1987–1993 municipal fair share shall be considered as an ongoing obligation in addressing the 1987–1999 housing need.

(c) The municipal approach to addressing the rental obligation may include, but not necessarily be limited to, any combination of the following:

1. Creation of alternative living arrangements pursuant to N.J.A.C. 5:93–5.8;

2. A municipally sponsored or non-profit sponsored rental development;

3. Agreements with developers for the municipality to purchase low and moderate income units and maintain them as rental units;

4. The creation of accessory apartments pursuant to N.J.A.C. 5:93–5.9;

5. Permitting inclusionary sites to be developed as sales or rental housing with a density increase if the developer chooses to build rental housing. The Council shall presumptively require a minimum density of ten units per acre and a maximum set-aside of 15 percent for rental housing. Municipalities that choose a zoning response to all or part of the rental obligation shall permit such densities and set-asides on all inclusionary sites until the requirement for rental housing has been addressed;

6. Agreements with developers to construct and administer low and moderate income rental units as part of an inclusionary development.

(d) The Council shall grant a rental bonus for rental units that are constructed and conform to the standards contained in N.J.A.C. 5:93–5.8(d) and 5.9(d) and 5:93–7. The Council may also grant the rental bonus prior to construction when it determines that the municipality has provided or received a firm commitment for the construction of rental units. A municipality may lose the benefit of the rental bonus granted in advance of the actual construction of the rental units if the municipality has not: constructed the rental units within the time periods established as a condition of substantive certification; or granted preliminary or final approval for the construction of the rental units (where a developer agreed to construct the rental units). A municipality may also lose the benefit of a rental bonus if the preliminary or final approval is no longer valid or if the developer has abandoned the development.

1. A municipality shall receive two units (2.0) of credit for rental units available to the general public.

2. A municipality shall receive one and one-third (1.33) units of credit for rental units restricted to senior citizens. However, no more than 50 percent of the rental obligation defined in (a) and (b) shall receive a bonus for rental units restricted to senior citizens unless:

i. The rental units have been constructed prior to the effective date of this rule;

ii. The development has a valid preliminary or final approval from the municipality and the developer remains committed to building rental housing as of the effective date of this rule; or

iii. The time limit for constructing the rental units as per the conditions of substantive certification has not expired.

3. No rental bonus shall be granted for rental units in excess of the rental obligation defined in (a) and (b).

(e) Municipalities that choose to transfer the rental obligation via a regional contribution agreement shall do so by creating new rental units in the receiving municipality. Gut rehabilitation units as defined in N.J.A.C. 5:93–1.3 may address the rental component. Municipalities that transfer the rental obligation shall receive a one unit credit for each rental unit transferred.

Recodified from 5:93–5.13 and amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

SUBCHAPTER 6. REGIONAL CONTRIBUTION AGREEMENTS (RCA)

5:93–6.1 General provisions

(a) Municipalities may propose the transfer of up to 50 percent of their housing obligation based on the procedures in N.J.A.C. 5:91–11 and on the following formulae:

1. For municipalities that have received substantive certification or a judgment of repose and are not seeking a vacant land adjustment:

RCA = .5 (municipal precredited need – prior cycle credits – credits pursuant to N.J.A.C. 5:93–3.4 – the impact of the 20 percent cap – the impact of the 1,000 unit limitation to N.J.A.C. 5:93–14) – any units transferred as a result of a previously approved RCA.

2. For municipalities that receive a vacant land adjustment:

RCA = .5 (prior–cycle fair share + realistic development potential + rehabilitation component – credits pursuant to N.J.A.C. 5:93–3.4) – any units transferred as a result of a previously approved RCA.

Municipalities that have not received substantive certification or a judgment of repose shall have a prior-cycle fair share of zero for this calculation. Municipalities that received a vacant land adjustment with a previous substantive certification or judgment of repose shall have a realistic development potential of zero for this calculation.

3. For municipalities that have never received substantive certification or a judgment of repose and are not seeking a vacant land adjustment:

RCA = .5 (municipal precredited need – prior cycle credits – credits pursuant to N.J.A.C. 5:93– 3.2 and 3.4 – the impact of the 20 percent cap – the impact of the 1000 unit limitation pursuant to N.J.A.C. 5:93–14).

(b) A municipality may propose such a transfer to another municipality within its housing region by means of a contractual agreement into which two municipalities voluntarily enter. However, a municipality may not transfer any portion of its rehabilitation component. The Council shall not review an RCA without a contractual agreement between the two municipalities.

(c) Notwithstanding the contractual agreement that initiates the review of an RCA, described in (b) above, the Council may require any contractual amendments it deems necessary upon reviewing the RCA.

(d) The Council shall maintain current lists of municipalities which have stated an intent to enter into RCAs as receiving municipalities and shall provide copies of such lists to potential sending municipalities as requested.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–6.2 Terms

(a) At least 50 percent of the units accepted by a receiving municipality shall be affordable to low income households. The Council may modify this requirement if it determines that the sending municipality has adequately provided for its low income housing obligation elsewhere in its housing element. In the case of RCAs for scattered site rehabilitation of occupied units, the receiving community shall ensure, as best as practicable, that 50 percent of the rehabilitated units are occupied by low income households.

(b) A receiving municipality may use revenues collected as a result of an RCA for any activity approved by the Council for addressing the low and moderate income obligation. Eligible activities shall include, but are not necessarily limited to, those activities outlined in N.J.A.C. 5:93–5.1.

(c) All RCAs shall specify payment schedules which conform to a construction or rehabilitation schedule and which relate to the receiving municipality's ability to deliver housing units in a timely fashion.

(d) All RCAs shall require that a receiving municipality submit a proposed project plan within 60 days of the sending municipality's petition for substantive certification which shall be in such form and contain such information as the Agency and the Council may require.

(e) Sending and receiving municipalities shall, as part of their contract negotiations, determine the use of transferred funds that may be in excess of the amount necessary to implement the RCA. Such funds shall either be returned to the sending community and/or utilized by the receiving community to produce additional low and moderate income housing units or for a capital expenditure ancillary to or benefiting low and moderate income households. However, if a receiving municipality can accomplish the housing activity approved as part of its project plan for less than the minimum per unit transfer pursuant to N.J.A.C. 5:93–6.4(b), the difference between the cost of the housing activity and the minimum per unit transfer shall be used within the receiving municipality. The specific use of excess funds by the receiving community need not be specified in the RCA contract, but shall be subject to Council approval.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–6.3 Credits

No receiving municipality shall receive credit towards its fair share obligation for units provided pursuant to an RCA, where credit for such units has been awarded to a sending municipality.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–6.4 Amount and duration of contributions

(a) In negotiating RCAs, cosmetic improvements may be included in determining the negotiated price of rehabilitating a housing unit. However, to be eligible for rehabilitation, a housing unit shall be substandard as defined in N.J.A.C. 5:93–1.3. Upon rehabilitation, housing deficiencies shall be corrected and the unit shall be brought up to code standard. The standard for evaluating rehabilitation activity shall be the local property maintenance code, or if none is available, the BOCA Property Maintenance Code, in effect at the time of evaluation (available from Building Officials and Code Administrators, Inc., 4051 West Flossmoor Road, County Club Hills, Illinois 60478–5795).

(b) A sending municipality shall transfer at least $20,000 to a receiving municipality for each unit transferred as part of a regional contribution agreement. This threshold has been established after consideration of:

1. The housing stock in New Jersey's urban municipalities;

2. The average cost of a regional contribution since 1986;

3. The maximum subsidies available under the Neighborhood Preservation Balanced Housing Program established pursuant to N.J.S.A. 52:27D–320; and

4. The average internal subsidization required for a developer to provide each low and moderate income unit within an inclusionary development.

(c) The receiving municipality may spend less than $20,000 per unit in implementing the RCA, provided the remaining funds are used for an activity approved by the Council for addressing the low and moderate income obligation. Eligible activities shall include, but are not necessarily limited to, those activities outlined in N.J.A.C. 5:93–5.1.

(d) An RCA may be entered into at any time during the sending municipality's period of substantive certification but shall not exceed six years.

(e) All RCAs that include a scattered site rehabilitation program shall be structured so that the final transfer payment occurs within five years of the approval of the RCA. All rehabilitation activity shall occur within the sending community's period of substantive certification. Rehabilitation schedules shall be structured for completion within five years of the approval of an RCA. Rehabilitation schedules shall be subject to Council approval and shall not be structured to require a disproportionate share of rehabilitation during the latter portion of the five year period.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–6.5 Monitoring and enforcement

(a) All RCAs shall require receiving municipalities to file annual reports with the Council and with the Agency setting forth the progress in implementing the project to be produced under an RCA. This report shall be in such form as the Council and the Agency may from time to time require.

(b) The Council shall take such actions as may be necessary to enforce an RCA with respect to the timely implementation of a project by the receiving municipality. In implementing its enforcement responsibilities, the Council may:

1. Initiate or join a lawsuit to enforce a RCA;

2. Bar a delinquent receiving municipality from entering into further RCAs for a specified period of time;

3. Recommend that the Agency and the Department of Community Affairs withhold further assistance available under the Act; and/or

4. Take such other actions as the Council may determine necessary, including ordering a sending municipality, for good cause, to temporarily or permanently cease payment to a receiving municipality.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

SUBCHAPTER 7. INCLUSIONARY DEVELOPMENTS

5:93–7.1 Purpose and scope

The purpose of this chapter is to provide standards that pertain to the creation of low and moderate income housing units. The rules that follow shall pertain to all inclusionary developments, including those created as part of a regional contribution agreement. This subchapter provides standards on: the distribution of low and moderate income units; bedroom distribution; and establishing the rents and prices of low and moderate income units.

5:93–7.2 Distribution of low and moderate income units

(a) With the exception of inclusionary developments constructed pursuant to the four percent low income tax credit regulations pursuant to the Internal Revenue Code Section 42(b)4, at least half of all units within each inclusionary development shall be affordable to low income households.

(b) With the exception of inclusionary developments constructed pursuant to the four percent low income tax credit regulations pursuant to the Internal Revenue Code Section 42(b)4, at least half of all rental units shall be affordable to low income households.

