

**CHAPTER 91**

**PROCEDURAL RULES OF THE NEW JERSEY  
COUNCIL ON AFFORDABLE HOUSING**

**Authority**

N.J.S.A. 52:27D-301 et seq., specifically 52:27D-308.

**Source and Effective Date**

R.2003 d.172, effective April 2, 2003.  
See: 34 N.J.R. 3604(a), 35 N.J.R. 1957(a).

**Chapter Expiration Date**

Chapter 91, Procedural Rules of the New Jersey Council on Affordable Housing, expires on April 2, 2008.

**Chapter Historical Note**

Chapter 91, Procedural Rules of the New Jersey Council on Affordable Housing, was adopted as R.1986 d.221, effective June 16, 1986. See: 18 N.J.R. 821(a), 18 N.J.R. 1267(a).

Pursuant to Executive Order No. 66(1978), Chapter 91, Procedural Rules of the New Jersey Council on Affordable Housing, was readopted as R.1991 d.119, effective February 7, 1991. See: 22 N.J.R. 3610(b), 23 N.J.R. 688(a).

Pursuant to Executive Order No. 66(1978), Chapter 91, Procedural Rules of the New Jersey Council on Affordable Housing, was repealed and a new Chapter 91, Procedural Rules of the New Jersey Council on Affordable Housing, was adopted by R.1992 d.491, effective December 7, 1992. See: 24 N.J.R. 2671(a), 24 N.J.R. 4344(b).

Pursuant to Executive Order No. 66(1978), Subchapter 14, Interim Substantive Certification, was repealed and a new Subchapter 14, Interim Procedures, was adopted by R.1993 d.407, effective August 16, 1993. See: 25 N.J.R. 1118(a), 25 N.J.R. 3753(a).

Pursuant to Executive Order No. 66(1978), Chapter 91, Procedural Rules of the New Jersey Council on Affordable Housing, was readopted as R.1997 d.511, effective November 5, 1997. See: 34 N.J.R. 3604(a), 35 N.J.R. 1957(a).

Chapter 91, Procedural Rules of the New Jersey Council on Affordable Housing, was readopted as R.2003 d.172, effective April 2, 2003. See, Source and Effective Date.

**Case Notes**

Use by Department of Environmental Protection (DEP) of its proposed impervious cover percentages for its coastal centers did not conflict with Fair Housing Act. In the Matter of the Protest of Coastal Permit Program Rules, 807 A.2d 198, 354 N.J.Super. 293.

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**SUBCHAPTER 1. GENERAL PROVISIONS**

**5:91-1.1 Short title**

The provisions of this chapter shall be known as "the procedural rules of the New Jersey Council on Affordable Housing."

**Case Notes**

Township could adopt housing element of master plan at properly noticed open meeting. Hills Development Co. v. Township of Bernards. 229 N.J.Super. 318, 551 A.2d 547 (A.D.1988).

**5:91-1.2 Definitions**

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

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

"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.).

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

"Days" means calendar days.

"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 proposes to satisfy its obligation to create a realistic opportunity to meet the low and moderate income housing need 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, and as further described and defined in N.J.A.C. 5:93.

"Filed" means accepted for filing by the Council in conformance with this chapter and N.J.A.C. 5:93.

"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, as further described by N.J.A.C. 5:93.

"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 as last defined by the United States Census Bureau prior to July 2, 1985.

"Mediation" means that process established by N.J.S.A. 52:27D-315 whereby objectors to a municipality's petition for substantive certification and other parties meet with the municipality under the direction of a Council-appointed mediator to attempt to resolve disputes.

"OAL" means the Office of Administrative Law.

"Objector" means a person who files objections to a municipal housing element and fair share plan in accordance with N.J.A.C. 5:91-4.1 or is the owner of record of a site designated for low and moderate income housing in a municipal housing element and fair share plan in accordance with N.J.A.C. 5:91-7.2(e).

"Participant to mediation" means any party the mediator deems necessary to conduct mediation and resolve any objections to a municipality's petition for substantive certification. The Council, or its designee conducting mediation, shall determine the extent of participation of each participant to mediation. A participant to mediation is not to be considered an objector to the municipality's petition for substantive certification.

“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.

“RCA recipient certification” means the determination of the Council that a receiving municipality in an RCA has met the criteria in N.J.A.C. 5:91-11.4 in at least one of four housing categories established in N.J.A.C. 5:91-11.4(b).

“Receiving municipality” means, for the purposes of a regional contribution agreement (RCA), a municipality which agrees to assume a portion of another municipality’s fair share obligation.

“Regional contribution agreement (RCA)” means the transfer pursuant to N.J.S.A. 52:27D-312 of up to 50 percent of a municipality’s fair share obligation to another municipality within its housing region by means of a contractual agreement into which two municipalities voluntarily enter.

“Sending municipality” means, for the purposes of a regional contribution agreement (RCA), a municipality which seeks to transfer a portion of its fair share obligation to another willing municipality.

“Submission” means an adopted housing element and fair share plan.

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.1998 d.21, effective January 5, 1998.

See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

Added N.J.A.C. reference to “Filed”; added “Mediation”, “OAL”, “RCA recipient certification”, “Regional contribution agreement (RCA)”.

**5:91-1.3 Waiver**

Any party desiring a waiver or release from the express provisions of the rules in this chapter may submit a written request to the Council to the attention of the Executive Director, in accordance with the provisions of N.J.A.C. 5:93-15.1.

Amended by R.1994 d.290, effective June 6, 1994.

See: 25 N.J.R. 5763(a), 26 N.J.R. 2300(a).

**SUBCHAPTER 2. FILING A HOUSING ELEMENT/FAIR SHARE PLAN**

**5:91-2.1 Jurisdiction**

(a) A municipality shall fall within the jurisdiction of the Council if:

1. The municipality has filed a housing element and fair share plan and petitioned for substantive certification within two years of such filing;
2. The municipality has filed a housing element and fair share plan and is the defendant to an exclusionary zoning suit within two years of such filing;

3. The municipality has filed a housing element and fair share plan and petitions for certification over two years after such filing, but prior to being sued for exclusionary zoning; or

4. A court transfers jurisdiction of the case to the Council.

**5:91-2.2 Filing requirements**

(a) The Council shall accept a municipal housing element and fair share plan for filing without a petition only under the following conditions:

1. The municipal planning board has adopted the housing element as part of the municipality’s master plan pursuant to the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq.); and
2. The governing body of the municipality has passed a resolution of participation which:
  - i. Endorses the housing element and fair share plan; and
  - ii. Requests that the plan remain on file without a petition.

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.1998 d.21, effective January 5, 1998.

See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

Rewrote (a)2ii.

**5:91-2.3 Transferred cases**

When a case is transferred to the Council by court order, pursuant to section 16 of the Act (N.J.S.A. 52:27D-316), the municipality shall file an adopted housing element and fair share plan with the Council within 60 days from the date of transfer. The municipal plan shall conform to the filing requirements of N.J.A.C. 5:91-3.

Amended by R.1998 d.21, effective January 5, 1998.

See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

Amended N.J.A.C. reference, and changed the time for the municipality to file a plan from 120 days to 60 days.

**5:91-2.4 Amendment**

A municipality that has filed a housing element and fair share plan with the Council may amend its housing element prior to petitioning for substantive certification and prior to the initiation of an exclusionary zoning suit. However, such amendment shall not extend the period in which a municipality may petition for certification and receive the considerations outlined in N.J.A.C. 5:91-3.6.

**Case Notes**

Settlement agreement with developer constituted proposed amendments to fair share ordinance. Hills Development Co. v. Township of Bernards, 229 N.J.Super. 318, 551 A.2d 547 (A.D.1988).

## SUBCHAPTER 3. PETITIONS FOR SUBSTANTIVE CERTIFICATION

### 5:91-3.1 Petition

A petition for substantive certification shall be in such form and shall contain such information as the Council may require from time to time from a municipality. A petition shall be in the form of a resolution adopted by the governing body of the municipality endorsing the adopted housing element and fair share plan and requesting that the Council review and certify the plan.

Amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).  
Rewrote second sentence.

#### Case Notes

Settlement agreement with developer constituted proposed amendment to fair share ordinance. Hills Development Co. v. Township of Bernards, 229 N.J.Super. 318, 551 A.2d 547 (A.D.1988).

### 5:91-3.2 Action equivalent to a petition for substantive certification

A municipality in an exclusionary zoning lawsuit transferred to the Council by the courts, pursuant to Section 16 of the Act, shall be deemed to have filed a petition for substantive certification when the Council accepts for filing the municipality's adopted housing element and fair share plan as required pursuant to N.J.A.C. 5:91-2.3.

Amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).  
Amended N.J.A.C. reference.

### 5:91-3.3 Notice

(a) When a municipality files a petition for substantive certification, or is deemed to have filed a petition by N.J.A.C. 5:91-3.2, it shall publish notice of this petition in a newspaper of general circulation within the municipality and county within seven days of the filing of the petition in order to provide the general public with an opportunity to review the municipal housing element and fair share plan and to object to or comment upon them. The public notice shall be in the legal newspaper as well as one that is widely circulated within the county if the legal newspaper is not widely circulated within the county. If the Council determines that notice was not published in a newspaper of general circulation, it shall require the municipality to republish in another newspaper.

