

(e) Each municipality shall develop a Housing Element that meets the requirements of this section to determine the municipal fair share of affordable housing for the 1987-2014 cumulative period. All components of a Housing Element shall be in accordance with the standards established by this subchapter and the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. The contents of a Fair Share Plan describing how the municipality intends to address the obligation determined in its Housing Element are described in N.J.A.C. 5:94-4. Appendix B, incorporated herein by reference, provides a "Number Calculation Example" for a municipality to follow to determine its total affordable need for the period 1987 to 2014.

5:94-2.2 Preparing a Housing Element

(a) The Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., requires a municipal master plan to include a Housing Element. The Housing Element shall be adopted by the Planning Board and endorsed by the governing body prior to the municipal filing pursuant to N.J.A.C. 5:95-2 or the municipal petition for substantive certification pursuant to N.J.A.C. 5:95-3. A municipality's Housing Element shall be designed to achieve the goal of providing affordable housing to meet the total 1987-2014 affordable housing need comprised of estimated growth share, the remaining balance of Prior Round Obligation from the municipality's 1987-1999 affordable housing obligation that has not been addressed (if any), and the rehabilitation share. The Housing Element submitted to the Council shall include the minimum requirements prescribed by N.J.S.A 52:27D-310.

(b) Supporting information to be submitted with the Housing Element shall include:

1. A projection of the municipality's probable future construction of housing for 10 years covering the period January 1, 2004 through January 1, 2014 based upon the following minimum information for residential development:

- i. Certificates of occupancy issued since January 1, 2004;
- ii. Construction and demolition permits issued and projected;
- iii. Approvals of applications for development; and
- vi. Historic trends, of, at least, the past 10 years, which shall include demolitions and certificates of occupancy issued;

2. An analysis of the existing jobs and employment characteristics of the municipality, and a projection of the probable future jobs and employment characteristics of the municipality for 10 years covering the period January 1, 2004 through January 1, 2014 based upon the following minimum information for non-residential development:

- i. Certificates of occupancy issued since January 1, 2004;
- ii. Construction and demolition permits issued and projected;
- iii. Approvals of applications for development including a breakdown of non-residential projections by use group as outlined in Appendix E, incorporated herein by reference; and
- iv. Historic trends, of, at least, the past 10 years, which shall include demolitions, certificates of occupancy issued and absorption rates;

3. An analysis of how existing zoning or planned changes in zoning provide adequate capacity to accommodate residential and non-residential growth projections consistent with the municipal growth projections calculated pursuant to (b)1 and 2 above. This analysis should include the availability of existing and planned necessary infrastructure, the anticipated demand for the types of uses permitted by zoning based on present and anticipated future demographic characteristics of the municipality, anticipated land use patterns, municipal economic development policies and constraints on development including State and Federal regulations, land ownership patterns, presence of incompatible land uses or sites needing remediation and existing or planned measures to address these constraints;

4. Plan Projections for 2015 or growth projections for 2015 in an endorsed plan approved by the State Planning Commission, whichever is later, after December 20, 2004. If Plan Projections for 2015 are not available when a municipality petitions for substantive certification, a municipality may substitute the most recent municipal population, household, and employment growth projections published by the municipality's metropolitan planning organization as a minimum replacement for the State Planning Commission Plan Projections. Where no metropolitan planning organization household growth projections are available, population projections shall be converted to households using the most recently published municipal household size data available from the Bureau of the Census.

5. If the municipal population, household and employment growth projections used to determine the municipal growth share obligations pursuant to N.J.A.C. 5:94-2.4 are not consistent with the municipal Plan Projections for 2015 required pursuant to (b)4 above, the municipality shall provide the following:

- i. A demonstration that the capacity of existing or planned zoning to accommodate the Plan Projections pursuant to (b)4 above renders those Plan Projections inaccurate;

ii. An analysis of the reasons for the differences between the municipal growth projections calculated pursuant to (b)1 and 2 above and the Plan Projections calculated pursuant to (b)4 above; and

iii. A detailed justification as to why the Council should accept the alternate projections.