(c) With the exception of inclusionary developments constructed pursuant to the four percent low income tax credit regulations pursuant to the Internal Revenue Code Section 42(b)4, at least one-third of all units in each bedroom distribution (pursuant to N.J.A.C. 5:93–7.3) shall be affordable to low income households.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–7.3 Bedroom distribution

(a) Inclusionary developments that are not restricted to senior citizens shall be structured in conjunction with realistic market demands so that:

1. The combination of efficiency and one bedroom units is at least ten percent and no greater than 20 percent of the total low and moderate income units;

2. At least 30 percent of all low and moderate income units are two bedroom units; and

3. At least 20 percent of all low and moderate income units are three bedroom units.

(b) Low and moderate income units restricted to senior citizens may utilize a modified bedroom distribution. At a minimum, the number of bedrooms shall equal the number of senior citizen low and moderate income units within the inclusionary development. The standard can be met by creating all one bedroom units or by creating a two bedroom unit for each efficiency unit. Applications to waive this standard shall be made in accordance with N.J.A.C. 5:93–15 and shall be referred by the Council to the DCA Division on Aging for review and recommendations.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–7.4 Establishing rents and prices of units

(a) The following criteria, in conjunction with realistic market information, shall be used in determining maximum rents and sale prices:

1. Efficiency units shall be affordable to one person households;

2. One bedroom units shall be affordable to 1.5 person households;

3. Two bedroom units shall be affordable to three person households; and

4. Three bedroom units shall be affordable to 4.5 person households.

(b) Median income by household size shall be established by a regional weighted average of the uncapped Section 8 income limits published by HUD. To compute this regional income limit, the HUD determination of median county income for a family of four is multiplied by the households within the county. The resulting product for each county within the housing region is summed. The sum is divided by the estimated total households in each housing region. This quotient represents the regional weighted average of median income for a household of four. This regional weighted average is adjusted by household size based on multipliers used by HUD to adjust median income by household size. The maximum average rent and price of low and moderate income units within each inclusionary development shall be affordable to households earning 57.5 percent of median income. The municipal ordinance shall require moderate income sales units to be available for at least three different prices and low income sales units to be available for at least two different prices.

(c) In averaging 57.5 percent under (b) above, developers and/or municipal sponsors of rental units may establish one rent for a low income unit and one rent for a moderate income unit for each bedroom distribution.

(d) Municipal ordinances regulating owner occupied and rental units shall require that low and moderate income units utilize the same heating source as market units within the inclusionary development.

(e) Municipalities shall require that the initial price of a low and moderate income owner-occupied single family housing unit be established so that after a downpayment of five percent, the monthly principal, interest, homeowner and private mortgage insurances, property taxes (property taxes shall be based on the restricted value of low and moderate income units) and condominium or homeowner fees do not exceed 28 percent of the eligible gross monthly income. Municipalities shall, by ordinance, require that master deeds of inclusionary developments regulate condominium or homeowner association fees or special assessments of low and moderate income purchasers at a specific percentage of those paid by market purchasers. The percentage that shall be paid by low and moderate income purchasers shall be at least one-third of the condominium or homeowner association fees paid by market purchasers. Once established within the master deed, the percentage shall not be amended without prior approval from the Council.

(f) Municipalities shall require that gross rents, including an allowance for utilities, be established so as not to exceed 30 percent of the gross monthly income of the appropriate household size referenced in (a) above. Those tenant-paid utilities that are included in the utility allowance shall be so stated in the lease. The allowance for utilities shall be consistent with the utility allowance approved by HUD for use in New Jersey.

(g) Low income housing units shall be reserved for households with a gross household income less than or equal to 50 percent of the median income approved by the Council. Moderate income housing units shall be reserved for households with a gross household income less than 80 percent of the median income approved by the Council. For example, a household earning 48 percent of median income may be placed in any low income unit; however, a household earning 53 percent may not qualify for a low income unit. A household earning 67 percent of median may be placed in any moderate income housing unit. A household earning less than 50 percent of median may be placed in a moderate income housing unit. Low and moderate income units shall not be offered to households that are not income eligible without Council approval pursuant to N.J.A.C. 5:93–9.16.

Amended by R.1995 d.491, effective September 5, 1995.

See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

SUBCHAPTER 8. DEVELOPMENT FEES

5:93–8.1 Purpose

(a) The New Jersey Supreme Court, in *Holmdel Builder's Ass'n v. Holmdel Township,* 121 *N.J.* 550 (1990) (issued December 13, 1990), determined that mandatory development fees are both statutorily and constitutionally permissible. The Court further anticipated that the Council would promulgate appropriate development fee rules specifying, among other things, the standards for these development fees. The purpose of this subchapter is to provide such guidance.

(b) Except as otherwise provided in these rules, a municipality may only impose, collect and spend development fees through participation in the Council's substantive certification process or through a comprehensive review designed to achieve a judgment of repose. The exceptions to this rule are set forth in N.J.A.C. 5:93–8.3 through 8.6 inclusive. These exceptions are permitted because some communities have already received substantive certification; others have achieved a judgment of repose; and still others are litigating exclusionary zoning cases. Some of these municipalities have already collected fees. The Council has created a process for these municipalities to collect and/or retain fees. However, in the future, the ability to impose, collect and spend development fees shall be limited to municipalities that petition for substantive certification. Urban aid municipalities are also considered a special case. These municipalities have historically housed a disproportionate share of New Jersey's poor and, as a result, may have exceedingly high fair share obligations that would be extremely difficult to address in a six year period. Therefore, the Council will allow these municipalities to impose, collect and spend fees outside of substantive certification provided the municipality adheres to the rules in this subchapter. The rules that follow provide basic requirements for imposing, collecting and spending development fees. They then provide additional requirements for municipalities in various categories.

(c) While the rules that follow shall govern those municipalities that petition for substantive certification and urban aid cities, the Council will review development fee ordinances and plan to spend money upon the request of the court with jurisdiction in an exclusionary zoning lawsuit.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.2 Basic requirements

(a) Except as set forth in N.J.A.C. 5:93–8.3 through 8.6 inclusive, the Council shall not review or approve any

development fee ordinance unless the municipality has petitioned for substantive certification.

(b) No municipality shall impose or collect development fees unless the municipality has adopted a housing element and the Council has approved its development fee ordinance.

(c) No municipality shall spend development fees unless the Council has approved a plan for spending such fees. With the exception provided for in N.J.A.C. 5:93–8.3, municipalities that have not received substantive certification or a judgment of repose shall not spend development fees until they have received substantive certification or a judgment of repose.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.3 Urban aid municipalities

Municipalities that qualify for State aid pursuant to P.L. 1978, c.14 (N.J.S.A. 52:27D–178 et seq.) shall not impose, collect or spend development fees without conforming to the requirements set forth in N.J.A.C. 5:93–8.2. Council approval of the municipal development fee ordinance shall allow the municipality to impose and collect development fees for a period specified by the Council, not to exceed six years, commencing with the Council's approval of the development fee ordinance. Notwithstanding any other provision of this chapter, these municipalities shall have one year from the Council's approval of their development fee ordinance to submit a plan for spending development fees. These municipalities may impose, collect and spend development fees without petitioning for substantive certification.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.4 Municipalities that collected fees and received certification

(a) This rule deals with the category of municipalities that have collected development fees prior to December 13, 1990 and have received substantive certification. These municipalities may petition the Council to review and approve an ordinance regarding development fees collected prior to December 13, 1990. The Council may approve such ordinance, provided it conforms to the procedures in N.J.A.C. 5:93–8.8, Development fee ordinance review, and N.J.A.C. 5:91–15, Procedures for retaining development fees.

(b) The municipalities in this category shall not resume collecting development fees or spending development fees without conforming to N.J.A.C. 5:93–8.2.

(c) Notwithstanding any other provision of this chapter, the municipalities in this category shall submit plans to spend the development fees (regardless of when these fees were collected) prior to the expiration of their substantive certification periods.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.5 Municipalities that collected fees and are proceeding toward certification

(a) This rule deals with the category of municipalities that have collected development fees prior to December 13, 1990 and have petitioned for substantive certification. These municipalities may petition the Council to review and approve an ordinance regarding development fees collected prior to December 13, 1990. The Council may approve such ordinances provided they conform to the procedures in N.J.A.C. 5:93–8.8, Development fee ordinance review, and N.J.A.C. 5:91–15, Procedures for retaining development fees.

(b) The municipalities in this category shall not resume collecting development fees or spending development fees without conforming to N.J.A.C. 5:93–8.2.

(c) Notwithstanding any other provision of this chapter, municipalities in this category shall submit plans to spend the development fees and receive approval of these plans prior to receiving substantive certification.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.6 Municipalities that have not imposed or collected fees that have received substantive certification, or are proceeding toward substantive certification

(a) This rule deals with municipalities that have not imposed or collected development fees and that have received substantive certification or are proceeding toward substantive certification. Municipalities in this category shall not impose or collect fees until they have received the Council's approval of their development fee ordinance. No municipality in this category shall spend development fees unless the Council has approved a plan for spending such fees.

(b) Municipalities that have not received substantive certification shall submit plans for spending the development fees and receive approval for these plans prior to receiving substantive certification.

(c) Notwithstanding any provision of this chapter, municipalities in this category that have received substantive certification shall submit plans for spending the development fees prior to the expiration of the substantive certification period or period of repose.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.7 Other municipalities that have not imposed or collected fees

(a) Except as provided for in N.J.A.C. 5:93–8.3 through 8.6 inclusive, municipalities that have not imposed or collected fees shall not impose or collect fees until they have adopted a housing element, petitioned for substantive certification and received the Council's approval of its development fee ordinance.

