

CHAPTER 92

SUBSTANTIVE RULES OF THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING FOR THE PERIOD AUGUST 4, 1986 THROUGH JUNE 5, 1994

Authority

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

Source and Effective Date

R.1991 d.120, effective February 7, 1991.
See: 22 N.J.R. 3671(a), 23 N.J.R. 688(b).

Executive Order No. 66(1978) Expiration Date

The expiration date of Chapter 92, Substantive Rules of the Council on Affordable Housing for the Period August 4, 1986 through June 5, 1994, was extended by gubernatorial directive from February 7, 1996 to June 1, 1996. See: 28 N.J.R. 1378(a).

Chapter Historical Note

Chapter 92, Substantive Rules of the Council on Affordable Housing, became effective on August 4, 1986, as R.1986 d.333. See: 18 N.J.R. 1124(b), 18 N.J.R. 1527(a). Subchapters 14 and 15 became effective on December 15, 1986 as R.1986 d.479. See: 18 N.J.R. 2442(a). Subchapter 16 became effective on February 16, 1988 as R.1988 d.84. See: 19 N.J.R. 2089(b), 20 N.J.R. 385(b). Pursuant to Executive Order No. 66(1978), Chapter 92 was readopted as R.1991 d.120. See: Source and Effective Date.

See section annotations for specific rulemaking activity.

CHAPTER TABLE OF CONTENTS

SUBCHAPTER 1. GENERAL PROVISIONS

- 5:92-1.1 Short title; purpose; scope
- 5:92-1.2 Severability clause
- 5:92-1.3 Definitions
- 5:92-1.4 Housing element
- 5:92-1.5 Substantive certification
- 5:92-1.6 Interim substantive certification

SUBCHAPTER 2. HOUSING REGIONS

- 5:92-2.1 Regions defined
- 5:92-2.2 Uses of regions

SUBCHAPTER 3. POPULATION AND HOUSEHOLDS

- 5:92-3.1 Purpose
- 5:92-3.2 Population and household estimates and projections

SUBCHAPTER 4. ESTIMATED PRESENT AND PROSPECTIVE NEED

- 5:92-4.1 Need

SUBCHAPTER 5. MUNICIPAL DETERMINATION OF PRESENT AND PROSPECTIVE NEED

- 5:92-5.1 General
- 5:92-5.2 Indigenous need (as of 1987)
- 5:92-5.3 Distribution of need
- 5:92-5.4 Reallocated present need
- 5:92-5.5 Present needs (as of 1987)
- 5:92-5.6 Prospective need: 1987-1993
- 5:92-5.7 Total need

- 5:92-5.8 Demolitions
- 5:92-5.9 Filtering
- 5:92-5.10 Residential conversion
- 5:92-5.11 Spontaneous rehabilitation
- 5:92-5.12 Pre-credited need
- 5:92-5.13 Calculation of indigenous need: selected urban aid cities
- 5:92-5.14 Low and moderate income split

SUBCHAPTER 6. CREDITS

- 5:92-6.1 Credits
- 5:92-6.2 Rehabilitation
- 5:92-6.3 New construction

SUBCHAPTER 7. DRASTIC ALTERATION OF THE ESTABLISHED PATTERN OF DEVELOPMENT

- 5:92-7.1 Drastic alteration

SUBCHAPTER 8. MUNICIPAL ADJUSTMENTS

- 5:92-8.1 General
- 5:92-8.2 Adjustment process
- 5:92-8.3 Adequate recreation, conservation and open space
- 5:92-8.4 Vacant sites
- 5:92-8.5 Adequate public facilities and infrastructure capacities
- 5:92-8.6 Prohibitive costs of infrastructure

SUBCHAPTER 9. PRIORITIZING

- 5:92-9.1 Prioritizing vacant and developable sites

SUBCHAPTER 10. PHASING OF PRESENT AND PROSPECTIVE NEED

- 5:92-10.1 Phasing plans
- 5:92-10.2 Phasing schedules
- 5:92-10.3 Commencement date of phasing schedule
- 5:92-10.4 General provisions
- 5:92-10.5 Priority of sites
- 5:92-10.6 Adjustments to phasing schedule