6. A copy of the most recently adopted municipal master plan and, when less than three years old, the immediately preceding, adopted master plan;

7. A copy of the most recently adopted municipal zoning ordinance;

8. A general description of any specific sites slated for affordable housing, including but not limited to the following: acreage, owner, block and lot, current zoning, surrounding land uses, and street access;

9. A copy of the most up-to date tax maps of the municipality, electronic if available, with legible dimensions; and

10. Any other documentation pertaining to the review of the municipal Housing Element as may be required by the Council.

(c) The Housing Element shall include the number of newly constructed affordable housing units the municipality was obligated to provide during the period 1987 to 1999 (from Appendix C), the number of low and moderate income units the municipality is obligated to rehabilitate as of April 1, 2000, the projected growth share need based upon residential and non-residential development patterns that are likely to occur pursuant to N.J.A.C. 5:94-2.4, and the number of affordable housing units actually provided to address the 1987 to 1999 cumulative municipal fair share obligation.

5:94-2.3 Growth projection consistency with the State Development and Redevelopment Plan; Plan endorsement

(a) Municipal growth projections that are consistent with the projections provided pursuant to N.J.A.C. 5:94-2.2(b)4 shall have a presumption of validity in a petition for substantive certification.

(b) If the growth projections in a municipality's Housing Element and Fair Share Plan used to determine the municipal growth share obligations pursuant to N.J.A.C. 5:94-2.4 are not consistent with the projections provided pursuant to N.J.A.C. 5:94-2.2(b)4, the Council may reject the municipality's petition for substantive certification unless the municipality demonstrates to the Council the validity of the analyses required in N.J.A.C. 5:94-2.2(b)5. The Council shall obtain a recommendation from the Executive Director of the Office of Smart Growth on the validity of the alternate projections.

(c) A municipality that has received a grant of substantive certification from the Council shall obtain initial plan endorsement from the State Planning Commission by the three-year anniversary review. A municipality that has not received initial plan endorsement may be subject to Council action, including revocation of the municipality's substantive certification.

5:94-2.4 Projecting growth share obligations

(a) Municipalities shall project the residential component of growth share obligations for the period January 1, 2004 to January 1, 2014 based on the data and analysis of growth projections pursuant to N.J.A.C. 5:94-2.2. Residential growth share obligations shall be projected as follows:

1. For every eight market-rate residential certificates of occupancy projected to be issued, the municipality shall plan for an obligation of one affordable housing unit. A municipality may adjust its projections based on projected or actual residential demolitions in calculating net residential growth share obligation. The residential growth share obligation shall not go below zero. Residential demolitions shall not be applied as a credit against the non-residential growth share.

2. Affordable housing units that received credit in a first or second round certified plan or a court judgment of compliance that are projected to be constructed after January 1, 2004 shall be excluded from projected residential growth for the purposes of projecting the growth share.

3. Affordable housing units included in the municipality's third round Fair Share Plan shall be excluded from projected residential growth for the purposes of projecting the growth share.

4. Market-rate units in an inclusionary or mixed-use development that received credit in a first or second round certified plan or a court judgment of compliance that are projected to be constructed after January 1, 2004 shall be excluded from residential growth for the purposes of projecting the growth share, provided these sites are zoned without conditions to produce affordable housing units. The Council shall assume, for crediting purposes, that market-rate units are generated at a rate of four times the number of affordable units generated on that particular site, unless the municipality demonstrates to the Council a rational basis for a lower set-aside percentage that was used to produce the affordable units. In making this determination, the Council shall consider the guidelines established in N.J.A.C. 5:93-5.6 and 5.15.