(b) No municipality in this category may spend development fees unless the Council has approved a plan for spending such fees and granted substantive certification. Municipalities shall submit these plans when they petition for substantive certification. Municipalities that have petitioned for substantive certification prior to the effective date of this rule shall submit plans for spending development fees prior to receiving substantive certification.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.8 Development fee ordinance review

(a) The Council shall not review a development fee ordinance unless the municipality has submitted:

1. A copy of an adopted housing element that complies with the Municipal Land Use Law, N.J.S.A. 40:55D et seq.;

2. A copy of the proposed ordinance designed to collect development fees;

3. A description of any changes to the municipal zoning ordinance during the previous two years;

4. A request in the form of a resolution by the governing body for the Council to review the development fee ordinance;

5. A copy of the compliance plan, implementation ordinances information regarding the period of time encompassed by the judgment of repose and a request for review by the court if the municipality has received a court ordered judgment of repose. The court shall indicate if the Council is to monitor the development fees;

6. A description of the types of developments that will be subject to fees;

7. A description of the amount and nature of the fees imposed;

8. A statement regarding the use of density bonuses or other devices to counterbalance development fees; and

9. If development fees have been collected prior to December 13, 1990 and the municipality wishes to retain some or all of these fees, the following information must be submitted to the Council within 90 days of the effective date of this rule:

i. A copy of the ordinance pursuant to which the fees were collected; and the proposed ordinance, if any, designed to reimpose some or all of these fees;

ii. A request in the form of a resolution by the governing body for the Council to review the development fee ordinance used to collect the fees;

iii. The name of each developer that paid a development fee;

iv. The amount paid by each developer and the formula for the amount collected;

v. The equalized assessed value of each development at the time of collection;

vi. An accounting of all money collected and identification of the municipal account that houses all development fees;

vii. If any money collected through a development fee ordinance has been spent, an accounting of the expenditure; and

viii. Any other information the Council may require.

(b) Municipalities that collected fees prior to December 13, 1990, shall be able to retain such revenues or reimpose such fees to the extent that the fees collected by the municipality do not exceed the amount permitted by this chapter. Municipalities interested in retaining development fees collected prior to December 13, 1990 shall also conform to the procedures outlined in N.J.A.C. 5:91–15, Procedures for retaining development fees.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.9 Content of plans to spend development fees

Plans to spend development fees shall consist of the information required in N.J.A.C. 5:93–5.1(c).

5:93–8.10 Development fees; residential

(a) Residential development fees shall be a maximum of one-half of one percent of the equalized assessed value for residential development, provided no increased density is permitted.

(b) In zones that permit increased residential development, the municipality may impose a development fee of up to six percent of the equalized assessed value for each additional unit that may be realized.

Example: if a rezoning allowed two extra units to be constructed, the fees could equal one-half of one percent of equalized assessed value on the first unit and six percent of equalized assessed value on the two incremental units.

(c) Municipalities may allow developers of sites zoned for inclusionary development to pay a fee in lieu of building low and moderate income units, provided the Council determines the municipal housing element and fair share plan provides a realistic opportunity for addressing the municipal fair share obligation. The fee may equal the cost of subsidizing the low and moderate income units that are replaced by the development fee. For example, an inclusionary development may include a 20 percent set-aside, no set-aside and a fee that is the equivalent of a 20 percent set-aside or a combination of a fee and set-aside that is the equivalent of a 20 percent set-aside.

(d) Municipalities may collect fees exceeding those permitted in this section, provided they enter into agreements with developers that offer a financial incentive for paying higher fees. The financial incentive may be in the form of a tax abatement. No agreement may provide for a voluntary developer fee without also providing for a comparable offsetting incentive. All agreements are subject to Council approval.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

Case Notes

In settlement of *Mount Laurel* litigation, developer's agreement to pay municipality $800,000 into municipalities *Mount Laurel* trust fund after extensive negotiations under supervision of court-appointed master was not unlawful. East/West Venture v. Borough of Fort Lee, 286 N.J.Super. 311, 669 A.2d 260 (A.D.1996).

5:93–8.11 Development fees; non-residential

(a) Non-residential development fees shall be a maximum of one percent of the equalized assessed value for non-residential development.

(b) Municipalities may collect fees exceeding those permitted in this section provided they enter into agreements with developers that offer a financial incentive for paying higher fees. Such agreements may include, but are not limited to, a tax abatement, increased commercial/industrial square footage, increased commercial/industrial lot coverage and/or increased commercial/industrial impervious coverage in return for an increased fee. The fee negotiated must bear a reasonable relationship to the additional commercial/industrial consideration to be received. All agreements are subject to Council approval.

5:93–8.12 Eligible exactions, ineligible exactions and exemptions

(a) Except as provided for in N.J.A.C. 5:93–8.10, inclusionary developments shall be exempt from development fees. All other forms of new construction may be subject to development fees.

(b) Development fees may be imposed and collected when an existing structure is expanded or undergoes a more intense use. The development fee that may be imposed and collected shall be calculated on the increase in the equalized assessed value of the improved structure.

(c) Municipalities shall not reduce densities from pre-existing levels and then require developers to pay development fees in exchange for an increased density.

(d) Developments that have received preliminary or final approval prior to the imposition of a municipal development fee shall be exempt from development fees unless the developer seeks a major change in the approval. Municipalities that collected development fees prior to December 13, 1990 may not retain any fees imposed subsequent to granting preliminary or final development approval, unless the developer seeks a major change in the approval.

(e) Municipalities may exempt specific types of development from fees or may impose lower fees for specific types of development, provided each classification of development is addressed consistently. For example, all retail development may be exempt from fees.

(f) Municipalities may exempt specific areas of the municipality from the imposition of fees or reduce fees in order to promote development in specific areas of the municipality.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.13 Collection of fees

Municipalities may collect up to 50 percent of the fee on any specific development at the time of issuance of the building permit. The remaining portion may be collected at the issuance of the certificate of occupancy.

5:93–8.14 Contested fees

Imposed and collected development fees that are challenged shall be placed in an interest bearing escrow account by the municipality. If all or a portion of the contested fees are returned to the developer, the accrued interest on the returned amount shall also be returned.

New Rule, R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.15 Housing trust fund

All development fees shall be deposited in a separate interest bearing housing trust fund. In establishing the housing trust fund, the municipality shall provide whatever express written authorization that may be required by the bank to permit the Council to direct the disbursement of development fees pursuant to N.J.A.C. 5:93–8.17 and 8.18.

Recodified from 5:93–8.14 by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.16 Use of money

(a) A municipality may use revenues collected from development fees for any activity approved by the Council for addressing the municipal fair share. Such activities include, but are not limited to: rehabilitation, new construction, regional contribution agreements, purchase of land for low and moderate income housing, improvement of land to be used for low and moderate income housing, extensions and/or improvements of roads and infrastructure to low and moderate income housing sites, assistance designed to render units to be more affordable and administration of the implementation of the housing element. Municipalities are encouraged to use development fee revenues to attract other funds such as, but not limited to, available public subsidies and funds from private lending institutions.

(b) Funds shall not be expended to reimburse municipalities for past housing activities.

(c) At least 30 percent of the revenues collected from development fees shall be devoted to render units more affordable. Examples of such activities include, but are not limited to, downpayment assistance, low interest loans, and rental assistance. Development fees collected to finance an RCA or a new construction project shall be exempt from this requirement. This requirement may be waived in whole or in part when the municipality demonstrates the ability to address the requirement of affordability assistance from another source.

(d) Municipalities may contract with a private or public entity to administer the implementation of any part of its housing element, including the requirement for affordability assistance.

(e) No more than 20 percent of the revenues collected from development fees shall be expended on administration, including, but not limited to, salaries and benefits for municipal employees or consultant fees necessary to develop or implement: a rehabilitation program; a new construction program; a regional contribution agreement; a housing element; and an affirmative marketing program. Administrative funds may be used for: income qualification of households; monitoring the turnover of sale and rental units; and compliance with Council monitoring requirements. Development fees shall not be used to defray the costs of existing staff.

Recodified from 5:93–8.15 and amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.17 Monitoring

Municipalities that collect development fees shall complete and return all monitoring forms related to the collection of fees, expenditure of revenues and implementation of the plan certified by the Council or approved by the court. Financial reports, annual program implementation and monitoring reports shall be completed on forms designed by the Council.

Recodified from 5:93–8.16 and amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.18 Penalties

(a) The municipality's ability to impose and collect fees and the Council's approval of an ordinance and spending plan shall be conditioned on compliance with all requirements of this subchapter. Occurrence of the following may result in the Council taking an action pursuant to (b) below:

1. Failure to submit a plan pursuant to N.J.A.C. 5:93–5.1(c) within the time limits imposed by the Council;

2. Failure to meet deadlines for information required by the Council in its review of a housing element, development fee ordinance, or plan for spending fees;

3. Failure to proceed through the Council's administrative process toward substantive certification in a timely manner;

4. Failure to address the Council's conditions for approval of a plan to spend development fees within the deadlines imposed by the Council;

5. Failure to address the Council's conditions for substantive certification within deadlines imposed by the Council;

6. Failure to submit accurate monitoring reports within the time limits imposed by the Council;

7. Failure to implement the plan to spend development fees within the time limits imposed by the Council, or within reasonable extensions granted by the Council;

8. Expenditure of development fees on activities not permitted by the Council;

9. Revocation of certification; or

10. Other good cause demonstrating that the revenues are not being used for the intended purpose.

(b) Consistent with this rule, any ordinance adopted by a municipality for the purpose of imposing and collecting development fees shall provide that, in the event that any of the conditions described in N.J.A.C. 5:93–8.17(a) occur, the Council shall be authorized, on behalf of the municipality, to direct the manner in which all development fees collected pursuant to that ordinance shall be expended. Such revenues shall immediately become available for expenditure once the Council has notified the municipal clerk and chief financial officer that such a condition has occurred. In furtherance of the foregoing, any such municipality shall, in establishing a bank account pursuant to N.J.A.C. 5:93–8.14, ensure that the municipality has provided whatever express written authorization may be required by the bank to permit the Council to direct the disbursement of such revenues from the account following the delivery to the bank of the aforementioned written notification provided by the Council to the municipality's clerk and chief financial officer.