SUBCHAPTER 11. REGIONAL CONTRIBUTION AGREEMENTS (RCAs)

- 5:92-11.1 General provisions
- 5:92-11.2 Terms
- 5:92-11.3 Credits
- 5:92-11.4 Review by county planning board or other county designated agency
- 5:92-11.5 Amount and duration of contributions
- 5:92-11.6 Enforcement

SUBCHAPTER 12. CONTROLS ON AFFORDABILITY

- 5:92-12.1 General provisions; new construction of sales units
- 5:92-12.2 General provisions concerning uniform deed restriction liens and enforcement through certificates of occupancy or reoccupancy on sales units
- 5:92-12.3 Option to buy sales units
- 5:92-12.4 Municipal option
- 5:92-12.5 State option
- 5:92-12.6 Non-profit option
- 5:92-12.7 Seller option
- 5:92-12.8 Municipal rejection of repayment option
- 5:92-12.9 Continued application of options to create, rehabilitate or maintain low and moderate income units
- 5:92-12.10 Rehabilitation, rentals, conversion of non-residential structure
- 5:92-12.11 Administrative mechanism
- 5:92-12.12 Initial pricing
- 5:92-12.13 Annual indexed increases while controls are in place
- 5:92-12.14 Subsidy to ensure affordability prior to the expiration of controls

- 5:92-12.15 Procedures for initial sales, resale prior to the expiration of controls, and rentals
- 5:92-12.16 Eligible capital improvements prior to the expiration of controls
- 5:92-12.17 Impact of foreclosure on resale while controls are in place
- 5:92-12.18 Excess proceeds upon foreclosure

APPENDIX AFFORDABLE HOUSING AGREEMENT

SUBCHAPTER 13. WAIVER

- 5:92-13.1 Waiver

SUBCHAPTER 14. INCLUSIONARY DEVELOPMENTS

- 5:92-14.1 Bedroom distribution
- 5:92-14.2 Range of affordability for purchased housing
- 5:92-14.3 Age restricted units and alternative living arrangements
- 5:92-14.4 Rental housing

SUBCHAPTER 15. AFFIRMATIVE MARKETING WITHIN INCLUSIONARY DEVELOPMENTS

- 5:92-15.1 Occupancy preference
- 5:92-15.2 Affirmative Marketing Program
- 5:92-15.3 Exemption from occupancy preference and Affirmative Marketing Program

SUBCHAPTER 16. ACCESSORY APARTMENTS

- 5:92-16.1 General provisions
- 5:92-16.2 Unit creation
- 5:92-16.3 Conversion standards
- 5:92-16.4 Occupancy and marketing
- 5:92-16.5 Terms
- 5:92-16.6 Applicability of subchapter

SUBCHAPTER 17. REHABILITATION OF INDIGENOUS NEED

- 5:92-17.1 Rehabilitation cost standards
- 5:92-17.2 Annual monitoring reports
- 5:92-17.3 Rehabilitation costs less than \$8,000

SUBCHAPTER 18. DEVELOPMENT FEES

- 5:92-18.1 Purpose
- 5:92-18.2 Basic requirements
- 5:92-18.3 Urban aid municipalities
- 5:92-18.4 Municipalities that collected fees and received certification
- 5:92-18.5 Municipalities that collected fees and are proceeding toward certification
- 5:92-18.6 Municipalities that have not collected fees that have received substantive certification, or are proceeding toward substantive certification
- 5:92-18.7 Other municipalities that have not collected fees
- 5:92-18.8 Development fee ordinance review
- 5:92-18.9 Content of plans to spend development fees
- 5:92-18.10 Development fees; residential
- 5:92-18.11 Development fees; non-residential
- 5:92-18.12 Eligible exactions, ineligible exactions and exemptions
- 5:92-18.13 Collection of fees
- 5:92-18.14 Housing trust fund
- 5:92-18.15 Use of money
- 5:92-18.16 Monitoring
- 5:92-18.17 Penalties
- 5:92-18.18 Designation of entities to receive development fees
- 5:92-18.19 Ongoing collection of fees
- 5:92-18.20 Severability

