

**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.1997 d.511, effective November 5, 1997.
See: 29 N.J.R. 3918(a), 29 N.J.R. 5063(a).

Executive Order No. 66(1978) Expiration Date

Chapter 91, Procedural Rules of the New Jersey Council on Affordable Housing, expires on November 5, 2002.

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 was readopted as R.1991 d.119, effective February 7, 1991. See: 22 N.J.R. 3610(b), 23 N.J.R. 688(a). Chapter 91, Procedural Rules of the New Jersey Council on Affordable Housing, was repealed and a new Chapter 91, Procedural Rules of the New Jersey Council on Affordable Housing, was adopted by R.1992 d.491, effective December 7, 1992.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). Subchapter 14, Interim Substantive Certification, was repealed and a new Subchapter 14, Interim Procedures, was adopted by R.1993 d.407, effective August 16, 1993.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 was readopted as R.1997 d.511, effective November 5, 1997. See: Source and Effective Date.

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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, and which has primary jurisdiction for the administration of housing obligation 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.

"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.

"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.

"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.

"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).

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 HOUSE 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 participation in the Council's administrative process.

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

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 a housing element and fair share plan with the Council within 120 days from the date of transfer. The municipal plan shall conform to the filing requirements of N.J.A.C. 5:91-2.2.

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 accompanied by a resolution adopted by the governing body of the municipality endorsing the petition for substantive certification.

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 housing element and fair share plan as required pursuant to N.J.A.C. 5:91-2.2 and 2.3.

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 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. If the Council determines that notice was not published in a newspaper of general circulation, it shall require the municipality to re-publish 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, CN 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, CN 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.

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

At the time it files its petition for substantive certification, a municipality shall provide the Council with the names and addresses of the owners of record of the sites designated in its housing element and fair share plan for low and moderate income housing. 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.

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 the Office of Administrative Law 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. 5:92.

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

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

1. The site is available, approvable, developable and suitable pursuant to N.J.A.C. 5:92; 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.

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

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 and in Chart 1 of the Appendix, incorporated herein by reference.

5:91-5.2 Council review

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

(b) After receipt and review of the comments of the municipality, the Council will either direct the municipality to amend its housing element and fair share plan within 120 days or issue substantive certification.

(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 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 120 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 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 refile of its housing element and fair share plan and any applicable objector period, the Council staff shall prepare another compliance report, which shall indicate any further necessary amendments to the municipal submission to achieve certification. The compliance report shall again be circulated to the municipality for a 14-day comment period.

(f) If the amended or refiled housing element and fair share plan is consistent with the standards for substantive certification as set forth in this chapter, the compliance report shall recommend conditions for substantive certification.

(g) If, after reviewing the compliance report and the municipal response, the Council finds that the refiled housing element and fair share plan continues to require substantial changes, such as the designation of additional inclusionary sites, a change in inclusionary sites 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).

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 moderate 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 refiles its petition with 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).

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. For purposes of calculating the time period between filing and repetition for substantive certification, the Council shall consider the initial filing as the date of filing and the date of repetition as the date the petition was filed.

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.

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 and in Chart 2 of the Appendix, incorporated herein by reference.

(b) Following a petition for substantive certification, the Council staff shall prepare either a report requesting additional information to be filed with COAH within 60 days of receipt of the report or a compliance report. The report shall be circulated to the municipality and to the objectors to the municipal submission for comments during a 14-day period.

(c) After reviewing the comments of the parties, the Council shall determine if there are problems associated with the municipal submission that require designation of additional sites, a change in inclusionary sites or a fundamental change in approach. If such problems do not exist, the Council shall direct the parties to mediation. If the Council determines that such problems exist, the Council shall direct the municipality to amend its submission, refile its submission and repetition for substantive certification within 120 days.

(d) Refiling and repetition shall require another objection period, as defined in N.J.A.C. 5:91-4.1.

(e) Following a repetition for substantive certification, the Council staff shall prepare another compliance report. The report shall be circulated to the municipality and to the objectors to the municipal submission for comments during a 14-day period.