(c) The Council may, after a hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B–1 et seq., revoke development fee ordinance approval for any municipality that fails to comply with the requirements of this subchapter. Where such approval has been revoked, the Council shall not approve an ordinance permitting such municipality to impose or collect development fees for the remaining period of the substantive certification period or judgment of repose. With regard to municipalities that qualify for State aid pursuant to P.L. 1978, c.14 (N.J.S.A. 52:27D–178 et seq.) the Council shall not approve any ordinance permitting such municipalities to impose or collect development fees for the remainder of the approval period (of up to six years) following a Council determination that they failed to comply with this subchapter.

(d) Neither loss of development fees, nor loss of the municipality's ability to impose and collect development fees shall alter the municipality's responsibilities pursuant to substantive certification or a court ordered judgment of repose.

Recodified from 5:93–8.17 and amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.19 Designation of entities to receive development fees

(a) The Council shall solicit plans from public sector entities and non-profit agencies to create or rehabilitate affordable housing.

(b) The Council shall designate such agencies to receive revenues from development fees when the Council takes an action pursuant to N.J.A.C. 5:93–8.17.

(c) To the extent practicable, when the Council takes an action pursuant to N.J.A.C. 5:93–8.17, the Council shall assign development fee revenues to projects planned within the municipality that generated the revenues or within close proximity to the municipality (such as within the county or region).

Recodified from 5:93–8.18 by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.20 Ongoing collection of fees

(a) Municipalities that qualify for State aid pursuant to P.L. 1978, c.14 (N.J.S.A. 52:27D–178 et seq.) and have received Council approval to impose and collect development fees, shall not impose or collect such fees for more than the period specified by the Council, not to exceed a six year period, unless the municipality has refiled an adopted housing element with the Council and received the Council's approval of its development fee ordinance. These municipalities shall submit a plan for spending development fees within one year of the Council's approval of their development fee ordinance. Municipalities that fail to renew their ability to impose and collect development fees within the six year period may resume the imposition and collection of development fees by complying with the requirements of this section.

(b) Except as provided for in (a) above, the ability for all other municipalities to impose, collect and expend development fees shall expire with their substantive certification or judgment of repose, unless the municipality has filed an adopted housing element with the Council; petitioned for substantive certification; and received the Council's approval of its development fee ordinance. Municipalities that fail to renew their ability to impose and collect development fees prior to the expiration of their substantive certification or judgment of repose may resume the imposition and collection of development fees by complying with the requirements of this section.

Recodified from 5:93–8.19 and amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–8.21 Severability

If any part of this subchapter shall be held invalid, the holding shall not affect the validity of the remaining parts of this subchapter. If any part of this subchapter is held invalid in one or more of their applications, the rules shall remain in effect in all valid applications that are severable from the invalid application.

Recodified from 5:93–8.20 by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

SUBCHAPTER 9. CONTROLS ON AFFORDABILITY

5:93–9.1 Purpose and scope

(a) This subchapter is designed to provide assurances that low and moderate income units are created with controls on affordability over time and that low and moderate income people occupy these units. To that end, municipalities shall designate a municipal authority with the responsibility of ensuring the affordability of sales and rental units over time. The authority shall also be responsible for: affirmative marketing; income qualification of low and moderate income households; placing income eligible households in low and moderate income units upon initial occupancy; placing income eligible households in low and moderate income units as they become available during the period of affordability controls; and enforcing the terms of the deed restriction and mortgage loan. Municipalities shall establish a municipal authority or contract with the Department of Community Affairs Affordable Housing Management Service (AHMS).

(b) In placing households in low and moderate income units, municipalities shall utilize the following verification and certification procedures:

1. Every household member 18 years of age or over who will live in the affordable unit and receives income shall be required to provide income documentation as applicable and determined by the reviewer for the Authority. This includes income received by adults on behalf of minor children for their benefit. Household members 18 years of age or over not receiving income must produce documentation of current status.

2. Verification may include, but is not limited to, the following:

i. Four consecutive pay stubs including overtime, bonuses, or tips dated within 120 days of the interview date or a letter from employer stating present annual income figure as projected annually;

ii. A copy of regular IRS Form 1040 (Tax computation form) 1040A, or 1040 EZ as applicable and State income tax returns filed for each of the three years prior to the date of interview;

iii. A letter or appropriate reporting form verifying benefits such as Social Security, Unemployment, Welfare, Disability or Pension income (monthly or annually);

iv. A letter or appropriate reporting form verifying any other sources of income claimed by the applicant such as alimony and child support;

v. Reports that verify income from assets to be submitted by banks or other financial institutions managing trust funds, money market accounts, certificates of deposit, stocks or bonds;

vi. Evidence or reports of income from assets such as real estate or businesses that are directly held by any Household Member;

vii. Evidence or reports that verify assets that do not earn regular income such as non-income producing real estate or savings that do not earn interest; and

viii. A notarized statement of explanation in such form as to be satisfactory to the reviewer.

3. Generally, sources of annual income shall be based on regular income reported to the IRS and which can be utilized for mortgage approval. Household annual gross income shall be calculated by projecting current gross income over a 12–month period.

4. Income includes but is not limited to wages, salaries, tips, commissions, alimony, regularly scheduled overtime, pensions, social security, unemployment compensation, AFDC, verified regular child support, disability, net income from business or real estate, and income from assets such as savings, CDs, money market, mutual funds, stocks and bonds and imputed income from non-income producing assets such as equity in real estate.

5. Assets not earning a verifiable income shall have an imputed interest income using a current average annual savings interest rate. Assets not earning income includes present real estate equity. Applicants owning real estate must produce documentation of a market value appraisal and outstanding mortgage debt. The difference will be treated as the monetary value of the asset and the imputed interest added to income.

6. Income from assets that have delayed earnings, such as IRA's or annuity programs shall not be included in current income until such payments are being received. However, these assets must be reported and verified.

7. Net rent from real estate is considered income after the monthly mortgage payment including real estate taxes and insurance is deducted. Other expenses are not deductible. In addition, the equity in the rented real estate is considered an asset and will have the imputed interest income on the calculated value of equity added to income.

8. Income does not include payments, rebates or credits received under Federal or State low income home energy assistance programs, Food Stamps, payments received for care of foster children, relocation assistance benefits, income of live-in attendants, scholarships, student loans, personal property such as automobiles, lumpsum additions to family assets such as inheritances, one-time lottery winnings, and insurance settlements except for additional income earned from these additions, and casual, sporadic or irregular gifts and bonuses.

9. Standard credit information services that provide conventional credit and tenant reports may be utilized when certifying a household with required written permission from the household. An unsatisfactory credit history or credit information that demonstrates a disproportionate debt to income ratio may result in a denial of certification. Court-ordered payments for alimony or child support to another household shall be considered a regular monthly debt whether or not it is being paid regularly.

10. Households whose total Gross Annual Income is measured at 50 percent or below 50 percent of the authorized median income guideline shall be certified as low income households and referred to units designated for low income households.

11. Households whose total gross annual income is measured above 50 percent but below 80 percent of the authorized median income shall be certified as moderate income households and referred to units designated for moderate income households.

12. Generally, households will be referred to units where predetermined total monthly housing costs correspond to the household's calculated ability to pay using 28 percent of gross monthly income as a standard for homeownership and 30 percent of gross monthly income as a standard for rental units.

13. At the discretion of the Authority, households may also be required to produce documentation of household composition for determining the correct unit size and the applicable median income guide.

14. Generally, households will be referred to available units using the following standards for occupancy:

i. A maximum of two persons per bedroom;

ii. Children of same sex in same bedroom;

iii. Unrelated adults or persons of the opposite sex other than husband and wife in separate bedrooms; and

iv. Children not in same bedroom with parents.

15. Households may be considered for units other than as above, but in no case shall a household be referred to a unit that provides for more than one additional bedroom per household occupancy standards as stated in (b)14 above.

16. A form for certification shall be prepared and signed by the Authority. Only households receiving certification shall be referred to Affordable Housing units.

17. Certified Households who reject an opportunity for affordable housing may be replaced on the referral list at their request and may be reinterviewed for certification when their name appears on a listing for a subsequent unit.

18. Certification shall be valid for no more than 120 days unless a valid sales contract or lease has been executed within that time period. In this event, certifications shall be valid until such time as the sales contract or lease is ruled invalid and no occupancy has occurred. Certifications may be renewed in writing at the request of a Certified Household for no more than an additional period of 120 days at the discretion of the Authority.

19. Households who are denied certification may make a written request for a redetermination. Households shall be required to produce additional documentation to support their claim. Households who are denied certification a second time may request a hearing by forwarding a written request to the Authority within 30 days following the household's receipt of a denial notification. If a written request has not been received within the 30 day time period, the ineligible determination will be final. The hearing decision shall be final.

5:93–9.2 Length of controls

(a) In developing housing elements, municipalities shall determine measures to assure that newly constructed low and moderate income sales units remain affordable to low and moderate income households for an appropriate period of not less than 30 years. The authority shall do so by requiring all conveyances of newly constructed low and moderate income sales units subject to the Act, to contain the deed restriction and mortgage lien adopted by the Council. (See Appendix E)

(b) Municipalities receiving State aid pursuant to P.L. 1978, c.14 (N.J.S.A. 52:27D–178 et seq.) that exhibit one of the characteristics delineated in N.J.A.C. 5:93–2.3(b) shall adopt measures to assure that newly constructed low and moderate income sales units remain affordable to low and moderate income households for a period of not less than 10 years. The authority shall do so by requiring all conveyances of newly constructed low and moderate income sales units subject to the Act to contain the deed restriction and mortgage lien adopted by the Council. (See Appendix E)

(c) Rehabilitated owner-occupied single family housing units that are improved to code standard shall be subject to affordability controls for at least six years.

(d) Rehabilitated renter-occupied housing units that are improved to code standard shall be subject to affordability controls for at least 10 years.

(e) Municipalities shall adopt measures to assure that newly constructed low and moderate income rental units remain affordable to low and moderate income households for a period of 30 years. Municipalities receiving State aid pursuant to P.L. 1978, c.14 (N.J.S.A. 52:27D–178 et seq.) that exhibit one of the characteristics delineated in N.J.A.C. 5:93–2.3(b) shall adopt measures to assure that newly constructed low and moderate income rental units remain affordable to low and moderate income households for a period of at least 10 years. Affordability controls on rental units may exceed the prescribed periods if the developer agrees to a longer period.