(b) In providing notice of a petition for substantive certification, the municipality shall follow this format:

#### NOTICE OF PETITION FOR SUBSTANTIVE CERTIFICATION

NOTICE is hereby given that the (MUNICIPALITY) has petitioned the New Jersey Council on Affordable Housing for Substantive Certification of its Housing Element and Fair Share Plan, pursuant to N.J.S.A. 52:27D-301 et seq. and N.J.A.C. 5:91-3.1 et seq. Copies of said adopted Housing Element and supporting documentation are available for public inspection at the (TOWNSHIP/BOROUGH) Municipal Building, (Address) New Jersey, during regular business hours. Comments or objections to said petition for Substantive Certification must be filed with the New Jersey Council on Affordable Housing, 101 South Broad Street, PO Box 813, Trenton, New Jersey 08625-0813 and with the municipal clerk by \_\_\_\_\_, which is within 45 days of publication of this notice.

\_\_\_\_\_  
Municipal Clerk

(c) A municipality required to refile or repetition for substantive certification, shall provide notice following this format:

#### NOTICE OF REPETITION FOR SUBSTANTIVE CERTIFICATION

NOTICE is hereby given that the (MUNICIPALITY) Planning Board, subsequent to public hearing, adopted a Housing Element and Fair Share Plan as an amendment to the (year) Master Plan on (date). The adopted plan is a revision of a previously adopted housing element and fair share plan, for which the (Township/Borough/Town/City) had petitioned the Council on Affordable Housing for substantive certification on (date).

A copy of the amended and adopted housing element and fair share plan is available for public inspection at the office of (Municipal Clerk, etc.) Municipal Building, located at (street address), during the hours of \_\_\_\_\_. Any interested party may file comments or objections to the plan with the Council on Affordable Housing, 101 South Broad Street, PO Box 813, Trenton, New Jersey 08625-0813 and with the (Township/Borough/Town/City) by \_\_\_\_\_, which is 45 days of publication of this notice.

(d) The Council shall publish monthly, in newspapers of general circulation within the State, an updated list of all petitions for substantive certification it has received.

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.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

### 5:91-3.4 Inspection

A municipality which has filed a petition for substantive certification and proposed housing element and fair share plan with the Council, shall make available for public inspection within the municipality, during business hours, copies of the petition and proposed housing element and fair share plan, with supporting documentation. The housing element and fair share plan shall be available for inspection for a period of 45 days beginning on the date of publication of notice of petition for substantive certification, pursuant to N.J.A.C. 5:91-3.3.

**5:91-3.5 Owners of sites designated for low and moderate income housing**

(a) At the time it files its petition for substantive certification, a municipality shall provide the Council with the following information:

1. The names and addresses of owners of sites that were included in previously certified or court settled plans that were zoned for low and moderate income housing and/or were to pay a negotiated fee(s). The owners of sites that have been completely developed shall not be included; and
2. The names and addresses of owners of all new or additional sites included in the 12-year housing plan.

(b) The owners of sites designated in the municipal submission shall be given individual written notice by the Council of the filing of the petition, may participate in mediation and shall have the rights granted to objectors of the municipal submission.

Amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).  
Redesignated text into (a) and (b), and inserted (a)1 and 2.

**5:91-3.6 Municipal/developer incentives**

(a) When a municipality files a housing element and fair share plan and either petitions for substantive certification or is sued for exclusionary zoning within two years of filing its housing element, the municipality shall not be subject to a builder's remedy and the Council shall not award relief to a developer except in extraordinary situations. Extraordinary situations include, but are not limited to, the lack of suitable alternative sites in the municipality to produce the required low and moderate income housing. If contested issues are transferred to (OAL) pursuant to N.J.A.C. 5:91-8, the burden of proof shall be on the objectors to the municipal housing element, unless the Council determines that such an extraordinary situation exists and that the burden of proof is with the municipality.

(b) The Council shall consider awarding relief to a developer who objects to a municipal plan when:

1. The municipality has filed a housing element and petitions for substantive certification prior to an exclusionary zoning lawsuit but more than two years after filing its housing element and fair share plan;
2. The Council determines the municipal plan does not adequately address the municipal fair share; and
3. The objector offers a site that is available, approvable, developable and suitable, pursuant to N.J.A.C. 5:93-1.

(c) If an exclusionary zoning lawsuit is filed against a municipality prior to a municipal petition for substantive certification and the case is transferred to the Council by the Court, the Council shall presumptively require the mu-

nicipality to include the contested site as a component of its plan if:

1. The site is available, approvable, developable and suitable pursuant to N.J.A.C. 5:93; and
2. The municipality has not filed a housing element; or has filed a housing element but has not petitioned for substantive certification within two years of filing.

Amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).  
Amended N.J.A.C. references.

**SUBCHAPTER 4. OBJECTIONS TO A PROPOSED HOUSING ELEMENT AND FAIR SHARE PLAN**

**5:91-4.1 Objection**

(a) Within 45 days of publication of the notice of a municipality's petition or repetition for substantive certification, any person may file objections with the Council and the municipality. An objection shall be in a form as may be determined by the Council and shall include at the very least:

1. A clear and complete statement as to each aspect of the municipality's housing element and fair share plan contested by the objector;
2. An explanation of the basis for each objection, including where appropriate citations to expert reports, studies, or other data relied upon by the objector;
3. Copies of all such expert reports, studies and data relied upon by the objector;
4. Proposed modifications, changes, or other measures which the objector contends would resolve the objector's dispute with the municipality and an explanation of how the objector's proposals are consistent with the Council's criteria and guidelines;
5. If the objector is seeking relief on a specific site in Planning Areas 3, 4 or 5 as designated in the State Development and Redevelopment Plan (SDRP) and the objector's site is not in a designated center, a statement addressing the appropriateness of identifying the area surrounding the objector's site for center designation using the criteria within the SDPR; and
6. A statement outlining the objector's prior efforts at premediation, participation in conferences, or public hearings and a summary of the results of any such efforts.

**Case Notes**

Council on Affordable Housing (COAH) never questioned developer's standing to appeal its motion to dismiss township's petition for certification of its housing plan and township repeteritioned for certifica-

tion. and thus, developer occupied the status of an objector in the pending proceedings before the COAH, which entitled developer to mediation of its objections to township's revised affordable housing compliance plan. 852 A.2d 258, 371 N.J.Super. 167.

Objection to petition for substantive certification lack of statutorily-mandated notice held township "cured" defective notice through later properly noticed hearing. Hills Development v. Bernards Twp., 229 N.J.Super. 318 (App.Div.1988).

#### 5:91-4.2 Review of objections

(a) The Council shall review objections subject to the requirements of N.J.A.C. 5:91-4.1. An objector who has filed a complete objection shall be able to participate in the Council's administrative process as described in these rules. Objections that are determined to be incomplete will be returned to the objectors with notice of their deficiencies.

(b) Once such deficiencies are corrected, the objections shall be resubmitted to the Council within 14 days of receipt of the notice of deficiency. If the resubmitted objections then conform to N.J.A.C. 5:91-4.1, the objector will then be able to participate in the Council's administrative process.

#### Case Notes

Council order was mere "interlocutory order" where matter was returned to jurisdiction of courts. Fair Share Housing Center, Inc. v. Township of Cherry Hill, 242 N.J.Super. 76, 576 A.2d 24 (A.D.1990).

### SUBCHAPTER 5. CONSIDERATION OF A MUNICIPALITY'S HOUSING ELEMENT AND FAIR SHARE PLAN WHEN NO OBJECTIONS ARE FILED

#### 5:91-5.1 Overview

This subchapter outlines the procedures for the review of a housing element to which no objections have been filed. The procedures are summarized in this subchapter.

Amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

#### 5:91-5.2 Council review

(a) After a municipality files a petition for substantive certification, the Council staff will prepare either a COAH report requesting additional information to be filed with COAH within 60 days of receipt of the COAH report requesting additional information or a compliance report. The COAH report requesting additional information will indicate any missing documentation and/or amendments to the housing element and fair share plan necessary to achieve substantive certification. The municipality and the service list shall receive copies of the COAH report requesting additional information. The compliance report will be submitted to the municipality and the service list for a 14-day comment period prior to Council action on a petition for substantive certification.

(b) If the municipality fails to submit the necessary documentation or fails to amend its housing element and fair share plan, if requested, after receiving the COAH report requesting additional information, the Council shall take whatever action is appropriate which may include dismissal of the petition.

(c) If the amendments required of the municipal housing element and fair share plan are substantial and require the designation of additional inclusionary sites, a change in inclusionary sites, a substantial increase in density or a fundamental change in approach, the municipality shall be directed to refile its housing element and fair share plan and to repetition for substantive certification within a timetable established within the COAH report requesting additional information. The municipality shall provide notice of repetition as required in N.J.A.C. 5:91-3.3. Repetition shall require an objector period as defined in N.J.A.C. 5:91-4.1.