TECHNICAL APPENDIX

APPENDIX A THROUGH APPENDIX F

SUBCHAPTER 1. GENERAL PROVISIONS

5:92-1.1 Short title; purpose; scope

(a) The provisions of this chapter shall be known as the "Substantive Rules of the New Jersey Council on Affordable Housing for the Period August 4, 1986 through June 5, 1994."

(b) The purpose of this chapter will be the crediting of past actions taken by municipalities in addressing their obligations to house low and moderate income households.

(c) These rules can be applied to all municipalities within the Council's jurisdiction.

Amended by R.1994 d.290, effective June 6, 1994.
See: 25 N.J.R. 5763(a), 26 N.J.R. 2900(a).

Case Notes

Regulations pertaining to determining municipal fair shares of low and moderate income housing were entitled to presumption of validity. *Bi-County Development Corp. v. Mayor and Council of Borough of Oakland*, 224 N.J.Super. 455, 540 A.2d 927 (L.1988).

Superior Court, Law Division had no authority to invalidate regulations of the Council on Affordable Housing dealing with determining municipal fair shares of low and moderate housing units. *Bi-County Development Corp. v. Mayor and Council of Borough of Oakland*, 224 N.J.Super. 455, 540 A.2d 927 (L.1988).

5:92-1.2 Severability clause

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

Case Notes

Invalid affordable housing regulations were severable. *Township of Bernards v. State, Dept. of Community Affairs*, 233 N.J.Super. 1, 558 A.2d 1 (A.D.1989), certification denied 118 N.J. 194, 570 A.2d 959, certification denied 118 N.J. 195, 570 A.2d 959.

5:92-1.3 Definitions

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

5:92-11.5 Amount and duration of contributions

(a) In negotiating RCAs, cosmetic improvements may be included in determining the negotiated price of rehabilitating a housing unit; but cosmetic improvements alone shall not constitute an eligible improvement for purposes of a RCA. In general, eligible rehabilitation may vary in degree from gutting and extensive reconstruction to repairs for damage caused by inadequate maintenance. Rehabilitation may also include the repair or replacement of major building systems or components in danger of failure (including roof, electrical, plumbing, heating, structural and foundation defects). To be an eligible improvement under a RCA, the housing unit must meet the municipal or other relevant housing code after rehabilitation.

(b) The cost of rehabilitating a low and moderate income housing unit may vary from unit to unit and from municipality to municipality. The Council establishes \$10,000 as the minimum per unit cost necessary for rehabilitation as may be adjusted by the Council on a case by case basis. (See Technical Appendix for average costs of replacing major systems for various types of housing.) This minimum amount includes the actual capital cost of substantive rehabilitation and the necessary operating costs to insure compliance with related code standards. This minimum amount shall be regarded as illustrative.

(c) The internal cost of subsidizing a low and a moderate income housing unit in an inclusionary development may vary from project to project and from municipality to municipality. The Council establishes that \$12,500 represents the current average, internal subsidization required to provide a moderate income housing unit in an inclusionary development, and constitutes 22 percent of the unit's total cost. The Council establishes \$27,500 as the current average, internal subsidization required to provide a low income housing unit in an inclusionary development, and constitutes 48 percent of the unit's total cost. These internal subsidization guidelines shall be regarded as illustrative and may be adjusted on a case by case basis.

(d) RCAs shall run concurrent with the sending municipality's period of substantive certification, not to exceed six years; contributions may be prorated in municipal appropriations concurrent with the certification period not to exceed six years.

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

to regional contribution agreements proposed by municipalities through executed memoranda of understanding subsequent to October 1, 1988.

Amended by R.1988 d.566, effective December 19, 1988. Sec: 20 N.J.R. 1673(b), 20 N.J.R. 3123(c). Added (e).