(f) Housing units created through conversion of a non-residential structure shall be considered a new housing unit and shall be subject to controls on affordability as delineated in (a), (b) and (e) above.

(g) Affordability controls on accessory apartments shall be for a period of at least 10 years. However, in order to be eligible for a rental bonus, (pursuant to N.J.A.C. 5:93–5.13) controls on affordability shall extend for a period of 30 years.

(h) Alternative living arrangements shall be controlled in a manner, suitable to the Council, that provides assurances that such a facility will house low and moderate income households for at least 10 years. However, in order to be eligible for a rental bonus (pursuant to N.J.A.C. 5:93–5.14(d)), controls on affordability shall extend for a period of 30 years.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–9.3 General provisions concerning uniform deed restriction liens and enforcement through certificates of occupancy or reoccupancy on sales units

(a) No municipality shall issue a certificate of occupancy for initial occupancy of a low or moderate income sales unit unless there is a written determination by the authority that the unit is to be controlled by a deed restriction and mortgage lien as adopted by the Council. The authority shall make such determination within 10 days of receipt of a proposed deed restriction and mortgage lien. Amendments to the deed restriction and lien shall be permitted only if they have been approved by the Council. A request for an amendment to the deed restriction and lien may be made by the authority, the municipality or a developer.

(b) No municipality shall permit the initial occupancy of a low or moderate income sales unit prior to issuance of a certificate of occupancy in accordance with (a) above.

(c) Municipalities shall, by ordinance, require a certificate of reoccupancy for any occupancy of a low or moderate income sales unit resulting from a resale and shall not issue such certificate unless there is a written determination by the authority that the unit is to be controlled by the deed restriction and mortgage lien prior to issuance of a certificate of occupancy, regardless of whether the sellers had executed the deed restriction and mortgage lien adopted by the Council upon acquisition of the property. The authority shall make such determination within 10 days of receipt of a proposed deed restriction and mortgage lien.

(d) The certificate of reoccupancy shall not be required in sales for which controls are allowed to expire or in which the repayment option is being exercised pursuant to N.J.A.C. 5:93–9.4.

(e) The mortgage lien and the deed restriction shall be filed with the records office of the county in which the unit is located. The lien and deed restriction shall be in the form adopted by the Council, as delineated in the Appendix E, unless amendments have been approved by the Council, for a specific municipality.

(f) The deed restriction, including the repayment clause, and the mortgage lien shall have priority over all mortgages on the property except for a first mortgage placed on the property by the mortgagee prior to the expiration of resale controls.

5:93–9.4 Option to buy sales units

(a) The deed restriction governing the deeds of low and moderate income units shall include an option permitting purchase of the affordable housing unit at the maximum allowable restricted sales price at the time of the first non-exempt sale after controls on affordability have been in effect on the unit for the period, specified in N.J.A.C. 5:93–9.2. The option to buy shall be available to the municipality, the Department of Community Affairs, the Agency, or a qualified non-profit as defined in this chapter.

(b) All deed restrictions governing low and moderate income units shall require the owner to notify the authority and the Council by certified mail of any intent to sell the unit 90 days prior to entering into an agreement for the first non-exempt sale after controls have been in effect on the housing unit for the period specified in N.J.A.C. 5:93–9.2.

(c) Upon receipt of such notice, the option to buy the unit at the maximum allowable restricted sales price or any mutually agreeable sales price that does not exceed the maximum allowable restricted sales price shall be available for 90 days. The authority shall notify the municipality, the Department of Community Affairs, the Agency, and the Council that the unit is for sale. If the municipality exercises this option, it may enter into a contract of sale. If the municipality fails to exercise this option within 90 days, the first of the other entities giving notice to the seller of its intent to purchase during the 90 day period, shall be entitled to purchase the unit. If the option to purchase the unit at the maximum allowable restricted sales price is not exercised by a written offer to purchase the housing unit within 90 days of receipt of the intent to sell, the owner may proceed to sell the housing unit (pursuant to N.J.A.C. 5:93–9.8). If the owner does not sell the unit within one year of the date of the delivery of notice of intent to sell, the option to buy the unit shall be restored and the owner shall be required to submit a new notice of intent to sell 90 days prior to any future proposed date of sale.

(d) Any option to buy a housing unit at the maximum allowable restricted sales price shall be exercised by certified mail and shall be deemed exercised upon mailing.

5:93–9.5 Municipal option; sales units

(a) Any municipality that elects to purchase a low or moderate income unit pursuant to N.J.A.C. 5:93–9.4 may:

1. Convey or rent the housing unit to a low or moderate income purchaser or tenant at a price or rent not to exceed the maximum allowable restricted sales price or rent provided the unit is controlled by a deed restriction in accordance with Exhibit E or an alternative approved by the Council; or;

2. Convey the unit at fair market value subject to the provisions of (c) below.

(b) Municipalities that purchase low income housing units shall maintain them as low income housing units.

(c) Municipalities that elect to purchase low or moderate income housing units and convey them at a fair market value shall:

1. Notify the Council of any proposed sale and sales price 90 days before closing;

2. Notify the Council of the price differential as defined in N.J.A.C. 5:93–1.3; and

3. Deposit the price differential in an interest bearing housing trust fund devoted solely to the creation, rehabilitation or maintenance of low and moderate income housing.

(d) Money deposited in housing trust funds may not be expended until the municipality submits and the Council approves a spending plan in accordance with the applicable COAH rules at that time. Money deposited in housing trust funds shall be subject to the applicable COAH rules at that time.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–9.6 State option; sales units

(a) When the Department of Community Affairs or Agency elects to purchase a low or moderate income unit pursuant to N.J.A.C. 5:93–9.4, it may:

1. Convey or rent the housing unit to a low or moderate income purchaser or tenant at a price or rent not to exceed the allowable restricted sales price or rental; or

2. Convey the unit at fair market value and utilize the price differential to subsidize the construction, rehabilitation or maintenance of low and moderate income housing within the appropriate housing region.

5:93–9.7 Non-profit option; sales units

(a) Non-profit agencies may apply to the Council at any time for the right to purchase low or moderate income units subsequent to the period of controls on affordability provided the unit remains controlled by a deed restriction in accordance with Appendix E, or an alternative approved by the Council.

(b) Non-profit agencies that have been designated by the Council shall be eligible to purchase low or moderate income units pursuant to N.J.A.C. 5:93–9.4 for the sole purpose of conveying or renting the housing unit to a low or moderate income purchaser or tenant at a price or rent not to exceed the allowable restricted sales price or rental. Low income units shall be made available to low income purchasers or tenants and the housing unit shall be regulated by the deed restriction and lien adopted by the Council, and included in Appendix E, incorporated herein by reference. The term of the controls on affordability shall be the same as those required by N.J.A.C. 5:93–9.2.

5:93–9.8 Seller option; sales units

(a) An eligible seller of a low or moderate income unit which has been controlled for the period established in N.J.A.C. 5:93–9.2, who has provided notice of an intent to sell, may proceed with the sale if no eligible entity as outlined in N.J.A.C. 5:93–9.4(c) and 9.7 exercises its option to purchase within 90 days.

(b) Subject to N.J.A.C. 5:93–9.9, the seller may elect to:

1. Sell to a qualified low and moderate income household at a price not to exceed the maximum permitted sales price in accordance with existing Council rules, providing the unit is regulated by the deed restriction and lien adopted by the Council and included in Appendix E, incorporated herein by reference, for a period of at least 30 years; or

2. Exercise the repayment option and sell to any purchaser at market price, providing that 95 percent of the price differential is paid to the authority, as an instrument of the municipality, at closing.

(c) If the sale will be to a qualified low and moderate income household, the authority shall certify the income qualifications of the purchaser and shall ensure the housing unit is regulated by the deed restriction and lien required by the Council, which has been included in Appendix E, incorporated herein by reference.

(d) The authority shall examine any contract of sale containing a repayment option to determine if the proposed sales price bears a reasonable relationship to the housing unit's fair market value. In making this determination, the authority may rely on comparable sales data or an appraisal. The authority shall not approve any contract of sale where there is a determination that the sales price does not bear a reasonable relationship to fair market value. The authority shall make a determination within 20 days of receipt of the contract of sale and shall calculate the repayment option payment.

(e) The authority shall adopt an appeal procedure by which a seller may submit written documentation requesting the authority to recompute the repayment obligation if the seller believes an error has been made, or to reconsider a determination that a sales price does not bear a reasonable relationship to fair market value. A repayment obligation determination made as a result of an owner's appeal shall be a final administrative determination of the authority.

(f) The repayment shall occur at the date of closing and transfer of title for the first non-exempt transaction after the expiration of controls on affordability.

(g) Repayment proceeds shall be deposited in a housing trust fund (see N.J.A.C. 5:93–8.14) and may be used as per N.J.A.C. 5:93–8.15. Money deposited in housing trust funds may not be expended until the municipality submits and the Council approves a spending plan (See N.J.A.C. 5:93–5.1(c)).

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–9.9 Municipal rejection of repayment option; sales units

(a) A municipality shall have the right to determine that the most desirable means of promoting an adequate supply of low and moderate income housing is to prohibit the exercise of the repayment option and maintain controls on lower income housing units sold within the municipality beyond the period required by N.J.A.C. 5:93–9.2. Such determination shall be made by resolution of the municipal governing body and shall be effective upon filing with the Council and the authority. The resolution shall specify the time period for which the repayment option shall not be applicable. During such period, no seller in the municipality may utilize the repayment option permitted by N.J.A.C. 5:93–9.8.

(b) Municipalities that exercise the option outlined in (a) above shall:

1. Provide public notice in a newspaper of general circulation; and

2. Notify the authority and Council of its governing body's action.

(c) The authority shall ensure that the deed restriction on all affected housing units reflects the extended period of controls.