(d) If objections are filed upon repetition to the refiled housing element and fair share plan, the municipal submission shall follow the procedures outlined in N.J.A.C. 5:91-6, beginning with N.J.A.C. 5:91-6.2(e).

(e) If there are no objections following the municipal amendment and refiled of its housing element and fair share plan and any applicable objector period, the Council staff shall prepare another COAH report requesting additional information or a compliance report. The COAH report requesting additional information shall indicate any further missing documentation and/or necessary amendments to the municipal submission to achieve certification. The municipality and the service list shall receive copies of the COAH report requesting additional information. The compliance report shall be circulated to the municipality and the service list for a 14-day comment period prior to Council action on the petition for substantive certification.

(f) If, after reviewing the COAH report requesting additional information, the Council finds that the refiled housing element and fair share plan continue to require substantial changes, such as the designation of additional inclusionary sites, a change in inclusionary sites, a substantial increase in density or a fundamental change in approach, the Council may dismiss the petition for substantive certification by issuing an administrative order pursuant to N.J.A.C. 5:91-10.3 or may deny the petition.

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.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).  
Rewrote (b); deleted (f) and recodified (g) as (f).

#### 5:91-5.3 Grant of substantive certification

(a) The Council will issue substantive certification of a municipality's housing element and fair share plan if:

1. The municipality's proposed housing element and fair share plan complies with this chapter and N.J.A.C. 5:93;
2. The housing element and fair share plan is not inconsistent with the achievement of the low and moder-

ate income housing needs of the region as adjusted pursuant to this chapter and N.J.A.C. 5:93; and

3. The combination of the elimination of unnecessary housing cost-generating features from the municipal land use ordinances and regulations, and the affirmative measures in the final proposed housing element and fair share plan make the achievement of the municipality's fair share of low and moderate income housing realistically possible after allowing for the implementation of any regional contribution agreement approved by the Council.

(b) Any grant of substantive certification may contain such conditions and terms as the Council considers necessary and which makes the achievement of a municipality's fair share obligation realistically possible.

(c) The Council may condition a grant of substantive certification upon specific changes in the housing element or fair share plan. Any conditions for approval shall be in writing and shall set forth the reasons for the conditions. If, within 60 days of the Council's conditional approval, the municipality submits changes satisfactory to the Council, the Council shall issue substantive certification.

(d) Within 45 days of the grant of substantive certification, the municipality shall adopt its fair share housing ordinance as approved by the Council. The Council's grant of substantive certification will be void and of no force and effect in the event that the municipality fails to timely adopt its fair share ordinance.

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.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

In (c), changed "refiles its petition with" to "submits changes".

**5:91-5.4 Dismissal**

If the Council dismisses a petition for substantive certification by an administrative order issued pursuant to N.J.A.C. 5:91-10.3, the municipality shall no longer receive the benefits outlined in N.J.A.C. 5:91-3.6. Such a municipality may revise its housing element and fair share plan, refile it with the Council and repetition.

Amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

Deleted second sentence defining date of filing and date of refileing.

**5:91-5.5 Denial**

The Council's denial of substantive certification shall be in writing and shall set forth the reasons for the denial. If, within 60 days of the Council's denial, the municipality refiles its petition with changes satisfactory to the Council, the Council shall issue substantive certification.

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**SUBCHAPTER 6. CONSIDERATION OF A MUNICIPALITY'S HOUSING ELEMENT AND FAIR SHARE PLAN WHEN OBJECTIONS ARE FILED**

**5:91-6.1 Overview**

This subchapter outlines the procedures for the review of a housing element when one or more objections have been

filed. The rules within the subchapter recognize that the Fair Housing Act at N.J.S.A. 52:27D-313 allows a municipality to petition for substantive certification within two years of filing a housing element. A municipality that petitions within two years of filing a housing element and fair share plan shall be processed pursuant to N.J.A.C. 5:91-6.2. A municipality that does not petition within two years of filing a housing element and fair share plan, but does petition prior to being made a defendant to an exclusionary lawsuit, shall be processed pursuant to N.J.A.C. 5:91-6.3. All other municipalities shall be processed in accordance with N.J.A.C. 5:91-6.4.

**Case Notes**

Council on Affordable Housing (COAH) has authority to judge municipality's fair housing plan. *Alexander's Dept. Stores of New Jersey, Inc. v. Borough of Paramus*, 125 N.J. 100, 592 A.2d 1168 (1991).

Agency rulemaking by Council on Affordable Housing was reasonably required under Fair Housing Act. *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990).

Council on Affordable Housing's failure to address mandatory development fees rendered exercise of rulemaking authority incomplete. *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990).

Fair Housing Act's broad delegation of authority met standards of reasonableness. *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990).

**5:91-6.2 Municipalities that have petitioned for substantive certification within two years of filing their housing element and fair share plan**

(a) Municipalities that have petitioned for substantive certification within two years of filing their housing element and fair share plan have complied with the Fair Housing Act. A municipality in this classification shall receive the benefits outlined in N.J.A.C. 5:91-3.6, unless and until the Council dismisses its petition for substantive certification by administrative order or denies it pursuant to N.J.S.A. 52:27D-314. The procedures for review are summarized in this rule.

(b) Following a petition for substantive certification, the Council staff shall prepare either a COAH report requesting additional information to be submitted to COAH within 60 days of receipt of the COAH report requesting additional information or a premediation report. The report shall be circulated to the municipality and to the service list.

(c) The appropriate report shall be forwarded to the service list. The COAH report requesting additional information shall determine if there are problems associated with the municipal submission that require designation of additional sites, a change in inclusionary sites, a substantial increase in density, a fundamental change in approach and/or missing documentation. While the problems are being addressed, the Council shall direct the parties to mediation.

(d) At the end of mediation, the procedures in N.J.A.C. 5:91-7.3 shall be followed. If there are no objections to the mediation report and the housing element is to be amended as a result of mediation, then the municipality shall follow the procedures in N.J.A.C. 5:91-7.4(a) through (c). If there are objections to the mediation report, following the public notice in N.J.A.C. 5:91-7.4(b), then the municipality shall follow the procedures in N.J.A.C. 5:91-7.6.

(e) A municipality shall amend its housing element as a result of mediation within 60 days after the expiration of the objection/comment period to the mediation report. If the municipality fails to amend its housing element as a result of mediation within that time period, the Council may dismiss the municipal submission by administrative order or deny it pursuant to N.J.S.A. 52:27D-314.

(f) If the Council dismisses a petition for substantive certification, the municipality shall no longer receive the benefits outlined in N.J.A.C. 5:91-3.6. Such a municipality may revise its housing element and fair share plan, refile it with the Council and repetition.

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.1998 d.21, effective January 5, 1998.

See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

Deleted (e); recodified (f) and (g) as (e) and (f).

### **5:91-6.3 Municipalities that petition for substantive certification more than two years after filing a housing element and fair share plan**

(a) Municipalities that petition for substantive certification more than two years after filing a housing element and fair share plan did not petition for certification within two years of filing its housing element and fair share plan, in accordance with N.J.S.A. 52:27D-313. However, the Council shall accept the petition for substantive certification.

(b) Following a petition for substantive certification, the Council staff shall prepare either a COAH report requesting additional information to be filed with COAH within 60 days of receipt of the COAH report requesting additional information or a premediation report. The report shall be circulated to the municipality and to the service list. The COAH report requesting additional information shall determine if there are problems associated with the municipal submission that require designation of additional inclusionary sites, a substantial increase in density, a change in inclusionary sites, a fundamental change in approach and/or any missing documentation. While the problems are being addressed, the Council shall schedule mediation.

(c) If the COAH report requesting additional information determines that the submission requires the designation of additional inclusionary sites, a change in inclusionary sites, a substantial increase in density, or a fundamental change in approach, the Council shall presumptively require the inclusion of one or more objector's sites in the municipal housing element and fair share plan.

(d) After mediation, a municipality may contest the suitability of any objector's site and request a hearing on the site's suitability before OAL. Subsequent to an evidentiary hearing at OAL, the Council may determine that an objector's site is suitable and that it is appropriate to be included in the municipal housing element and fair share plan. If so, the Council will direct its inclusion in an amended plan.

(e) At the end of mediation, if there are no objections to the mediation report and the housing element is to be amended as a result of mediation, then the municipality shall follow the procedures in N.J.A.C. 5:91-7.4(a) through (c).

(f) A municipality shall amend its housing element as a result of mediation within 60 days after the expiration of the objection/comment period to the mediation report. If the municipality fails to amend its housing element as a result of mediation within that time period, the Council shall dismiss the municipal submission by administrative order pursuant to N.J.A.C. 5:91-10.3 or deny it pursuant to N.J.S.A. 52:27D-314.

Amended by R.1998 d.21, effective January 5, 1998.

See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

Deleted (d) and (e); recodified (f) as (d); inserted new (e) and (f).

### **5:91-6.4 Other municipalities**

(a) This class of other municipalities includes those that were sued for exclusionary zoning either prior to filing a housing element or after filing a housing element where a petition for substantive certification was not filed within two years. It is anticipated that these municipalities will be vulnerable to a builder's remedy in court. Should the court, however, transfer the case to the Council, this rule outlines the review of these transferred cases.