(b) Municipalities shall project the non-residential component of growth share obligations for the period January 1, 2004 to January 1, 2014 based on the data and analysis of growth projections pursuant to N.J.A.C. 5:94-2.2. Non-residential growth share obligations shall be projected as follows:

1. For every 25 newly created jobs as measured by new or expanded non-residential construction within the municipality in accordance with Appendix E the municipality shall plan for an obligation of one affordable housing unit. A municipality may adjust its projections based on projected or actual non-residential demolition permits issued by square footage in calculating net non-residential growth share obligation. The non-residential growth share obligation shall not go below zero. When adjusting non-residential growth projections by demolitions, any resulting job loss calculation shall be based upon the most recent use group of the building prior to its demolition. The non-residential growth share obligation shall not go below zero. Non-residential demolitions and any resultant job loss shall not be applied as a credit against the residential growth share. Job growth shall be projected by applying the appropriate factor by use group as listed in Appendix E, to the gross square footage of non-residential development projected to be created.

2. Non-residential development that, as a condition of preliminary or final site plan approval granted prior to January 1, 2004 or as a stipulation included in a developers agreement executed prior to January 1, 2004, was required to specifically address a portion of a municipality's first or second round obligation or an obligation determined by the court, may be fully or partially excluded from non-residential growth for the purposes of projecting growth share. Such non-residential development may be excluded at a rate of 25 jobs for every one affordable unit addressed within the municipality as measured by new or expanded non-residential construction. Jobs shall be measured by use group pursuant to Appendix E.

(c) The net residential component of growth share projections shall be added to the net non-residential growth share projections to determine a total projected growth share obligation.

5:94-2.5 Comparing growth share projections to actual growth

(a) A municipality's actual growth share obligation shall be calculated based upon permanent residential and non-residential certificates of occupancy issued between January 1, 2004 and January 1, 2014 within the municipality. Growth share obligations shall be based upon actual residential and non-residential growth pursuant to the procedures described in N.J.A.C. 5:94-2.4.

(b) On an annual basis, pursuant to N.J.A.C. 5:94-9, the municipality shall provide a comparison of its pro-rated growth share projection with its actual pro-rated growth share obligation and the actual number of affordable units that have been constructed or provided for between January 1, 2004 and the date that the review period ended. On the third, fifth and eighth anniversary of each municipal filing of a Housing Element and Fair Share Plan that has received

substantive certification, the Council shall compare the actual growth share obligation with the actual number of affordable units constructed or provided for the purposes of enforcing monitoring and remedies described in N.J.A.C. 5:95-9.

SUBCHAPTER 3. CREDITS, REDUCTIONS AND MUNICIPAL ADJUSTMENTS

5:94-3.1 General

(a) Credits, reductions and adjustments for prior housing activity may be applied against total municipal fair share (1987-2014). All credits, reductions and adjustments shall be subject to verification and validation at the time a municipality submits its petition for certification pursuant to N.J.A.C. 5:95.

1. Credits include units that were built, units transferred to another municipality within the housing region pursuant to the terms of a regional contribution agreement (RCA), rental bonus credits pursuant to N.J.A.C. 5:93-5.15(d) and units that were rehabilitated pursuant to N.J.A.C. 5:93 subsequent to April 1, 2000.

2. Reductions include duly adopted zoning that has been put in place by a municipality to create affordable housing that complies with the Council's regulations and was part of a Fair Share Plan that was certified by the Council or was subject to a judgment of compliance.

3. Adjustments include the 20 percent cap described in N.J.A.C. 5:93-2.16, vacant land and durational adjustments granted pursuant to N.J.A.C. 5:93-4 and the 1,000-unit limitation described in N.J.A.C. 5:93-14 that are only applied to the prior round obligation (1987-1999).

5:94-3.2 Credits

(a) A municipality shall receive credits for housing activity prior to the date of its petition for substantive certification, provided such activity complies with criteria in N.J.A.C. 5:93. A municipality shall document eligible new construction with certificates of occupancy, eligible rehabilitation with final inspections, and transferred RCA units with evidence of the required transfer of funds to the receiving municipality.