5:93–9.10 Continued application of options to create, rehabilitate or maintain low and moderate income units; sales units

When a housing unit has been maintained as a low or moderate income unit after controls have been in effect for the period specified in N.J.A.C. 5:93–9.2, the deed restriction governing the housing units shall allow municipalities, the State, non-profit agencies and sellers of low and moderate income units to again exercise all the same options as provided in this subchapter.

5:93–9.11 Eligible capital improvements prior to the expiration of controls; sales units

(a) Property owners of single family, owner-occupied housing may apply to the authority for permission to increase the maximum price for eligible capital improvements. Eligible capital improvements shall be those that render the unit suitable for a larger household. In no event shall the maximum price of an improved housing unit exceed the limits of affordability for the larger household. Property owners shall apply to the authority if an increase in the maximum sales price is sought.

(b) At resale, all items of property which are permanently affixed to the units and/or were included when the unit was initially restricted (for example, refrigerator, range, washer, dryer, dishwasher, wall to wall carpeting) shall be included in the maximum allowable resale price. Other items of property may be sold to the purchaser at a reasonable price that has been approved by the authority at the time of signing the agreement to purchase. The purchase of central air conditioning installed subsequent to the initial sale of the unit and not included in the base price may be made a condition of the unit resale provided the price has been approved by the authority. Unless otherwise permitted by the Council, the purchase of any property other than central air conditioning shall not be made a condition of the unit resale. The owner and the purchaser must personally certify at the time of closing that no unapproved transfer of funds for the purpose of selling and receiving property has taken place at resale.

5:93–9.12 Subsidy to ensure affordability prior to the expiration of controls; sales units

If the use of median income data adopted by the Council to index the cost of housing renders a unit unaffordable to a low or moderate income household at the time of resale, a municipality shall not lose credit for the housing unit, provided that adequate controls on affordability remain in place, but the municipality may subsidize the housing unit to maintain affordability.

5:93–9.13 Impact of foreclosure on resale while controls are in place; sales units

A judgment of foreclosure or a deed in lieu of foreclosure to a financial institution regulated by State and/or Federal law or to a lender on the secondary mortgage market (including, but not limited to, the Federal National Mortgage Association, the Home Loan Mortgage Corporation, the Government National Mortgage Association or an entity acting on their behalf) shall extinguish controls on affordable housing units provided there is compliance with N.J.A.C. 5:93–9.14. Notice of foreclosure shall allow the authority, the municipality, the Department of Community Affairs, the Agency or a non-profit entity to purchase the affordable housing unit at a negotiated price not to exceed the maximum sales price and maintain it as an affordable unit for the balance of the intended period of controls. Failure to purchase the affordable housing unit shall result in the Council adding that unit to the municipal present and prospective fair share obligation. Failure of the financial institution to provide notice of a foreclosure action to the authority shall not impair any of the financial institution's rights to recoup loan proceeds; shall not negate the extinguishment of controls or the validity of the foreclosure; and shall create no cause of action against the financial institution.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–9.14 Excess proceeds upon foreclosure; sales units

In the event of a foreclosure sale, the owner of the affordable housing unit shall be personally obligated to pay to the authority responsible for assuring affordability, any surplus funds, but only to the extent that such surplus funds exceed the difference between the sales price at the time of foreclosure and the amount necessary to redeem the debt to the financial institution, including costs of foreclosure.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–9.15 Annual indexed increases while controls are in place; sales and rentals

(a) The price of an owner-occupied housing unit may increase annually based on the percentage increase in the regional median income limit for each housing region. In no event shall the maximum resale price established by the authority be lower than the last recorded purchase price.

(b) With the exception of rentals constructed pursuant to low income tax credit regulations, the rent of a low or

moderate income housing unit may be increased annually based on the percentage increase in the Housing Consumer Price Index for the United States. This increase shall not exceed nine percent in any one year. Rents for units constructed pursuant to low income tax credit regulations shall be indexed pursuant to the regulations governing low income tax credits.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–9.16 Procedures for initial sales, resale prior to the expiration of controls, and rentals

(a) Low and moderate income sales units shall not be offered to non-income eligible households at initial sale without Council approval. Parties that petition the Council for such approval shall document efforts to sell housing units to income eligible households and shall adhere to the procedures outlined in N.J.A.C. 5:91–12.

(b) Persons wishing to sell affordable units shall notify the authority responsible for assuring affordability of the intent to sell. If no eligible buyer enters a contract of sale for the unit within 90 days of notification, the authority shall have the option to purchase the unit for a negotiated price that shall not exceed the maximum price permitted based on the regional increase in the median income as defined by HUD or other recognized standard adopted by the Council. If the authority does not purchase the unit, the seller may apply for permission to offer the unit to a non-income eligible household at the maximum price permitted. The seller shall document efforts to sell the unit to an income eligible household as part of this application. In reviewing the request, the authority shall consider the specific reasons for any delay in selling the housing unit and the hardship to the seller in continuing to offer the affordable unit to an income eligible applicant. The inability to sell a unit for the maximum permitted resale price shall not, in itself, be considered an appropriate reason for allowing a housing unit to be sold to a non-income eligible household. If the request is granted, the seller may offer a low income housing unit to a moderate income household and a moderate income housing unit to a household earning in excess of 80 percent of median. In no case shall the seller be permitted to receive more than the maximum price permitted. In no case shall a sale pursuant to this section eliminate the resale controls on the unit or permit any subsequent seller to convey the unit except in full compliance with the terms of this subchapter.

(c) Owners of low and moderate income rental units shall not offer rental units to non-income eligible households without prior approval of the Council. Parties that petition for such approval shall document all efforts to rent to income eligible households and demonstrate to the satisfaction of the Council that alternatives, such as a reduction in rent, is not feasible. Parties that petition the Council shall adhere to the procedures outlined in N.J.A.C. 5:91–12.

SUBCHAPTER 10. COST GENERATION

5:93–10.1 Purpose and scope

(a) Section 14(b) of the Fair Housing Act (N.J.S.A. 52:27D–301 et seq.) incorporates the need to eliminate unnecessary cost generating features from municipal land use ordinances as a requirement of substantive certification. In order to receive and retain substantive certification, municipalities shall eliminate development standards that are not essential to protect the public welfare and to expedite (or "fast track") municipal approvals/denials on inclusionary development applications. In order to expedite the review of development applications, municipalities shall cooperate with developers of inclusionary developments in scheduling pre-application conferences. Municipal boards shall schedule regular and special monthly meetings (as needed) and provide ample time at these meetings to consider the merits of the inclusionary development application. The goal of such a schedule is to act on a development application within time limits approximating those outlined in the Municipal Land Use Law (N.J.S.A. 40:55D–1 et seq.) Failure to expedite the approval/denial of an inclusionary development application shall be considered a reason for revoking substantive certification.

(b) Inclusionary developments that are included in a housing element and fair share plan have proceeded through a very public process. Therefore, the focus of municipal review shall not be whether the sites are properly zoned. Rather, the focus shall be whether the design of the inclusionary development is consistent with the zoning ordinance and the mandate of the Fair Housing Act regarding unnecessary cost generating features. Municipalities shall be expected to cooperate with developers of inclusionary developments in granting reasonable variances necessary to construct the inclusionary development.

5:93–10.2 Standards

(a) In reviewing the fair share plans, the Council shall use the standards promulgated pursuant to N.J.S.A. 40:55D–40.1 through 40.7 (P.L. 1993 c.32) as a frame of reference. Municipalities that wish to impose more stringent standards shall bear the burden of justifying the need for such standards. In its review of municipal ordinances, the Council shall give special attention to:

1. The combined impact of requirements that cumulatively prevent an inclusionary development from achieving the density and set-aside necessary to address the municipal fair share. Examples of such requirements include but are not limited to: building set-backs, spacing between buildings, impervious surface requirements and open space requirements;

2. Requirements to provide oversize water and sewer mains to accommodate future development without a reasonable prospect for reimbursement;

3. Excessive road width, pavement specifications and parking requirements;

4. Excessive requirements for sidewalks and paved paths;

5. Excessive culvert and pumping station requirements; and

6. Excessive landscape, buffering and reforestation requirements.

(b) Municipal housing elements and fair share plans shall allow for phased construction and phased bonding of on-site, off-site and off-tract improvements required of inclusionary developments.

(c) The Council shall not permit restrictions on the bedroom mix of the market rate units within an inclusionary development.

5:93–10.3 Special studies/escrow accounts

(a) It is common for municipalities to require inclusionary developers to conduct special studies related to the fiscal, traffic and environmental impacts of proposed inclusionary developments. These studies are then reviewed by municipal professionals who are paid from escrow accounts funded by the inclusionary developer as a requirement of the municipal review of the development application. The Council has determined that these studies shall not be used to alter the density of sites that are part of the municipal substantive certification. Such studies may be used to foster proper design and to determine pro-rata off-site and off-tract improvements. The Council has also determined that it is unnecessary for developers of inclusionary developments to pay for the initial preparation of such a study and for its review. Therefore, municipalities that receive substantive certification shall offer inclusionary developers the option of preparing fiscal, traffic and environmental impact studies or choosing a consultant from a list of at least six professionals (prepared by the municipality) to prepare the studies. If the developer chooses a consultant from the municipally prepared list, the developer and municipality shall rely on the consultant's recommendations.

(b) Fees to review development applications shall be estimated prior to payment of filing fees. Developers shall be entitled to review all charges against any escrowed fees and be provided with monthly accounting reports upon request.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–10.4 Relief subsequent to substantive certification

(a) Developers may provide notice to the Council of the date they filed their development application with the municipality. The municipality need not have deemed the application complete for the developer to provide such notice.

(b) Developers and/or municipalities that cannot agree on specific standards that apply to a specific inclusionary development may request the Council to provide a mediator to resolve the dispute. The resulting mediation shall not require a transfer to the Office of Administrative Law pursuant to the Administrative Procedures Act.

(c) Inclusionary developers may seek an administrative order to expedite the municipal review of a development application by filing a motion pursuant to N.J.A.C. 5:91–12. Developers need not request mediation pursuant to (b) above in order to file such a motion; and the Council may hear such a motion concurrent with any such mediation.