(b) Following a court transfer and the filing of a petition for substantive certification, the Council staff shall prepare a COAH report requesting additional information to be filed with the Council within 60 days of receipt of the report or a premediation report and circulate it to the parties. The report shall indicate that an objector/litigant is presumptively entitled to site-specific relief. The COAH report requesting additional information shall determine if there are problems associated with the housing element and fair share plan that require designation of additional inclusionary sites, a change in inclusionary sites, a substantial increase in density, a fundamental change in approach and/or any missing documentation. While the problems are being addressed, the Council shall schedule mediation.

(c) After mediation, a municipality may contest the suitability of an objector's site and request a hearing on the suitability of the site before OAL. Because the municipality did not meet the requirements of N.J.S.A. 52:27D-301 et seq., there shall be a presumption that the site is suitable and the municipality will have the burden to show that the site is not suitable.

(d) At the end of mediation if there are no objections to the mediation report and the housing element is to be amended as a result of mediation, then the municipality shall follow the procedures in N.J.A.C. 5:91-7.4(a) through (c).

(e) A municipality must amend its housing element as a result of mediation within 60 days after the expiration of the objection/comment period to the mediation report. If the municipality fails to amend its housing element as a result of mediation within that time period, the Council may dismiss the municipal submission by administrative order or deny it pursuant to N.J.S.A. 52:27D-314.

Amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).  
Deleted (c) and (d); recodified (e) as (c); inserted new (d) and (e).

**5:91-6.5 Substantive certification action**

(a) Upon review of the housing element and fair share plan, the mediation report pursuant to N.J.A.C. 5:91-7 and, where required, the Initial Decision from OAL pursuant to N.J.A.C. 5:91-9, the Council shall issue substantive certification if:

1. The municipality's proposed housing element and fair share plan complies with this chapter and N.J.A.C. 5:93;
2. The housing element and fair share plan is not inconsistent with the achievement of the low and moderate income housing need of its region as adjusted pursuant to this chapter and N.J.A.C. 5:93; and
3. The combination of the elimination of unnecessary housing cost-generating features from the municipal land use ordinances and regulations and affirmative measures in the housing element and fair share plan make the achievement of the municipality's fair share of low and moderate income housing realistically possible after allowing for the implementation of any regional contribution agreement approved by the Council.

(b) Upon conducting the review set forth in (a) above, the Council may deny the petition for substantive certification, or condition a grant of substantive certification upon specific changes in the housing element or fair share plan. Any denial or conditional approval shall be in writing and shall set forth the reasons for the denial or the conditions for the approval. If, within the 60 days of the Council's denial or conditional approval, the municipality submits changes satisfactory to the Council, the Council shall issue substantive certification.

(c) In conducting its review set forth in this section, the Council may meet with the municipality and any objector thereto.

(d) Within 45 days of the grant of substantive certification, the municipality shall adopt its fair share housing ordinance as approved by the Council. The Council's grant

of certification will be void and of no force and effect in the event that any municipality fails to timely adopt its fair share ordinance.

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.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).  
Substituted "OAL" for "Office of Administrative Law".

**SUBCHAPTER 7. MEDIATION**

**5:91-7.1 General**

(a) The Council shall engage in mediation where a timely objection to a municipality's petition for substantive certification is filed. The mediation procedure is summarized in this subchapter. The Council may appoint a designee to conduct mediation, and the Council or its designee shall meet with the representatives of the municipality and the objectors and attempt to mediate a resolution of the dispute.

(b) Payment of a mediator's compensation shall be shared equally by the municipality and the objectors.

Amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).  
Deleted reference to Chart 5 of the Appendix.

**Case Notes**

Closed township committee meeting involving anticipated litigation did not violate Open Public Meetings Act. Hills Development Co. v. Township of Bernards, 229 N.J.Super. 318, 551 A.2d 547 (A.D.1988).

**5:91-7.2 Scope of mediation**

(a) The Council or its designee shall meet with the municipality and the objectors as quickly as practicable after the end of the 45-day objector period after a matter is referred to the Council for mediation, and as often thereafter as the Council or its designee shall determine necessary, and may impose such deadlines for the submission of information, reports, studies or other documentation as the Council or its designee shall find necessary.

(b) The Council or its designee may, upon notice to the parties, during the course of mediation, rely upon or use any interim adjudications previously entered by a trial court in the matter, or any stipulations previously entered into by the parties in any such litigation.

(c) The Council may, during mediation, choose to hear and decide an issue itself if, in the Council's determination, such a hearing would facilitate a satisfactory conclusion to the mediation process.

(d) Mediation before the Council or its designated mediator may be conducted for a period of no more than 90 days

after the first scheduled mediation date. If the Council is, for any reason, dissatisfied with the progress of the mediation proceedings, or determines that mediation cannot resolve a dispute, the Council may declare an end to mediation and in its discretion (see N.J.A.C. 5:91-8) refer the matter to OAL for adjudication as a contested case. The period for mediation established in this section may be extended by the Council for good cause shown.

(e) Owners of record of sites that have been designated for low and moderate income housing in a municipality's housing element and fair share plan shall be deemed objectors and shall be permitted to participate in mediation to the same extent as a party that objected to the municipal housing element and fair share plan pursuant to N.J.A.C. 5:91-4. Owners of record of sites may file objections pursuant to N.J.A.C. 5:91-4.1 and may also be required to do so by the mediator.

(f) The Council or its designee may, in its discretion, permit any person to participate in mediation when the Council or its designee determines that such participation may facilitate mediation and/or help resolve an objection to a municipality's petition for substantive certification. A person invited to participate pursuant to this subsection shall be deemed a participant to mediation and shall be permitted to participate in mediation to the extent the Council or its designee determines appropriate.

(g) Objectors and owners of sites in accordance with N.J.A.C. 5:91-3.5 shall be permitted mediation teams of not more than three representatives, unless otherwise permitted by the mediator, and shall submit to the Council the names of the individuals who will participate. A municipality shall be permitted three representatives in addition to a member of the municipal planning board. Prior to the commencement of mediation, a municipality shall submit to the Council a duly adopted resolution that designates its representatives, authorizes the representatives to negotiate on behalf of the municipality and also authorizes one or more of the municipal representatives to execute any written agreement reached during mediation on behalf of the municipality.

1. Additions or replacements to mediation teams shall be made only with the approval of the mediator, and shall be immediately submitted to the Council in writing by the objector, owner or municipality, as appropriate.

(h) The Council or its designee shall have the widest possible discretion as to the manner by which mediation is conducted.

(i) If a mediated agreement involves the removal of a previously certified site, COAH shall only retain jurisdiction over the site if the mediated agreement contains low and moderate income units or a mandatory or negotiated development fee.

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.1998 d.21, effective January 5, 1998.

See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).  
Inserted (g) and (i).

#### Case Notes

Council's rejection of township's motion was not appealable order. Fair Share Housing Center, Inc. v. Township of Cherry Hill, 242 N.J.Super. 76, 576 A.2d 24 (A.D.1990).

#### 5:91-7.3 Mediation report

(a) At the end of mediation, the mediator shall prepare a mediation report and serve the municipality, objectors and other participants to the mediation with a copy of the written mediation report including owners of sites in accordance with N.J.A.C. 5:91-3.5 and owners of sites in a proposed amendment. The report shall list all issues that remain in dispute between the municipality and the objectors and shall present the stipulations or other agreements reached by the municipality and the objectors.

(b) The municipality, objectors, owners of sites in accordance with N.J.A.C. 5:91-3.5, and owners of sites in a proposed amendment and the participants to the mediation may file comments regarding the mediation report within 14 days. The 14 day comment period shall begin with the receipt of the mediation report.

(c) The parties shall be bound by any agreements entered into during mediation when formally reduced to writing and signed by the parties.

(d) The mediator shall present the mediation report and any comments or objections to the mediation report to the Council advising the Council of the results of mediation.

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.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).  
Inserted references to owners of sites.

#### Case Notes

Council on Affordable Housing may determine whether case is contested. Quad Enterprises v. Borough of Paramus, 250 N.J.Super. 256, 593 A.2d 1227 (A.D.1991).

#### 5:91-7.4 Publication of notice of housing element and fair share plan to be amended as a result of mediation where there are no unresolved objections and no material contested issues of fact

(a) Except as provided under N.J.A.C. 5:91-7.5, if the Council determines as a result of mediation, that there will be substantial amendments to the adopted housing element as originally filed, the municipality shall publish notice of the amendment, within seven days after receiving the mediation report that has been presented to the Council, in a newspaper of general circulation within the municipality and the county or, in the case of a municipality that intends to publish in a weekly newspaper, in the next possible edition of the weekly paper following receipt of the mediation report. The notice shall state that the housing element and fair share plan will be amended as a result of mediation and state the nature of any and all amendments to the plan as a result of mediation.

(b) A municipality shall make available for public inspection within the municipality, during business hours, copies of the mediation report, and shall include in its notice pursuant to (a) above the times when and places within the municipality where the mediation report will be made available for public inspection. The notice also shall specify that any objection or comment to the mediated housing element and fair share plan must be filed with the Council and the municipality within 45 days of the date of the publication of the notice and give the Council's address and the municipality's address where the objection or comment shall be filed.