(b) A municipality may address its growth share with surplus credits from its prior Fair Share Plan that addressed its 1987-1999 total housing need and which received substantive certification or a judgment of compliance as follows:

- 1. Units that have been built and a certificate of occupancy for each unit has been issued;
- 2. Bonus credits generated by units that have been built; and

3. Units transferred through an RCA when all funds required by the RCA contract have been disbursed to the receiving municipality.

(c) Sites from the municipality's 1987-1999 Fair Share Plan that have been zoned for affordable housing but remain undeveloped shall comply with the review requirements of N.J.A.C. 5:94-3.3(a) to be included in a municipality's third round plan.

(d) A municipality may receive credit for rehabilitation of low and moderate income deficient housing units performed subsequent to April 1, 2000.

1. Units shall be eligible for crediting if:

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

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

iii. Except for units rehabilitated before December 20, 2004, which shall be governed by the provisions of N.J.A.C. 5:93-5.2(g), the units shall have the appropriate controls on affordability pursuant to N.J.A.C. 5:94-4.3(e).

2. Credits for rehabilitation shall not exceed the rehabilitation share and shall only be credited against the rehabilitation component.

5:94-3.3 Reductions for unbuilt affordable housing sites

(a) A municipality shall receive reductions for unbuilt affordable housing sites that were part of its prior Fair Share Plan that addressed its 1987-1999 housing need and which received substantive certification or a judgment of compliance, subject to the provisions of (a)1 below. Reductions for unbuilt housing units shall not exceed the adjusted 1987-1999 affordable housing obligation listed for each municipality in Appendix C.

1. A site that has been zoned but remains unbuilt shall be evaluated by the Council at the time the municipality petitions for the third round to determine if the site continues to present a realistic opportunity for the construction of affordable housing. The municipality shall submit all decisions on applications for development on any unbuilt sites included in the 1987-1999 certified Fair Share Plan. In evaluating an unbuilt site, the Council shall consider whether the site meets the following criteria:

i. The site is a suitable site pursuant to N.J.A.C. 5:94-4.5;

ii. Market conditions create a realistic opportunity for the affordable housing to be constructed; and

iii. Unconditional zoning on the site has been adopted prior to the filing of a third round Housing Element and Fair Share Plan

2. Sites that no longer present a realistic opportunity shall not be eligible to receive a reduction toward any portion of a municipal Fair Share Plan. If the Council determines that the site continues to present a realistic opportunity, but can realistically accommodate a lower number of units than proposed in the 1987-1999 Fair Share Plan, the municipality shall receive a reduction for the lower number.

3. Sites that address the 1987-1999 housing need and are found to present a realistic opportunity pursuant to the provisions above shall be reviewed again at the three-year anniversary review pursuant to N.J.A.C. 5:95-9. If a site has not developed, a municipality may be required to amend its plan to address the shortfall created in the plan in accordance with the mechanisms described in N.J.A.C. 5:94-4.

5:94-3.4 Adjustments

(a) A municipality may address its first and second round obligation through a vacant land adjustment or include a durational adjustment as provided in N.J.A.C. 5:93 and in compliance with the following:

1. A municipality that received a vacant land or durational adjustment pursuant to N.J.A.C. 5:93-4 or by Court order shall be deemed to have met its 1987-1999 cumulative affordable housing obligation provided it has implemented all of the terms of the substantive certification granted by the Council or the judgment of compliance ordered by the Court. All components of said certification or judgment that are designed to address unmet need pursuant to N.J.A.C. 5:93-4.1(b) shall continue in full force and any affordable housing units created thereunder shall be deemed to be credited toward unmet need until such time as the municipality has provided for its entire unmet need prior to being used to address the growth share obligation.