(d) Inclusionary developers may request the Council to act as an advocate for inclusionary developments that require permits from DEPE and DOT.

5:93–10.5 Revocation of substantive certification

A Council determination, after a hearing conducted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B–1 et seq., that a municipality has delayed action on an inclusionary development application, required unnecessary cost generating standards or obstructed the construction of an inclusionary development may result in Council action revoking substantive certification.

SUBCHAPTER 11. AFFIRMATIVE MARKETING

5:93–11.1 The affirmative marketing plan; definition and contents

(a) The affirmative marketing plan is a regional marketing strategy designed to attract buyers and/or renters of all majority and minority groups, regardless of sex, age or number of children, to housing units which are being marketed by a developer or sponsor of affordable housing. It is a continuing program and covers the period of deed restriction.

(b) The affirmative marketing plan shall provide the following information:

1. The name and address of the project;

2. The number of units, including the number of sales and rental units;

3. The price of sales and/or rental units;

4. The name of the rental manager and/or sales agent;

5. A description of outreach efforts to groups that are not readily reached by commercial media efforts (See N.J.A.C. 5:92–11.3 for advertising program details); and

6. A description of the random selection method that will be used to select occupants of low and moderate income housing.

(c) The affirmative marketing plan shall be a part of the fair share plan and shall be referenced by ordinance.

5:93–11.2 Training and general responsibilities

(a) The municipality shall assure the affirmative marketing of low and moderate income units. Municipalities shall designate a municipal authority to be responsible for implementing the affirmative marketing plan. A representative of the municipal authority shall attend an affirmative marketing training program approved by the Council. The municipality may contract with other agencies to administer the affirmative marketing program and the actual sales and rentals of the units. Where a municipality contracts with another agency to administer the affirmative marketing program, the municipality shall appoint a housing officer that shall act as a liaison to the contracting agency. In addition, where the contracting agency is not responsible for the entire affirmative marketing program, the municipality shall outline who or what municipal agency is responsible for the remaining portion of the affirmative marketing program.

(b) In implementing an affirmative marketing program, a municipality may delegate specific tasks to a developer of an inclusionary development provided that all applicant and sales records of low and moderate income units are returned to the municipality for reporting purposes and to aid with future resales.

(c) In implementing the affirmative marketing plan, municipalities shall be responsible for providing counseling services to low and moderate income applicants on subjects such as budgeting, credit issues, mortgage qualifications, rental lease requirements, and landlord/tenant law.

5:93–11.3 Marketing program

(a) The advertising program shall be designed to reach all segments of the eligible population within the housing region.

(b) The plan shall describe the media to be used in advertising and publicizing the availability of housing. In developing the plan, the municipality shall consider the use of language translations. The plan shall include the following:

1. The names of specific newspapers with circulation throughout the housing region;

2. The names of specific radio and television stations broadcasting throughout the housing region;

3. The names of other publications circulated within the housing region that are likely to be read by low and moderate income households, such as neighborhood oriented weekly newspapers, religious publications and organizational newsletters;

4. The names of employers throughout the housing region that will be contacted to post advertisements and distribute flyers regarding available low and moderate income housing;

5. The names of specific community and regional organizations that will aid in soliciting low and moderate income applicants. Such organizations may include nonprofit, religious, governmental, fraternal, civic, and other organizations.

(c) The marketing process for available low and moderate income units shall begin at least four months prior to expected occupancy. In implementing the marketing program, there shall be at least one paid advertisement in a newspaper of general circulation within the housing region during the first week of the marketing program. Such advertisement shall include at least the following:

1. The location of the units;

2. Directions to the housing units;

3. A range of prices for the housing units;

4. The size, as measured in bedrooms, of the housing units;

5. The maximum income permitted to qualify for the housing units;

6. The location of applications for the housing units; and

7. The business hours when interested households may obtain an application for a housing unit.

(d) Applications for low and moderate income housing shall be available in several convenient locations, including, at a minimum, the municipal administrative building(s), the municipal library and at the developer's sales office. Applications shall be mailed to prospective applicants upon request.

(e) If the cost of advertising low and moderate income units are to be a developer's responsibility, the requirement shall be a condition of the municipal planning board's approval.

5:93–11.4 Marketing for initial sales and/or rent up; composition of marketing pool

(a) Households that apply for low and moderate income housing shall be screened for preliminary income eligibility by comparing their total income to the low and moderate income limits adopted by the Council. Applicants shall be notified as to their eligibility status.

(b) Having screened applicants for preliminary income eligibility, the municipal authority may analyze the income and household sizes of applicants to determine which applicants have the assets and/or income necessary to purchase or rent each available low or moderate income unit.

(c) The municipal authority shall interview each applicant and utilize the procedures outlined in N.J.A.C. 5:93–9.1 to: verify the applicant's income and household size; determine the applicant's asset availability; and review the applicant's credit history. Applicants shall be required to submit income verification for each household member 18 years or older. This process shall be utilized in establishing the final certified applicant group.

(d) The process described in (a) through (c) above may begin no sooner than one month after the advertising program outlined in N.J.A.C. 5:93–11.3 begins. Households shall be selected to proceed through the process described in (a) through (c) above through a method of random selection. Households shall be certified for low and moderate income units using the procedures outlined in N.J.A.C. 5:93–9.1. The process described in (a) through (c) shall be continued until all the low and moderate income units are occupied.

5:93–11.5 Continuing marketing activities

(a) The types of activities to be undertaken after the completion of initial occupancy of sales and rental units in order to fill vacancies resulting from normal turnover shall include:

1. Insuring a sufficient supply of income eligible applicants by continuing to implement the marketing plan throughout the housing region, as outlined in N.J.A.C. 5:93–11.3. At a minimum, the municipality shall maintain a current pool of at least five income eligible applicants for each low and moderate income unit.

2. Contacting each income eligible applicant annually to request updated information regarding income and family size.

(b) As units become available, the municipal authority shall select eligible applicants for the units, as described in N.J.A.C. 5:92–11.4(b) through (d) until the units are occupied by low and moderate income households.

5:93–11.6 Monitoring and reporting requirements

(a) Municipalities shall collect information on each applicant for low and moderate income housing on forms approved by the Council that are forwarded to municipalities during January of each calendar year.

(b) Municipalities shall evaluate the results of their affirmative marketing activities and file a report with the Council by February 28 of each year. Such report shall include:

1. Monitoring forms approved by the Council;

2. An evaluation of the income and demographic characteristics of each applicant of low and moderate income housing, as well as the occupants of the units; and

3. An evaluation of any necessary adjustments in the affirmative marketing program as a result of the evaluation in (a) above.

(c) The Council shall review and assess the effectiveness of the municipal affirmative marketing program. If it is deemed that the affirmative marketing program is not effective, the municipality shall be required to amend the program.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

5:93–11.7 Residency preference

(a) Municipalities may provide an occupancy preference for low and moderate income units created within the municipality that responds to the municipal rehabilitation component.

(b) Municipalities may provide an occupancy preference to low and moderate income households that reside or work in the housing region. Such a preference may apply to all low and moderate income units created within the municipality.

SUBCHAPTER 12. MONITORING

5:93–12.1 Completion of monitoring forms

(a) A municipality that has received substantive certification shall complete monitoring forms adopted by the Council and submit them to the Council no later than February 28 of each year. Failure to submit monitoring forms in a timely manner may result in a Council action, including;

1. The revocation of substantive certification;

2. The revocation of the certification required to impose and collect development fees; and/or

3. Such other action as the Council may determine necessary.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

SUBCHAPTER 13. SITE SPECIFIC RELIEF AND THE STATE DEVELOPMENT AND REDEVELOPMENT PLAN (SDRP)

5:93–13.1 Purpose and scope

(a) The Fair Housing Act allows municipalities two years following the filing of a housing element to petition for

substantive certification. Municipalities that file housing elements with the Council prior to an exclusionary lawsuit and petition or are sued within two years of such filing shall not, except in extraordinary situations (see N.J.A.C. 5:91–4.5) be subject to the Council granting site specific relief to an objector of the municipal housing element. Municipalities that do not petition or are not sued within two years of filing a housing element may be subject to the Council granting site specific relief to one or more objectors. The process of granting such relief is outlined in N.J.A.C. 5:91.

(b) The Fair Housing Act at N.J.S.A. 52:27D–307 directs the Council to "give appropriate weight" in carrying out its duties to the implementation of the SDRP. It is the purpose of this subchapter to outline the way in which the goals and policies of the SDRP will be considered by the Council in awarding site specific relief to an objector to a municipal housing element. This process relies upon the SDRP's definitions of "Planning Areas" and "Centers." The principles outlined in the subchapter are illustrated in Appendix G.

5:93–13.2 Site–specific relief in Planning Areas 1 and 2

When considering granting site-specific relief to an objector in Planning Area 1 or 2, the Council shall grant such relief if the Council determines that the objector's site is available, approvable, developable and suitable.

5:93–13.3 Site–specific relief in Planning Area 3

(a) When considering granting site-specific relief to an objector in Planning Area 3, the Council shall determine if the realistic development potential within the development boundaries of centers and Planning Areas 1 and/or 2 is adequate to address the municipal inclusionary component.

1. If the objector's site is located within a center, the Council shall presumptively grant relief if the site is available, approvable, developable and suitable.

2. If the realistic development potential within the development boundaries of centers and Planning Areas 1 and/or 2 is adequate to address the municipal inclusionary component and the objector's site is not located in a center, the Council shall deny relief to the objector.

3. If the realistic development potential within the development boundaries of centers and Planning Areas 1 and/or 2 is not adequate to address the municipal inclusionary component:

i. The Council shall grant relief to sites that are suitable if it determines the site lies within a center or Planning Area 1 and/or 2; has access to infrastructure; or that infrastructure can be easily extended from Planning Area 2;

ii. Where the objector's site does not lie within a center or Planning Area 1 and/or 2, does not have access to infrastructure or where infrastructure cannot be easily extended from Planning Area 2, the Council shall render a decision on granting relief after consideration of:

(1) A report from the Office of State Planning that contains recommendations pertaining to the appropriateness of the area surrounding the objector's site for center designation; and

(2) The presence of other suitable sites serviced by infrastructure or to which infrastructure can easily be extended from Planning Area 2.