(c) If there are no objections to the mediation report, the planning board shall amend the housing element at a public meeting and forward the adopted amendment to the governing body. The governing body shall endorse the amendment and forward the amendment to the Council for review and approval.

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.1998 d.21, effective January 5, 1998.

See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

Inserted (c); changed objector/comment period from 14 to 45 days.

Amended by R.1999 d.107, effective April 5, 1999.

See: 30 N.J.R. 3719(a), 31 N.J.R. 868(a).

In (c), deleted the condition that the amended housing element not involve a new site or a fundamental change in approach.

Amended by R.2001 d.219, effective July 2, 2001.

See: 33 N.J.R. 1042(a), 33 N.J.R. 2279(b).

In (a), substituted "Except as provided under N.J.A.C. 5:91-7.5, if" for "if".

**5:91-7.5 Amendment of housing element and fair share plan when there are unresolved objection(s) and no material contested issues of fact**

Once mediation has concluded, when there are unresolved objections and the Council determines that there are no material contested issues of fact and also determines that, as a result of mediation, substantial amendments to the adopted housing element as originally filed are necessary, the municipality shall amend its adopted housing element and fair share plan at a public meeting of the planning board within 60 days after the COAH Mediation Report has been presented to the Council. By resolution, the governing body shall then endorse the amended housing element and fair share plan and repetition for substantive certification. In addition, within the same 60 days, the municipality shall provide notice of repetition as required in N.J.A.C. 5:91-3.3. Repetition shall require an objector period as provided in N.J.A.C. 5:91-4.

New Rule, R.2001 d.219, effective July 2, 2001.

See: 33 N.J.R. 1042(a), 33 N.J.R. 2279(b).

Former N.J.A.C. 5:91-7.5, Request for hearing following mediation, recodified to N.J.A.C. 5:91-7.6.

**5:91-7.6 Request for hearing following mediation**

(a) Following mediation, the municipality or any objector may request a hearing on issues that remain unresolved. The request for a hearing shall set forth:

1. A detailed description of all unresolved issues and all information and documentation the party relies upon with regard to the objections for which a hearing is requested; and

2. Any other arguments or information the party feels is necessary for the Council to make a determination.

(b) A request for a hearing shall be served upon all parties that participated in the mediation no later than 14 days after receipt of the mediation report. Any response to a request for a hearing by any party to mediation shall be served and filed no later than 10 days after receipt of the request for a hearing. A reply to the responses shall be served and filed no later than five days after receipt of the response. If any request for a hearing, response or reply is supported by an affidavit or brief, that affidavit or brief shall be filed with the request for a hearing, response or reply. All papers filed shall be accompanied by proof of service.

(c) After consideration of all papers and the mediation report, the Council shall determine whether to refer any unresolved issues to OAL for adjudication as a contested case pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

Amended by R.1998 d.21, effective January 5, 1998.

See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

Recodified from N.J.A.C. 5:91-7.5 by R.2001 d.219, effective July 2, 2001.

See: 33 N.J.R. 1042(a), 33 N.J.R. 2279(b).

Former N.J.A.C. 5:91-7.6, Reopened mediation, recodified to N.J.A.C. 5:91-7.7.

**5:91-7.7 Reopened mediation**

(a) If during the 45 day objector/comment period provided for in N.J.A.C. 5:91-7.4, an objection is filed to the proposed mediated housing element and fair share plan, the Council may, in its discretion, reopen mediation for a period not to exceed 30 days. This period may be extended by the Council for good cause.

(b) The Council shall consider only those objections to the portions of the housing element and fair share plan that have been amended as a result of mediation.

(c) If mediation is reopened, the municipality and objectors to both the initial housing element and fair share plan, and to the proposed mediated housing element and fair share plan shall be given the opportunity to participate in the reopened mediation.

(d) At the end of the reopened mediation, the mediator shall prepare another mediation report and serve the municipality, objectors and other participants to the mediation with a copy of the written mediation report. The report shall list all issues that remain in dispute between the municipality and the objectors and shall present the stipulations or other agreements reached by the municipality and the objectors. The municipality, objectors and participants

to the mediation may file comments regarding the second mediation report within 14 days. The mediator shall present the second mediation report together with any comments or objections to the Council advising the Council of the results of the reopened mediation.

(e) Following a reopened mediation and the presentation of the second mediation report to the Council, the procedures in N.J.A.C. 5:91-7.4 shall be followed.

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.1998 d.21, effective January 5, 1998.

See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

In (a), substituted "45 day objector/comment period" for "14 day comment period"; inserted (e).

Revised from N.J.A.C. 5:91-7.6 by R.2001 d.219, effective July 2, 2001.

See: 33 N.J.R. 1042(a), 33 N.J.R. 2279(b).

## SUBCHAPTER 8. REFERRAL TO OFFICE OF ADMINISTRATIVE LAW (OAL)

### 5:91-8.1 General

(a) In the event mediation efforts are unsuccessful, the Council upon the motion of any party or in its own discretion shall determine whether to refer the matter to the OAL for resolution as a contested case. Prior to determining whether a case is contested, the Council may in appropriate instances require all parties to submit affidavits of experts with regard to issues that require expert testimony and/or affidavits of individuals with personal knowledge of the facts at issue. Such affidavits should set forth, with specificity, facts sufficient to demonstrate there is a genuine issue that requires a hearing. From these submitted papers, the Council may determine if there is an issue of material fact that necessitates a hearing as a contested case before the OAL.

(b) Upon determining that the matter shall be referred to the OAL for adjudication as a contested case, the Council shall transmit the matter to the OAL together with the mediation report, the municipality's petition for substantive certification and any objections thereto, and any other papers pertinent to the adjudication.

(c) The cost of the transcript of all oral testimony transmitted to the Council from OAL shall be shared equally by the municipality and the objectors.

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.1998 d.21, effective January 5, 1998.

See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

Substituted "OAL" for "Office of Administrative Law".

### Case Notes

Borough's petition for substantive certification was contested case to be transferred to Office of Administrative Law. *Quad Enterprises v. Borough of Paramus*, 250 N.J.Super. 256, 593 A.2d 1227 (A.D.1991).

Superior Court, Appellate Division was proper forum to resolve objection to Council on Affordable Housing certificate. *Quad Enterprises v. Borough of Paramus*, 250 N.J.Super. 256, 593 A.2d 1227 (A.D.1991).

Claim that Council on Affordable Housing improperly failed to transfer case to Office of Administrative Law was to be resolved in Superior Court, Appellate Division. *Quad Enterprises v. Borough of Paramus*, 250 N.J.Super. 256, 593 A.2d 1227 (A.D.1991).

## SUBCHAPTER 9. COUNCIL'S REVIEW OF THE INITIAL DECISION

### 5:91-9.1 Review

Within 45 days after the issuance of an initial decision from OAL, the Council shall review the initial decision of the Administrative Law Judge, the record upon which it is based and all exceptions to the initial decision. The Council shall then accept, reject or modify the decision and issue its final decision on the matter. Unless the Council accepts, modifies or rejects the initial decision within this period of time, the decision of the Administrative Law Judge shall be deemed adopted and shall become the final decision of the Council. For good cause shown, the time limit established under this subchapter may be extended pursuant to N.J.A.C. 1:1-16.6.

Amended by R.1998 d.21, effective January 5, 1998.

See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

Substituted "OAL" for "Office of Administrative Law".

## SUBCHAPTER 10. GENERAL POWERS

### 5:91-10.1 Restraining orders

At any time, upon its own determination or upon the application of any interested party, and after a hearing and opportunity to be heard, the Council may issue such orders as may be necessary to require that a participating municipality take appropriate measures to preserve scarce resources that may be essential to the satisfaction of the municipality's obligation to provide for its fair share of its region's present and prospective need for low and moderate income housing.

### Case Notes

Rulemaking by Council on Affordable Housing was reasonably required to fulfill purpose of the Fair Housing Act. *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990).

Exercise of rulemaking authority by Council on Affordable Housing under Fair Housing Act was incomplete. *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990).

Statutory basis for development fees as permissible inclusionary zoning devices provided by Fair Housing Act. *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990).

Moratorium on land development was not an unconstitutional "taking". *Tocco v. New Jersey Council on Affordable Housing*, 242 N.J. Super. 218, 576 A.2d 328 (A.D.1990), certification denied 122 N.J. 403, 585 A.2d 401, certiorari denied 111 S.Ct. 1389, 499 U.S. 937, 113 L.Ed.2d 446.

### **5:91-10.2 Accelerated denial of substantive certification**

At any time, upon its own determination, or upon the application of any interested party, and after a hearing and opportunity to be heard, the Council may deny substantive certification without proceeding further with the mediation and review process.

### **5:91-10.3 Administrative orders**

At any time, upon its own determination, or upon the application of an interested party, the Council may issue an administrative order for a municipality to provide information or take an action that expedites the Council's administrative process and/or the production of low and moderate income housing. The Council may dismiss a municipal

housing element and fair share plan by administrative order when the order sets forth in detail the reasons for the dismissal and the actions the municipality must take before it may refile its housing element and fair share plan.