5:94-6.7 Development fees; non-residential

(a) Non-residential development fees shall be a maximum of two percent of either the equalized assessed value for non-residential development or the appraised value on the document utilized for construction financing. Municipalities may also utilize any recognized industry standard to establish values of non-residential development that is acceptable to both the municipality and the Council.

(b) When a municipality approves an increase in floor area pursuant to N.J.S.A. 40:55D-70d(4) (known as a "d" variance), the municipality may impose a development fee of up to six percent on the additional floor area realized. However, if the zoning on a site has changed during the two-year period preceding the filing of such a variance application, the base floor area for the purposes of calculating the bonus development fee shall be the highest floor area permitted by right during the two-year period preceding the filing of the variance application.

(c) The imposition of payments in lieu or development fees pursuant to a development fee ordinance approved by the Council pursuant to N.J.A.C. 5:93-8 shall not be construed as a condition of preliminary or final site plan approval or as a stipulation included in a developers agreement for the purposes of calculating growth exclusions pursuant to N.J.A.C. 5:94-2.4(a)5.

5:94-6.8 Eligible exactions, ineligible exactions and exemptions

(a) Affordable housing developments shall be exempt from development fees. All other forms of new construction may be subject to development fees.

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

(c) Developments that have received preliminary or final approval prior to the imposition of a municipal development fee shall be exempt from development fees unless the developer seeks a substantial change in the approval.

(d) Municipalities may exempt specific types of development from fees or may impose lower fees for specific types of development, provided each classification of development is addressed consistently. For example, all retail development or all development within a specific zoning district may be exempt from the imposition of fees.

(e) Municipalities may exempt specific areas of the municipality from the imposition of fees or reduce fees in order to promote development in specific areas of the municipality. For example, all development north of Main Street may be exempt from the imposition of fees.

5:94-6.9 Collection of fees

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

5:94-6.10 Contested fees

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

5:94-6.11 Housing trust fund

(a) All development fees, payments in lieu of constructing affordable units on site and funds from the sale of units with extinguished controls shall be deposited in a separate, interest-bearing housing trust fund. In establishing the housing trust fund, the municipality shall provide written authorization, in the form of a three-party escrow agreement between the municipality, the bank and the Council, to permit the Council to direct the disbursement of the funds as provided for in N.J.A.C. 5:94-6.16(b). This authorization shall be submitted to the Council within seven days from the opening of the trust fund account. All interest accrued in the housing trust fund shall only be used on eligible affordable housing activities approved by the Council.

(b) With the approval of the Council and of the Division of Local Government Services, the municipality may invest development fee revenue, payments in lieu of constructing affordable units on site and funds from re-sales of units with extinguished controls in a cash management fund, provided that the amount of money in the cash management fund that comprises the funds and income attributable to such funds shall at all times be identifiable. The municipality shall provide written authorization, in the form of a two-party escrow agreement between the municipality and the Council, to permit the Council to direct the disbursement of development fees as provided for in N.J.A.C. 5:94-6.16(b). This authorization shall be submitted to the Council within seven days from the opening of the trust fund account. All interest attributable to such funds shall only be used on eligible affordable housing activities approved by the Council.

5:94-6.12 Use of money

(a) A municipality may use revenues collected from development fees, payments in lieu of constructing affordable units on site and funds from the sale of units with extinguished controls for any activity approved by the Council to address the municipal fair share. Such activities include, but are not limited to: rehabilitation, new construction, RCAs subject to the provisions of N.J.A.C. 5:94-4.4(d), ECHO housing, purchase of land for affordable housing, improve-

ment of land to be used for affordable housing, purchase of housing, extensions or improvements of roads and infrastructure to affordable housing sites, financial assistance designed to increase affordability, or administration necessary for implementation of the Housing Element and Fair Share Plan. Municipalities are encouraged to use development fee revenues to attract other funds such as, but not limited to, available public subsidies and funds from private lending institutions.