5:92-11.6 Enforcement

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

- 1. Initiate or join a lawsuit to enforce a RCA; and/or
2. Bar a delinquent receiving municipality from entering into further RCAs for a specified period of time; and/or
3. Recommend that the Agency and the Department of Community Affairs withhold further assistance available under the Act; and/or
4. Take such other actions as the Council may determine necessary.

SUBCHAPTER 12. CONTROLS ON AFFORDABILITY

This subchapter has been recodified by R.1989 d.370, effective July 17, 1989. Below is a Cross Reference Chart reflecting recodification changes.

RECODIFICATION CHART

Table with 2 columns: Old Citation and New Citation. Lists various citations such as 5:92-12.1 (Repealed) and 12:92-12.1.

5:92-12.1 General provisions: new construction of sales units

(a) In developing housing elements, municipalities shall adopt measures to assure that newly constructed low and

moderate income sales units remain affordable to low and moderate income households for a period of not less than 20 years. The authority shall do so by requiring all conveyances of newly constructed low and moderate income sales units subject to the Act to contain the restrictive covenant and mortgage lien adopted by the Council.

(b) Municipalities receiving State Aid pursuant to P.L. 1978, c.14 (N.J.S.A. 52:27D-178 et seq.) that exhibit one of the characteristics delineated in N.J.A.C. 5:92-5.3(b) shall adopt measures to assure that newly constructed low and moderate income sales units remain affordable to low and moderate income households for a period of not less than 10 years. The authority shall do so by requiring all conveyances of newly constructed low and moderate income sales units subject to the Act to contain the restrictive covenant and mortgage lien adopted by the Council.

Repeal and New Rule, R.1989 d.370, effective July 17, 1989.
See: 21 N.J.R. 592(b), 21 N.J.R. 2020(a).

Section was "General provisions."

5:92-12.2 General provisions concerning uniform deed restriction liens and enforcement through certificates of occupancy or reoccupancy on sales units

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

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

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

(d) The certificate of reoccupancy shall not be required in sales for which controls are allowed to expire or in which the repayment option is being exercised pursuant to N.J.A.C. 5:92-12.3.

(e) The mortgage lien and the restrictive covenant shall be filed with the records office of the county in which the unit is located. The lien and restrictive covenant shall be adopted by the Council, unless amendments have been approved by the Council.

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

Repeal and New Rule, R.1989 d.370, effective July 17, 1989.

See: 21 N.J.R. 592(b), 21 N.J.R. 2020(a).

Section was "Length of controls on affordability."

5:92-12.3 Option to buy sales units

(a) The restrictive covenant governing the deeds of low and moderate income units shall include an option permitting purchase of the affordable housing unit at the maximum allowable restricted sales price at the time of the first non-exempt sale after controls on affordability have been in effect on the unit for the period specified in N.J.A.C. 5:92-12.1. The option to buy shall be available to the municipality, the Department of Community Affairs, the Agency, or a qualified non-profit as determined by the Council.

(b) All restrictive covenants governing low and moderate income units shall require the owner to notify the authority by certified mail of any intent to sell the unit 90 days prior to entering into an agreement for the first non-exempt sale after controls have been in effect on the housing unit for the period specified in N.J.A.C. 5:92-12.1.

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

Occupancy preference for households that reside in municipality or have members working in municipality was not violative of constitutional prohibitions against racial discrimination. 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.

Council could authorize occupancy preference for *Mount Laurel* lower income housing for households which have existing roots in municipality. 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.

Council on Affordable Housing's authorization of preference in lower income housing units for households that reside in municipality or have members working in municipality was properly included in township's fair share plan. 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.

The Council on Affordable Housing had continuing responsibility to monitor actual operation of preference to assure that the preference did not result in abuses. 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.

5:92-15.2 Affirmative Marketing Program

(a) Municipalities shall have primary responsibility for developing and implementing an Affirmative Marketing Program that addresses the occupancy preference requirements in N.J.A.C. 5:92-15.1. Municipalities shall either require developers and/or sponsors of low and moderate income housing to market, screen, offer occupancy and select income eligible households accordingly; perform this responsibility themselves; establish an agency to perform on their behalf and/or enter into an agreement with outside agents.