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## **SUBCHAPTER 11. REGIONAL CONTRIBUTION AGREEMENTS (RCA)**

### **5:91-11.1 Terms of agreement**

(a) A municipality may propose to transfer up to 50 percent of its fair share to another municipality within its housing region by means of an initial contractual RCA pursuant to N.J.S.A. 52:27D-312 between the two municipalities. The initial contractual agreement shall be submitted to the Council by the sending municipality and shall specify, at a minimum the number of units to be transferred, the type of housing activity anticipated by the receiving municipality and the amount of compensation to be paid to the receiving municipality in return for such a transfer. The Council may require amendments to the initial contract upon its review of the RCA and prior to the Council's approval.

(b) An RCA which has been approved by the Council by the granting of a petition for substantive certification to the sending municipality, may be executed once the Council awards substantive certification.

(c) RCA funds shall be deposited in a separate interest bearing escrow account for each RCA. A receiving municipality shall enter into an escrow agreement with the Council whereby the Council has access to the escrow account.

Amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

Substituted "RCA" for "regional contract agreement"; inserted (c).

**5:91-11.2 Statements of intent**

(a) Municipalities which intend to enter into an RCA as a receiving municipality shall notify the Council of their interest and of any proposed conditions or requirements for their participation.

(b) Statements of intent submitted under this section shall be in the form of a resolution adopted by the municipality.

(c) Statements of intent filed with the Council pursuant to this section shall not preclude any receiving municipality from negotiating with any potential sending municipality.

(d) Statements of intent are not binding upon the municipality.

(e) No receiving municipality shall be required to accept a greater number of low and moderate income units through an agreement than it has expressed a willingness to accept in its statement, but the number stated shall not be less than a reasonable minimal number of units, as determined by the Council, not to exceed 100.

Amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

Substituted "RCA" for "regional contract agreement".

**5:91-11.3 Project plan review by the New Jersey Housing and Mortgage Finance Agency**

(a) Except for a municipality that has been granted RCA recipient certification pursuant to N.J.A.C. 5:91-11.4, the receiving municipality shall submit a proposed project plan to the Agency that delineates the manner in which the receiving municipality shall create or rehabilitate low and moderate income housing in response to the regional contribution agreement. The project plan shall be in such a form and contain such information as the Agency may require. The Council or the Agency may impose time limitations for the submission of a project plan, or any updates or conditions thereto.

(b) The Agency may undertake such review as is necessary, including scheduling meetings or hearings and requiring further information, studies or reports, in order to render a timely report on the feasibility of the proposed

plan for the Council. Failure of the receiving municipality to promptly or properly comply with the requirements of the Agency may result in the Agency's refusal to recommend the feasibility of the proposed project.

Amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

**5:91-11.4 RCA recipient certification**

(a) In addition to the procedures outlined in N.J.A.C. 5:91-11.3(a) and (b), a receiving municipality may request RCA recipient certification. RCA recipient certification is a streamlined process of implementing an RCA program for receiving municipalities with a history of demonstrated experience in housing production.

(b) A receiving municipality may apply to the Agency for RCA recipient certification in one or more of the four following housing categories:

1. Limited or moderate rehabilitation of one-to-four family buildings;
2. Substantial rehabilitation of new construction of one-to-four family buildings including in-fill housing;
3. Substantial rehabilitation, new construction or adaptive reuse of nonresidential buildings into multifamily buildings containing more than four units; and
4. Substantial rehabilitation or new construction of special needs housing including transitional housing for the homeless.

(c) In order to receive RCA recipient certification, a receiving municipality shall file an application with the Agency and with the county planning board or agency of the county in which the receiving municipality is located that meets or includes the following:

1. An application for certification stating the category or categories of housing for which the municipality seeks certification and a listing of all RCA projects undertaken by the municipality in the applicable categories during the past five years;
2. Evidence of the ability to market, lease-up and successfully manage affordable housing. The receiving municipality shall submit three sample projects for each requested category for certification and the housing must have been funded either through an RCA or other affordable housing program;
3. The receiving municipality shall demonstrate an ability to administer a housing program by providing a description of the administrative mechanism used to carry out past affordable housing programs including a description of staff responsibilities and procedures for income qualification of applicants. A receiving municipality may have started a program in-house, reached an agreement with a participating governmental agency or retained an outside experienced firm;

4. Submittal of an administrative manual that complies with COAH and Agency rules; and

5. A detailed regional marketing program as per N.J.A.C. 5:93-11 that describes the outreach efforts to be used in carrying out the program.

(d) A receiving municipality shall establish criteria for the selection of development teams that will develop affordable housing projects. A receiving municipality shall encourage the formation of development teams that can complete projects of the type for which financing is sought. The following characteristics are to be considered:

1. The organizational setup of the housing investor/developer (limited dividend, limited partnership, nonprofit);
2. The formation of the project in terms of the site, the number of dwelling units, the number of buildings and the number of stories; and
3. The extent of experience in developing mixed use facilities (for example, commercial space, day care accommodations).

(e) The Agency shall review all RCA recipient certification applications for feasibility and accordance with the criteria in (c) above and shall make recommendations to the Council.

(f) The county planning board or agency of the county in which the receiving municipality is located shall review the RCA recipient certification application in accordance with sound comprehensive regional planning.

(g) The Council shall approve an RCA recipient certification application based upon the recommendation of the Agency and the county planning board or agency of the county in which the receiving municipality is located and the criteria established by N.J.A.C. 5:91-11.4 and 5:93-6.

(h) A municipality that receives RCA recipient certification is considered to have an approved project plan and has the ability to use RCA funds for any eligible project within that certified housing category without Agency review and Council approval during the three-year certification period.

(i) After receiving RCA recipient certification, a receiving municipality shall file with the Agency, the county planning board or agency of the county in which the receiving municipality is located and with the Council a summary of each project prior to the commencement of the project. The summary shall include:

1. A brief project description, including address and number of units;
2. The total development cost and breakdown of financing;
3. The estimated start date; and
4. The projected completion date.

(j) RCA recipient certification shall extend for a three-year period. At the end of the third year, the Agency and the Council shall evaluate the receiving municipality's RCA program for conformity with N.J.A.C. 5:91-11.4 and 5:93-6, including completion of projects and timely submission of reports. A municipality shall receive a three-year extension upon a satisfactory review of the first certification period.

(k) Any changes in facts upon which the RCA recipient certification is based or any deviations from the terms and conditions of the RCA recipient certification which affects the ability of the receiving municipality to provide for the RCA units in the certified housing categories shall render the RCA recipient certification invalid.

(l) All RCA contracts between a sending and RCA recipient certification municipality shall be reviewed and approved by the Council prior to the execution of the agreement and, after approval, shall be forwarded to the Agency and the county planning board.

New Rule, R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

#### 5:91-11.5 Review by county planning board or agencies

(a) Each RCA, together with the RCA recipient certification application, shall be forwarded to the county planning board or agency of the county in which the receiving municipality is located for review and recommendation. RCAs and RCA recipient certification applications shall be reviewed by the county planning board or agency of the county in which the receiving municipality is located. The county planning board or agency shall consider whether or not the RCA and/or RCA recipient certification application is in accordance with sound comprehensive regional planning.

(b) All determinations of a county planning board or agency shall be by resolution and shall be made within such time limits as the Council may prescribe, beyond which the Council shall make those determinations. No fee shall be paid to the county planning board or agency for its review pursuant to this subsection.

(c) A county planning board shall file its review with the Council within 45 days of receipt of a complete application for review. For good cause shown, a 15 day extension may be granted.

(d) In the event that there is no county planning board or agency in the county in which the receiving municipality is located, the Council shall determine whether or not the agreement is in accordance with sound comprehensive regional planning.

Amended by R.1995 d.491, effective September 5, 1995.  
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).  
Recodified from N.J.A.C. 5:91-11.4 and amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

Inserted (c). Former section recodified to N.J.A.C. 5:91-11.6

**5:91-11.6 Review by the Council**

(a) The Council shall approve an RCA upon finding that:

1. The agreement provides a realistic opportunity for low and moderate income housing within convenient access to employment opportunities;
2. The agreement is consistent with sound comprehensive regional planning; and
3. The receiving municipality's project plan is a feasible means of achieving the purposes of the agreement, as determined by the Agency. If the receiving municipality has been granted RCA recipient certification by the Council, such feasibility is established by N.J.A.C. 5:91-11.4.

(b) Upon recommendation of the Agency, the Council may approve as part of the RCA, a provision that the time limitations for contractual guarantees or resale controls for low and moderate income units included in the proposed project be for less than 30 years if the Agency determines that modification is necessary to assure the economic viability of the project.

(c) The Council shall approve all RCAs by resolution; the Council shall set forth in its resolution a schedule for the contributions to be appropriated annually by the sending municipality. A copy of the adopted resolution shall be filed promptly with the Division of Local Government Services of the Department of Community Affairs and the Director of the Division shall, pursuant to N.J.S.A. 52:27D-312(d), thereafter not approve an annual budget of a sending municipality if it does not include appropriations necessary to meet the terms of the resolution.