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

(c) After subtracting development fees collected to finance an RCA, a rehabilitation program or a new construction project that are necessary to address the municipality's affordable housing obligation, at least 30 percent of the balance remaining shall be used to provide affordability assistance to low and moderate income households in affordable units included in a municipal Fair Share Plan. One-third of the affordability assistance portion of development fees collected shall be used to provide affordability assistance to those households earning 30 percent or less of median income by region.

1. Affordability assistance programs may include down payment assistance, security deposit assistance, low interest loans, and rental assistance.

2. Affordability assistance to households earning 30 percent or less of median income may include buying down the cost of low income units in a municipal Fair Share Plan to make them affordable to households earning 30 percent or less than median income. The use of development fees in this manner shall entitle a municipality to bonus credits pursuant to N.J.A.C. 5:94-4.22.

3. Payments in lieu of constructing affordable units on site and funds from the sale of units with extinguished controls shall be exempt from the affordability assistance requirement.

(d) Municipalities may contract with a private or public entity to administer any part of its Housing Element and Fair Share Plan, including the requirement for affordability assistance, in accordance with N.J.A.C. 5:94-7.

(e) No more than 20 percent of the revenues collected from development fees each year, exclusive of the fees used to fund an RCA, shall be expended on administration, including, but not limited to, salaries and benefits for municipal employees or consultant fees necessary to develop or implement a new construction program, a Housing Element and Fair Share Plan, and/or an affirmative marketing program. In the case of a rehabilitation program, no more than 20 percent of the revenues collected from development fees shall be expended for such administrative expenses. Administrative funds may be used for income qualification of households, monitoring the turnover of sale and rental units, and compliance with Council monitoring requirements. Development fee administrative costs are calculated and may be expended at the end of each year or upon receipt of the fees.

5:94-6.13 Monitoring

Municipalities that collect development fees, payments in lieu of constructing affordable units on site and funds from the sale of units with extinguished controls shall complete and return to the Council all monitoring forms included in the annual monitoring report related to the collection of these funds, expenditure of revenues and implementation of the plan certified by the Council or approved by the court. All monitoring reports shall be completed on forms designed by the Council.

5:94-6.14 Amendment to approved development fee ordinance

(a) Except as set forth in (c) and (d) below, a municipal amendment to an approved development fee ordinance pursuant to N.J.A.C. 5:94-6.2 and 6.4 must be reviewed and approved by the Council prior to the adoption and imposition of fees pursuant to the amendment.

(b) A municipality shall submit a request in the form of a resolution by the governing body for the Council to review an amendment to an approved development fee ordinance.

(c) A municipality may adopt an amendment to its approved, 1987-1999 development fee ordinance to increase the fee percentages pursuant to N.J.A.C. 5:94-6.6(a) and 6.7(a) without prior Council approval. Upon adoption of the amendment to the development fee ordinance, the municipality shall forward the prior approved ordinance and the amended ordinance to the Council within seven days together with a resolution from the governing body that:

1. States that the municipality has only made changes to the fee percentages pursuant to N.J.A.C. 5:94-6.6(a) and 6.7(a);

2. Commits to petitioning for third round substantive certification in accordance with N.J.A.C. 5:95 by December 20, 2005; and

3. Renders the ordinance null and void if the municipality fails to petition for third round substantive certification pursuant to (c)2 above.

(d) A municipality that qualifies for State aid pursuant to P.L. 1978, c.14 (N.J.S.A. 52:27D-178 et seq.) may adopt an amendment to its approved, 1987-1999 development fee ordinance to increase the fee percentages pursuant to N.J.A.C. 5:94-6.6(a) and 6.7(a). Upon adoption of the amendment to the development fee ordinance, the municipality shall forward the prior approved ordinance and the amended ordinance to the Council within seven days together with a resolution from the governing body that states that the municipality has only made changes to the fee percentages pursuant to N.J.A.C. 5:94-6.6(a) and 6.7(a).