(b) Municipalities shall provide the Council on Affordable Housing with an Affirmative Marketing Program that addresses occupancy preference required in N.J.A.C. 5:92-15.1, subject to Council review and certification. This Affirmative Marketing Program shall identify representative groups operating in the municipality and its respective housing region (for example, community based and civic organizations, council of churches, welfare and social service agencies, etc.). Further, the program shall require that any developers and/or sponsors of projects with 25 or more low and moderate income housing units actively market these units to appropriate representative groups, as is specified in the Affirmative Marketing Program.

(c) Municipalities shall identify minimum and appropriate affirmative marketing requirements for projects of less than 25 units of low and moderate income housing.

(d) The Affirmative Marketing Program shall commence at least 90 days before issuance of either temporary or permanent certificates of occupancy, and shall continue until all low and moderate income housing units are under contract of sale and/or lease.

(e) For initial occupancy priority, households shall be screened for occupancy preference as required in N.J.A.C. 5:92-15.1. These households shall be offered contracts of

sale and/or lease first and before other income eligible households. When 50 percent of the housing units have been purchased or leased, according to N.J.A.C. 5:92-15.1 the remaining income eligible applicants, not yet under contract, shall be pooled and offered contracts.

(f) Within all rounds of applicant selection, random selection of eligible applicants should prevail.

(g) Municipalities shall prepare progress reports on an 18 month cycle from the date of substantive certification. These reports shall be made available to the public and filed with the Council on Affordable Housing. These reports shall provide an analysis of the actual characteristics of households occupying low and moderate income units compared to the occupancy preference in N.J.A.C. 5:92-15.1.

(h) Three and six years from substantive certification, municipalities shall prepare summary reports of their affirmative marketing programs. These reports shall expand upon previous progress reports by assessing the aggregate and up-to-date effectiveness of the programs. If applicable, municipalities shall recommend improvements to redress their record of occupancy preference to reflect requirements as in N.J.A.C. 5:92-15.1.

5:92-15.3 Exemption from occupancy preference and Affirmative Marketing Program

(a) Municipalities which do not have a reallocated present and prospective need shall be exempt from occupancy preferences as contained in N.J.A.C. 5:92-15.1 and related Affirmative Marketing Program requirements as contained in N.J.A.C. 5:92-15.1-2.

(b) Where the affirmative marketing regulations of the U.S. Department of Housing and Urban Development, the N.J. Department of Community Affairs and/or the N.J. Housing & Mortgage Finance Agency are applicable, the Council shall adhere to their affirmative marketing regulations of these agencies.

SUBCHAPTER 16. ACCESSORY APARTMENTS

5:92-16.1 General provisions

(a) Municipalities may provide zoning for the creation of affordable accessory apartment units.

(b) "Accessory apartment" means a self-contained residential dwelling unit containing its own kitchen, sanitary facilities, and private entrance, which is created within an existing home, or through the conversion of an existing accessory building on the same site, or by addition to an existing home or accessory building.

Case Notes

Accessory apartment rule, allowing municipality to include zoning for creation of affordable accessory apartments, was not invalid under Fair Housing Act. *Calton Homes, Inc. v. Council on Affordable Housing*, 244 N.J.Super. 438, 582 A.2d 1024 (A.D.1990), certification denied 127 N.J. 326, 604 A.2d 601.

Affordable housing regulations did not violate Fair Housing Act. *Calton Homes, Inc. v. Council on Affordable Housing*, 244 N.J.Super. 438, 582 A.2d 1024 (A.D.1990), certification denied 127 N.J. 326, 604 A.2d 601.

5:92-16.2 Unit creation

(a) In determining that portion of its fair share obligation that it may allocate to accessory apartment, a municipality shall calculate one half of one percent (.005) of the base housing stock, multiplied by six years.