Recodified from N.J.A.C. 5:91-11.5 and amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).  
Former section recodified to N.J.A.C. 5:91-11.7

**5:91-11.7 Monitoring and enforcement**

(a) All RCAs shall require receiving municipalities to file semi-annual reports with the Council and the Agency setting forth the progress in implementing the RCA project plan to be produced with the funds from the RCA. These reports 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 plan by the receiving municipality. Such actions may include:

1. The initiation of a lawsuit to enforce a regional contribution agreement;

2. The prevention of a delinquent receiving municipality from entering into further regional contribution agreements for a specified period of time;

3. The recommendation that the Agency and the Department of Community Affairs withhold from the receiving municipality further assistance available under the Act; and

4. Such other actions as the Council may determine necessary including ordering a sending municipality for good cause to temporarily or permanently cease payments 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).  
Recodified from N.J.A.C. 5:91-11.6 and amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

**SUBCHAPTER 12. MOTIONS**

**5:91-12.1 Form of Motion**

An application to the Council for an order shall be by motion. A motion shall be by notice of motion in writing, unless the Council permits it to be made orally. Every motion shall state the time and place when it is to be presented to the Council, the grounds upon which it is made and the nature of the relief sought. When a matter becomes a contested case, motions shall generally be made to the OAL pursuant to N.J.A.C. 1:1-12.

Amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

Substituted "OAL" for "Office of Administrative Law".

**5:91-12.2 Oral argument**

A movant's request for oral argument shall be made either in the moving papers or the reply. A respondent's request for oral argument shall be made in the answering papers. All requests for oral argument shall state the reasons therefore.

Amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

Substituted "the" for "his".

**5:91-12.3 Affidavits, briefs and supporting statements**

Motions and answering papers shall be accompanied by all necessary supporting affidavits, briefs and supporting documents. A party shall submit an original and 20 copies of all motions and answering papers, as well as all accompanying papers. All motions and answering papers shall be supported by affidavits for facts relied upon which are not of record or which are not subject to official notice. Such affidavits shall set forth only facts to which the affiants are competent to testify. Properly verified copies of all papers referred to in such affidavits may be annexed thereto.

Amended by R.1998 d.21, effective January 5, 1998.  
 See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).  
 Substituted "20 copies" for "16 copies".

#### Case Notes

Agreement by which township funded lower income housing units was permissible under the Fair Housing Act. In re Township of Warren, 247 N.J.Super. 146, 588 A.2d 1227 (A.D.1991), certification denied 127 N.J. 557, 606 A.2d 369, reversed 132 N.J. 1, 622 A.2d 1257.

Agreement by which township funded lower income housing units was not racially discriminatory. In re Township of Warren, 247 N.J.Super. 146, 588 A.2d 1227 (A.D.1991), certification denied 127 N.J. 557, 606 A.2d 369, reversed 132 N.J. 1, 622 A.2d 1257.

Township's plan to meet lower income housing obligation did not violate Mount Laurel doctrine. In re Township of Warren, 247 N.J.Super. 146, 588 A.2d 1227 (A.D.1991), certification denied 127 N.J. 557, 606 A.2d 369, reversed 132 N.J. 1, 622 A.2d 1257.

#### 5:91-12.4 Time for serving and filing motions and affidavits or briefs

(a) A notice of motion shall establish a return date at least 30 days from the date of service upon the opposing party. All motions, except for those which seek emergent relief, shall be made returnable on a regularly scheduled meeting day of the Council. A party seeking emergent relief shall contact the Executive Director to arrange for an emergency hearing by the Council. If a motion is supported by an affidavit or brief, the affidavit or brief shall be served and filed with the motion. Any opposing affidavits or briefs, or any cross-motions, shall be served and filed not later than 20 days after receipt of the moving papers. Answers or responses to any opposing affidavits or briefs, or to any cross-motions, shall be served and filed not later than 10 days after receipt of the opposing papers.

(b) All papers shall be accompanied by a certification of service.

#### 5:91-12.5 Orders

The Council shall render a decision on the motion and may instruct the prevailing party to prepare and submit an appropriate order. If the Council has made findings of fact and conclusions of law explaining its disposition of the motion, the order shall so indicate.

### SUBCHAPTER 13. AMENDMENT OF SUBSTANTIVE CERTIFICATION

#### 5:91-13.1 General

(a) Amendments to the terms of substantive certification may be approved by the Council at any time following the granting of substantive certification. Amendments may be required by the Council as a result of facts that were not apparent at the time of substantive certification. Approval of any such amendment shall be solely at the discretion of the Council. Amendments may be requested by a municipality or any other party.

(b) A municipality seeking an amendment to substantive certification that requires a change in site, substantial increase in density or other zoning requirements that result in a change of housing structure on a specific site or a fundamental change in approach to its low and moderate income housing obligation shall file a petition for such an amendment.

(c) A municipality seeking a minor, technical amendment to its certified housing element and fair share plan that does not materially alter the terms of certification may request such an amendment by motion pursuant to N.J.A.C. 5:91-12.

(d) Requests for amendments of the terms of substantive certification may be made by any party other than a municipality by motion. If the motion requests a change in site, a substantial increase in density or other zoning requirements that result in a change of housing structure, on a specific site or a fundamental change in approach to the municipal low and moderate income housing obligation, and if the municipality does not object to the motion, the Council may direct the municipality to seek a plan amendment by filing a petition.

(e) All parties to the substantive certification, including the municipality and all objectors, shall be able to comment on any proposed amendment.

(f) In general, a municipality shall not be able to amend zoning on sites included in the certified housing element and fair share plan without the agreement of the affected property owner.

Amended by R.1998 d.21, effective January 5, 1998.  
 See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

#### 5:91-13.2 Municipal petition

(a) A municipal petition to amend the terms of its certification shall include, at a minimum, the following information, as well as such other information as the Council may request:

1. A summary of, and detailed reasons for, the proposed amendment;
2. Evidence that the amendment was previously presented to, and endorsed by, the municipal planning board;
3. A duly adopted resolution of the municipal governing body requesting Council review and approval of the petition to amend;
4. Proof of service of the petition on all objectors and owners of sites contained in both the certified and proposed fair share plans; and
5. Proof of public notice in conformity with the requirements of N.J.A.C. 5:91-13.4.

(b) All of the information required by (a)1 through 4 above shall be filed with the Council by the municipality at the time of filing of its petition for amendment. The information required by (a)5 above shall be filed with the Council within seven days of the date of the municipality's filing of its petition.

Amended by R.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(h).  
In (a)3, substituted "review and approval" for "approval".

**5:91-13.3 Amendment by motion**

(a) A motion to amend the terms of a certification by a municipality or other party shall follow the requirements of N.J.A.C. 5:91-12, and shall include, at a minimum, the following information, as well as such other information as the Council may request:

1. A summary of, and detailed reasons for, the proposed amendment; and
2. Proof of service of the motion on all objectors, interested parties, and owners of sites contained in both the certified and proposed fair share plans.

**5:91-13.4 Notice of amendment petition**

(a) A municipality which has petitioned to amend its substantive certification shall publish a notice of said petition in a newspaper of general circulation within the municipality and the county, using this format:

**NOTICE OF AMENDMENT TO SUBSTANTIVE  
CERTIFICATION**

Notice is hereby given that the (name of municipality) Planning Board, adopted a housing element/fair share plan on (date) which was certified by the Council on Affordable Housing (COAH) on (date). Now, the (name of municipality) is proposing to amend its certified housing element and fair share plan.

**(INSERT BRIEF DESCRIPTION OF AMENDMENT)**

A copy of the amendment to the housing element/fair share plan is available for public inspection at the office of (Municipal Clerk, etc.) Municipal Building, located at (street address), during the hours of \_\_\_\_\_. Any interested party must file comments or objections to the plan with the Council on Affordable Housing, 101 South Broad Street, PO Box 813, Trenton, NJ 08625-0813 and with the (name of municipality) within 30 days of publication of this notice.

(b) Where a party other than the municipality moves to amend the terms of certification, the Council may direct the municipality to publish notice of this motion and the municipality may require the moving party to pay the cost of publishing the required notice. The municipality shall file with the Council proof of publication within seven days of

its receipt of notification from the Council of the necessity of publishing notice.

(c) The Council shall publish a monthly list of all petitions for amendments to certification it has received in newspapers of general circulation within the State.

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.1998 d.21, effective January 5, 1998.  
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).  
Amended address.

**5:91-13.5 Objections to amendment petitions**

(a) Within 30 days of the publication of a notice of a petition to amend the terms of certification, any person may file objections to the terms of the proposed amendment with the Council. These objections shall be in a form acceptable to the Council and shall include, at a minimum, the following:

1. A clear and complete statement as to each aspect of the municipality's proposed amendment to its housing element and fair share plan to which an objection is made;
2. An explanation of the basis for each objection, including, where appropriate, citations to expert reports, studies, or other data relied upon;
3. Copies of all expert reports, studies and data relied upon;
4. Proposed modifications, changes, or other measures which will resolve the objection consistent with the Council's criteria and guidelines; and
5. A statement documenting all efforts at premediation, participation in conferences, or public hearings and a summary of the results of any such efforts.