5:93–13.4 Site–specific relief in Planning Areas 4 and 5

(a) When considering granting site-specific relief to an objector in Planning Areas 4 and 5, the ***Council shall*** determine if the realistic development potential within the development boundaries of centers and Planning Areas 1 and/or 2 is adequate to address the municipal inclusionary component.

1. If the objector's site is located within a center, the Council shall presumptively grant relief if the site is available, approvable, developable and suitable.

2. If the realistic development potential within the development boundaries of centers and Planning Areas 1 and/or 2 is adequate to address the municipal inclusionary component, and the objector's site is not located in a center, the Council shall deny relief to the objector.

3. If the realistic development potential within the development boundaries of centers and Planning Areas 1 and/or 2 is not adequate to address the municipal inclusionary component, the Council shall render a decision on granting relief after consideration of a report from the Office of State Planning that contains recommendations pertaining to the appropriateness of the area surrounding the objector's site for center designation.

SUBCHAPTER 14. ONE THOUSAND UNIT LIMITATION

5:93–14.1 General

No municipality shall be required to address a fair share beyond 1,000 units within six years from the grant of substantive certification, unless it is demonstrated, following an objection and an evidentiary hearing, based upon the facts and circumstances of the affected municipality that it is likely that the municipality through its zoning powers could create a realistic opportunity for more than 1,000 low and moderate income units within the six year period. The facts and circumstances which shall determine whether a municipality's fair share shall exceed 1,000 units shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in the six year period preceding the petition for substantive certification.

APPENDIX G

REGIONAL CONTRIBUTION AGREEMENT COUNTY REVIEW CHECKLIST

The Fair Housing Act permits a municipality to transfer up to 50 percent of its low and moderate income housing obligation to a willing receiving municipality. The terms of this Regional Contribution Agreement (RCA) transfer are determined by individual negotiations between willing sending and receiving municipalities within the same housing region.

Recognizing the need for sound comprehensive regional planning, the Act refers the RCA to the county of the *receiving* municipality for review and for submittal of its comments and recommendations to COAH. The Act indicates that this review shall be performed by the county planning board or other designated agency and that in its review, the county "shall consider the master plan and zoning ordinance of the sending and receiving municipalities, its own county master plan and the State development and redevelopment plan." The results of this review and the county recommendation are to be **by resolution** of the county planning board. At a minimum, the following language is to be incorporated into the resolution, if the recommendation is positive:

WHEREAS, directed by the New Jersey Council on Affordable Housing, the (receiving) County Planning Board has reviewed this proposal; and

WHEREAS, the staff of the (receiving) County Planning Board has examined the Master Plan and Zoning Ordinances of the (sending) municipality and (receiving) municipality; the Master Plan of (receiving) County and the State Development Guide Plan; and

WHEREAS, after duly examining all the above cited plans, the staff of the (receiving) County Planning Board has found that the proposed Regional Contribution Agreement is in accordance with sound, comprehensive regional planning; that the (receiving) municipality and the proposed RCA housing locations therein offer convenient access to employment opportunities; and that the proposed RCA housing would have access to public transportation;

NOW, THEREFORE BE IT RESOLVED that the (receiving) County Planning Board recommends approval of the proposed Regional Contribution Agreement between the (sending) municipality and the (receiving) municipality; and

BE IT FURTHER RESOLVED that the (receiving) County Planning Board recommends that the New Jersey Council on Affordable Housing approve the proposed Regional Contribution Agreement.

If negative, please develop appropriate language.

In order to conduct this review, the **sending** municipality must forward the following documents to the receiving municipality's county planning board:

1. Master Plan of Sending Municipality.
2. Zoning Ordinances of Sending Municipality.
3. Housing Element of Sending Municipality.
4. Transportation Element of Sending Municipality.
5. 208 Plan of Sending Municipality.
6. Other Regional Plans, if applicable.
7. Regional Contribution Agreement Project Plan.

If both sender and receiver are in the same county, then all necessary documents are on file except the RCA Project Plan. In that instance, only a formal review request letter and the RCA Project Plan need be forwarded.

The Act permits COAH to establish time limits for county review and, since COAH views expedient review of RCAs as crucial, it has imposed a 45 day limit for the county to complete its review. COAH may provide a 15 day extension if the county requests such an extension for legitimate reasons. The 45 days begin when the sending municipality forwards all the necessary documents as a complete package to the receiving municipality's county planning board with a request for review and recommendation. COAH should be copied on the transmittal letter only. If the county is unable to complete its review within the allotted time, or if there is no county planning board or designated county agency, COAH shall perform the required review.

To facilitate county review, COAH has developed a four section checklist which is attached. The checklist is to be completed as part of the county review process and forwarded with the resolution to COAH. When both the County Planning Board and NJ Housing and Mortgage Finance Agency feasibility reviews are completed, the RCA will be presented to COAH for action.

SECTION I: ACCESS TO EMPLOYMENT OPPORTUNITIES

A. Does the proposed agreement provide realistic housing opportunities within convenient access to employment opportunities?

Housing Site(s) Proposed:

	Location	Site #	Yes	No
1. Receiving Munic.	_____	____	A.___	___
	_____	____	B.___	___
	_____	____	C.___	___
2. Sending Munic.	Location	Site #		
	_____	____	A.___	___
	_____	____	B.___	___
	_____	____	C.___	___

BRIEFLY EXPLAIN ACCESS FOR EACH SITE ON SEPARATE SHEET INCLUDE SITE #

B. Is the proposed housing served by available transit?

Housing Site(s) Proposed:
If yes, check type(s) of service

1. Receiving Munic. Location	#	Yes	Munic	Inter-Municipal County	Inter-Co	No
_____	___	A.___	___	____	____	___
_____	___	B.___	___	____	____	___
_____	___	C.___	___	____	____	___
2. Sending Munic. Location	**#**					
_____	___	A.___	___	____	____	___
_____	___	B.___	___	____	____	___
_____	___	C.___	___	____	____	___

IF TRANSIT POSSIBLE, BRIEFLY EXPLAIN TRANSIT FOR EACH SITE ON SEPARATE SHEET

SECTION II: CURRENTLY ADOPTED AND/OR OFFICIAL LAND USE ELEMENT CONSISTENCY REVIEW (ATTACH RELEVANT PAGES OF DOCUMENTS CITED BELOW)

	Check One: Complies In Whole	Part (Explain)	Conflicts In Whole
A.1. Receiving Munic. (a) Master Plan Of: _____; Adopted:	____	_____	_____

Brief Explanation (attach additional sheets as necessary)

(b) Zoning Ordinance	Complies In Whole	Part (Explain)	Conflicts In Whole
Of: _____; Adopted:	____	_____	_____

Brief Explanation (attach additional sheets as necessary)

2. Sending Munic.	Complies In Whole	Part (Explain)	Conflicts In Whole*
(a) Master Plan Of: _____; Adopted:	____	_____	_____

Brief Explanation (attach additional sheets as necessary)

(b) Zoning Ordinance	Complies In Whole	Part (Explain)	Conflicts In Whole
Of: _____; Adopted:	____	_____	_____

Brief Explanation (attach additional sheets as necessary)

C. Are there any future plans to serve the proposed housing with transit?

	Yes	No
1. Receiving Munic.	A.___	___
	B.___	___
	C.___	___
2. Sending Munic.	A.___	___
	B.___	___
	C.___	___

IF TRANSIT POSSIBLE, BRIEFLY EXPLAIN TRANSIT FOR EACH SITE ON SEPARATE SHEET

	Complies In Whole	Part (Explain)	Conflicts In Whole
C.1. Receiving County Land Use Element Of: _____ County; Adopted: _____	____	_____	_____

Brief Explanation (attach additional sheets as necessary)

	Complies In Whole	Part (Explain)	Conflicts In Whole
C.1. Other Regional Plan Land Use Element(s) * Affecting: (a) Receiving Munic. _____; Adopted: _____	____	_____	_____

Brief Explanation (attach additional sheets as necessary)

	Complies In Whole	Part (Explain)	Conflicts In Whole
D.1. State Development Redevelopment Plan (S.D.R.P.) **			
(a) Receiving Munic.	____	_____	_____
(b) Sending Munic.	____	_____	_____

Brief Explanation (attach additional sheets as necessary)

* For example, is site(s) consistent with Hackensack Meadowland Development Commission's Adopted Land Use Element

** Use official State Development Guide Plan until S.D.R.P. is adopted.

SECTION III: CURRENTLY ADOPTED TRANSPORTATION PLAN AND/OR PROGRAM ELEMENT CONSISTENCY REVIEW

1. Are there transportation or transit plans at any level of government which would positively or negatively affect the proposed housing and/or the proposed housing sites?

1. Within Sending Munic.

2. Within Receiving Munic.

CERTIFICATION: There are currently no transportation plans to build roadway that may invalidate sites.

(ATTACH RELEVANT PAGES OF DOCUMENT)

A. Is the proposed housing consistent with the 208 plan?

	Housing Site(s) Proposed location	Site #	Check One Yes	No
1. Within Receiving Munic.			A.	
			B.	
			C.	

ATTACH ADDITIONAL SHEETS IF NECESSARY TO COMPLETE ABOVE QUESTION

This review is certified by the undersigned as representing a true and accurate statement of fact.

Based on this review, it is found that the following sites are:

1. Within Receiving Munic. Housing Site(s) Proposed Location	Site #	In Keeping With Sound Regional Comprehensive Planning	Not in Keeping With Sound Regional Comprehensive Planning
		A.	
		B.	
		C.	

2. Within Sending Munic. Location	Site #		
		A.	
		B.	
		C.	

CERTIFIED BY: _____

DATED: _____

TYPE NAME: _____

TITLE: _____

REPRESENTING _____

PROFESSIONAL LICENSE #:(as applicable)_____