(b) For purposes of this section, the base housing stock shall be the number of dwelling units in the areas designated by the municipality for accessory apartments zoning that are of sufficient size and character, as determined by the Council, so as to permit conversion to an accessory apartment.

5:92-16.3 Conversion standards

(a) Any accessory apartment ordinance must insure compliance with all applicable zoning ordinances.

(b) Parking shall be provided for accessory apartment units.

(c) The creation of an accessory apartment shall not violate municipal on-site sewer requirements.

(d) An accessory apartment shall be considered rental rehabilitation and shall be subject to a 10 year affordability control pursuant to N.J.A.C. 5:92-12.2.

(e) The municipality shall provide a plan to promote the accessory apartment program for approval by the Council.

(f) An accessory apartment shall not be used in fulfillment of a municipality's rental component pursuant to N.J.A.C. 5:92-14.4 and is not eligible for rental bonus credits pursuant to N.J.A.C. 5:92-14.4(d).

5:92-16.4 Occupancy and marketing

(a) The municipality shall require that 50 percent of the accessory apartment units created be provided for low income households.

(b) The municipality shall insure that all accessory apartment units are affirmatively marketed pursuant to N.J.A.C. 5:92-15 et seq.

5:92-16.5 Terms

(a) Two years from the date of substantive certification, the municipality shall provide the Council with a report on the type and number of the created accessory apartment units.

(b) The municipality shall project the total in (a) above over the six year certification period to determine the total number of units expected to be created.

(c) If the total in (a) above is less than the total identified in the housing element, the municipality shall provide an alternative method of fulfilling the fair share obligation.

(d) If the alternate method adopted to fulfill the fair share obligation pursuant to (c) above involves the zoning of new sites, the municipality shall participate in any mediation sessions conducted by the Council.

(e) The municipality may provide a back-up plan to the accessory apartment program in the final housing element.

5:92-16.6 Applicability of subchapter

(a) The provisions of this subchapter shall be effective for those municipalities that have petitioned for certification prior to December 19, 1988.

(b) Municipalities that petition for certification subsequent to December 19, 1988 shall not utilize accessory apartments in addressing their fair share obligations.

New Rule, R.1988 d.566, effective December 19, 1988.
See: 20 N.J.R. 1673(b), 20 N.J.R. 3123(c).

**SUBCHAPTER 17. REHABILITATION OF
INDIGENOUS NEED**
Authority

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

Source and Effective Date

R.1988 d.295, effective July 5, 1988.
See: 20 N.J.R. 864(b), 20 N.J.R. 1539(b).

5:92-17.1 Rehabilitation cost standards

Municipalities that choose to rehabilitate their indigenous need shall provide a minimum of \$10,000 per unit of which at least \$8,000 shall be allocated to actual capital costs. Municipalities shall be expected to expend all moneys provided for actual capital rehabilitation costs.

5:92-17.2 Annual monitoring reports

Municipalities that rehabilitate their indigenous need shall file annual monitoring reports with the Council.

5:92-17.3 Rehabilitation costs less than \$8,000

Municipalities may rehabilitate deficient units that meet the Council's criteria, even if the actual capital costs are less than \$8,000. However, at the end of each two year period, the rehabilitation shall average at least \$8,000 per unit.

SUBCHAPTER 18. DEVELOPMENT FEES

Source and Effective Date

R.1992 d.45, effective January 21, 1992.
See: 23 N.J.R. 2813(b), 24 N.J.R. 235(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).

5:92-18.1 Purpose

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

(b) Except as otherwise provided to these rules, a municipality may only collect and spend development fees through participation in the Council's substantive certification process or through a comprehensive review designed to achieve a judgment of repose. The exceptions to this rule are set forth in N.J.A.C. 5:92-18.3 through 18.6 inclusive. These exceptions are permitted because some communities have already received substantive certification; others have achieved a judgment of repose; and still others are litigating exclusionary zoning cases. Some of these municipalities have already collected fees. The Council has created a process for these municipalities to collect and/or retain fees. However, in the future, the ability to collect and spend development fees shall be limited to municipalities that petition for substantive certification. Urban aid municipalities are also considered a special case. These municipalities have historically housed a disproportionate share of New Jersey's poor and, as a result, may have exceedingly high fair share obligations that would be extremely difficult to address in a six year period. Therefore, the Council will allow these municipalities to collect fees outside of substantive certification provided the municipality adheres to the rules in this subchapter. The rules that follow provide basic requirements for collecting and spending development fees. They then provide additional requirements for municipalities in various categories.