**5:91-13.6 Review of objections**

(a) The Council shall review objections subject to the criteria in N.J.A.C. 5:91-13.5. An objector that has met these criteria shall participate in the Council's administrative process beginning with mediation as set out at N.J.A.C. 5:91-7.

(b) Objections that are determined to be incomplete shall be returned to the objectors and they will be given 14 days to amend their objections and resubmit them in a manner conforming to 5:91-13.5.

**SUBCHAPTER 14. INTERIM PROCEDURES**

Authority  
N.J.S.A. 52:27D-301 et seq.

**Source and Effective Date**

R.1999 d.378, effective November 1, 1999.  
See: 31 N.J.R. 2319(a), 31 N.J.R. 3290(a).

**Subchapter Historical Note**

Subchapter 14, Interim Procedures, was repealed and Subchapter 14, Interim Procedures, was adopted as new rules by R.1999 d.378, effective November 1, 1999. See: Source and Effective Date.

**5:91-14.1 Municipalities that petition on or before June 6, 2000**

A municipality that has not addressed its cumulative 1987-1999 fair share obligation may file an adopted housing element and fair share plan together with a petition for substantive certification on or before June 6, 2000. The Council shall grant a six-year certification if the housing element and fair share plan meet the criteria of N.J.A.C. 5:93.

**5:91-14.2 Municipalities that petition after June 6, 2000**

(a) A municipality that has not addressed its cumulative 1987-1999 fair share obligation may file an adopted housing element and fair share plan together with a petition for substantive certification after June 6, 2000. The Council shall grant an Interim Substantive Certification if the housing element and fair share meet the criteria of N.J.A.C. 5:93.

(b) This Interim Substantive Certification will be valid for up to one year after the effective date of the adoption of the Council's third round methodology and rules.

(c) To remain under the jurisdiction of the Council after receiving Interim Substantive Certification, a municipality shall petition before the one-year date to receive a third round certification.

**5:91-14.3 Extended substantive certification**

(a) A municipality whose second round substantive certification has expired prior to October 14, 2004 or will expire by December 13, 2004, including those municipalities that previously received extended second round substantive certification from the Council, may move before the Council to extend the substantive certification of its 1987-1999 Housing Element and Fair Share Plan for a period ending December 20, 2005. Such motion shall be filed by December 13, 2004.

(b) A municipality whose substantive certification will expire after December 13, 2004 may move before the Council to extend the substantive certification of its 1987-1999 Housing Element and Fair Share Plan until December 20, 2005. Such motion must be filed prior to the expiration date of its substantive certification.

(c) A municipality that submits a motion for extended substantive certification pursuant to (a) and (b) above shall have its second round substantive certification continue in full force and effect for the period of review of such motion by the Council. The Council shall complete its review and issue its decision on such motion in a reasonable period of time.

(d) The motion submitted by a municipality pursuant to (a) or (b) above shall:

1. Comply with the requirements of N.J.A.C. 5:91-12;
2. Be served upon the service list maintained by the Council; and
3. Be accompanied by:

- i. Proof of public notice in a newspaper of general circulation within the municipality and county that the municipality has moved before the Council to extend its 1987-1999 substantive certification of the municipality's Housing Element and Fair Share Plan. The public notice shall be published simultaneously with the submission of the motion to the Council and to the service list. The public notice shall be in the legal newspaper as well as one that is widely circulated within the county if the legal newspaper is not widely circulated within the county. If the Council's Executive Director determines that notice was not published in a newspaper of general circulation, it shall require the municipality to re-publish in another newspaper. Notice shall be provided in the following format:

**Notice of Motion before the Council on Affordable Housing for Extended Substantive Certification**

NOTICE is hereby given that (MUNICIPALITY) has moved before the New Jersey Council on Affordable Housing ("Council") in accordance with N.J.A.C. 5:91-12 to extend its 1987-1999 substantive certification of its Housing Element and Fair Share Plan. The Council is accepting comments to the municipality's motion for extended substantive certification in conformance with N.J.A.C. 5:91-12.3 for a period of 20 days from the publication of this notice. The comment shall set forth how the municipality has failed to comply with the terms of the substantive certification. The comment shall be served upon the Council and (MUNICIPALITY). A copy of the motion and supporting documentation are available for public inspection at the office of the (MUNICIPAL CLERK, etc.), Municipal Building, located at (STREET ADDRESS), during the hours of \_\_\_\_\_

\_\_\_\_\_  
Municipal Clerk

On the date of publication, the municipality shall make copies of the motion and supporting documentation available for public inspection during regular business hours within the municipality.

ii. The municipality's adopted current Housing Element and Fair Share Plan;

iii. A resolution from the governing body that requests the extension, commits to continue to implement the certified second round plan, and commits to file or petition for third round substantive certification in accordance with N.J.A.C. 5:94 and 5:95 by December 20, 2005.

iv. A proposed schedule for the submission of the filing or petition for third round substantive certification;

v. A statement describing the progress of the municipality's compliance with the terms of its 1987-1999 substantive certification; and

vi. The municipality's current monitoring report and development fee monitoring report.

(e) If the municipality received an adjustment pursuant to N.J.A.C. 5:93-4, the municipality shall also submit the following:

1. Documentation on the issuance of all building permits since the grant of the 1987-1999 substantive certification;

2. A statement describing how the municipality has captured or attempted to capture affordable housing opportunities since the grant of the 1987-1999 substantive certification; and

3. Certification that there have been no substantive changes in the availability of land, water and/or sewer within the municipality.

(f) Comments to the municipality's motion for extended substantive certification shall be accepted by the Council in conformance with N.J.A.C. 5:91-12.3 for a period of 20 days from the publication of the notice required in (d)3i above. The comment shall set forth how the municipality has failed to comply with the terms of the substantive certification. The comment shall be served upon the Council and the municipality.

(g) In conformance with N.J.A.C. 5:91-12.4(a), the municipality shall have 10 days to respond to any comments received pursuant to (f) above.

(h) If the Council determines that the municipality is complying with the terms of its 1987-1999 substantive certification, the Council shall grant extended substantive certification of the municipality's Housing Element and Fair Share Plan for a period of time not to exceed until December 20, 2005. The Council may condition its grant of extended substantive certification with any conditions it deems necessary or appropriate in order to insure continued com-

pliance with the terms of substantive certification and the satisfaction of the affordable housing obligation.

(i) When extended substantive certification is granted, a municipality shall leave all ordinances implementing its original substantive certification in effect for the extended substantive certification, unless the municipality can demonstrate good cause why the ordinances should not remain in effect.

(j) If a municipality received a judgment of compliance that expires by December 20, 2005, the municipality shall move before the Court that issued the judgment of compliance for an extension prior to the expiration of its judgment of compliance. The Council shall consider a motion for extended substantive certification if the Court transfers the request to the Council. In such cases, the procedures and criteria in this section shall apply.

Emergency Repeal and New Rule, R.2004 d.424, effective October 14, 2004 (to expire December 13, 2004).

See: 36 N.J.R. 4992(a).

Section was "Municipalities with expiring substantive certifications". Repeal and New Rule, R.2005 d.28, effective December 13, 2004.

See: 36 N.J.R. 4992(a), 37 N.J.R. 270(a).

Substituted references to December 20, 2005 for references to one year following the effective date of N.J.A.C. 5:94 and 5:95 throughout.

## SUBCHAPTER 15. RETENTION OF DEVELOPMENT FEES

### 5:91-15.1 Procedures for retaining development fees

(a) Municipalities that collected development fees prior to December 13, 1990, as outlined in N.J.A.C. 5:92-18.4 and 18.5, and 5:93-8.4 and 8.5 may retain at least some portion of such fees by conforming to the requirements of N.J.A.C. 5:92-18.8(a) and 5:93-8.8(a) (Development fee ordinance review).

(b) In addition, municipalities that collected development fees prior to December 13, 1990 shall provide notice to each developer that paid a development fee of its request for Council review of the development fee ordinance. The municipality shall provide each developer with a copy of all information required in N.J.A.C. 5:92-18.8(a)9 and 5:93-8.8(a)9 within seven days of the governing body's resolution to request review of its development fee ordinance.

(c) Municipalities that fail to provide all information to the Council, or fail to provide information to developers that paid development fees prior to December 13, 1990 within the time limits imposed by the Council, may be required by the Council to return the development fees to the developers that paid them.

(d) Developers shall have 14 days from the receipt of the information provided in (b) above to submit comments to the Council regarding the submissions made by the municipality. The developer shall simultaneously serve the municipality with a copy of the comments.

(e) Following the submissions from municipalities and developers, the Council shall review and approve or disapprove the ordinance. The Council may also determine the revenues that the municipality must return to the developers that paid the fees. Municipalities shall be able to retain fees that conform to the standards in this subchapter and N.J.A.C. 5:92-18 and 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).

**Law Review and Journal Commentaries**  
COAH Rules Permit Retroactive fee Ordinances, Thomas F. Carroll,  
III, 135 N.J.L.J. No. 7, 56 (1993).

**APPENDIX**

**(RESERVED)**

Repealed by R.1998 d.21, effective January 5, 1998.  
Sec: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).