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

5:92-18.2 Basic requirements

(a) Except as set forth in N.J.A.C. 5:92-18.3 through 18.6 inclusive, the Council shall not review or approve any development fee ordinance unless the municipality has petitioned for substantive certification.

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

(c) No municipality shall spend development fees unless the Council has approved a plan for spending such fees. With the exception provided for in N.J.A.C. 5:92-18.3, municipalities that have not received substantive certification shall not spend development fees until they have received substantive certification.

5:92-18.3 Urban aid municipalities

Municipalities that qualify for state aid pursuant to P.L. 1978, c.14 (N.J.S.A. 52:27D-178 et seq.) shall not collect or spend development fees without conforming to the requirements set forth in N.J.A.C. 5:92-18.2. Council approval of the municipal development fee ordinance shall allow the municipality to collect development fees for a period specified by the Council not to exceed six years, commencing with the Council's approval of the development fee ordinance. Notwithstanding any other provision of this Chapter, these municipalities shall have one year from the Council's approval of their development fee ordinance to submit a plan for spending development fees. These municipalities may collect and spend development fees without petitioning for substantive certification.

5:92-18.4 Municipalities that collected fees and received certification

(a) This rule deals with the category of municipalities that have collected development fees prior to December 13, 1990 and have received substantive certification. These municipalities may petition the Council to review and approve an ordinance regarding development fees collected prior to December 13, 1990. The Council may approve such ordinance, provided it conforms to the procedures in N.J.A.C. 5:92-18.8, Development fee ordinance review and N.J.A.C. 5:91-15, Procedures for retaining development fees.

(b) The municipalities in this category shall not resume collecting development fees or spend development fees without conforming to N.J.A.C. 5:92-18.2.

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

5:92-18.5 Municipalities that collected fees and are proceeding toward certification

(a) This rule deals with the category of municipalities that have collected development fees prior to December 13, 1990 and have petitioned for substantive certification. These municipalities may petition the Council to review and approve an ordinance regarding development fees collected prior to December 13, 1990. The Council may approve such ordinance provided they conform to the procedures in N.J.A.C. 5:92-18.8, Development fee ordinance review, and N.J.A.C. 5:91-15, Procedures for retaining development fees.

(b) The municipalities in this category shall not resume collecting development fees or spend development fees without conforming to N.J.A.C. 5:92-18.2.

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

5:92-18.6 Municipalities that have not collected fees that have received substantive certification, or are proceeding toward substantive certification

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

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

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

5:92-18.7 Other municipalities that have not collected fees

(a) Except as provided for in N.J.A.C. 5:92-18.3 through 18.6 inclusive, municipalities that have not collected fees shall not collect fees until they have adopted a housing element, petitioned for substantive certification and received the Council's approval of its development fee ordinance.

(b) No municipality in this category may spend development fees unless the Council has approved a plan for spending such fees and granted substantive certification. Municipalities shall submit these plans when they petition for substantive certification. Municipalities that have petitioned for substantive certification prior to January 21, 1992 shall submit plans for spending development fees prior to receiving substantive certification.

5:92-18.8 Development fee ordinance review

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

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

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

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

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

5. If the municipality has received a court ordered judgment of repose, a copy of the compliance plan, implementation ordinances and information regarding the period of time encompassed by the judgment of repose;

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

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

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

9. If development fees have been collected prior to December 13, 1990 and the municipality wishes to retain some or all of these fees, the following information must be submitted to the Council by April 20, 1992:

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

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

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

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

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

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

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

viii. Any other information the Council may require.