(f) After reviewing the comments of the parties, the Council shall determine if there are problems associated with the municipal housing element and fair share plan that

require designation of additional inclusionary sites, a change in inclusionary sites or a fundamental change in approach. If the Council determines that such problems exist, the Council may dismiss the municipal submission by administrative order or deny it pursuant to N.J.S.A. 52:27D-314. If the Council determines that such problems do not exist, the Council shall direct the parties to mediation.

(g) 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. For purposes of calculating the time period between filing and repetition for substantive certification, the Council shall consider the initial filing as the date of filing and the date of repetition as the date the petition was filed.

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

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. If the Council, upon review of the plan, determines that the submission requires the designation of additional inclusionary sites, a change in inclusionary sites 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. Otherwise, the municipality shall not be presumptively required to utilize an objector's site. The procedures for review are summarized in this rule and in Chart 3 of the Appendix, incorporated herein by reference.

(b) Following a petition for substantive certification, the Council staff shall prepare a compliance report and circulate it to the parties for a 14-day comment period. After reviewing the comments of the parties, the Council shall determine if there are problems associated with the municipal submission that require designation of additional inclusionary sites, a change in inclusionary sites or a fundamental change in approach. If the Council determines that no such problems exist, the Council shall schedule mediation. If the Council determines that there are such problems with the municipal submission, the Council shall direct the municipality to amend its submission, refile its submission and repetition for substantive certification within 120 days.

(c) If the Council directs the municipality to amend its submission, refile and repetition, the Council shall advise the municipality that it will presumptively require one or

more of the objectors' sites to be included in the housing element and fair share plan.

(d) Municipalities that repetition shall provide notice of repetition as required in N.J.A.C. 5:91-3.3. Refiling and repetition shall require another objector period as defined in N.J.A.C. 5:91-4.

(e) Following a repetition for substantive certification, Council staff shall prepare another compliance report, which will be circulated to the parties for a 14-day comment period. After reviewing the comments of the parties, the Council shall determine if there are problems with the municipal submission that require designation of additional inclusionary sites, a change in inclusionary sites or a fundamental change in approach. If there are no such problems, the Council shall schedule mediation. If the Council determines that there are such problems with the municipal submission, the Council shall dismiss the municipal petition for substantive certification by administrative order or deny it pursuant to N.J.S.A. 52:27D-314.

(f) After mediation, a municipality may contest the suitability of any objector's site and request a hearing on the site's suitability before the Office of Administrative Law. Subsequent to an evidentiary hearing at the Office of Administrative Law, 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 as a condition of substantive certification.

5:91-6.4 Other municipalities

(a) The 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. The procedures for review are summarized in the following and in Chart 4 of the Appendix, incorporated herein by reference.

(b) Following a court transfer and the filing of a petition for substantive certification, the Council staff shall prepare a compliance report and circulate it to the parties for a 14-day comment period. The report shall indicate that an objector/litigant is presumptively entitled to site-specific relief. After reviewing the comments of the parties, the Council 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 or a fundamental change in approach. If there are no such problems, the Council shall schedule mediation. If the Council determines that there are such problems with the municipal submission, the Council shall direct the municipality to amend its submission, refile its submission and repetition for substantive certification within 120 days.

(c) A municipality that is required to repetition shall provide notice as required in N.J.A.C. 5:91-3.3. Refiling and repetition shall require another objector period as defined in N.J.A.C. 5:91-4.

(d) Following a repetition for substantive certification, the Council staff shall prepare another compliance report and circulate it to the parties for a 14-day comment period. After reviewing the parties' comments, the Council shall determine if there are problems with the municipal submission that require designation of additional inclusionary sites, a change in inclusionary sites or a fundamental change in approach. If no such problems exist, the Council shall schedule mediation. If the Council determines that such problems exist, the Council shall transfer jurisdiction of the case to the appropriate court along with any record of the case created during the Council's administrative process.

(e) After mediation, a municipality may contest the suitability of an objector's site and request a hearing on the suitability of the site before the Office of Administrative Law. 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.

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 the Office of Administrative Law 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 refiles its petition with 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).

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 and in Chart 5 of the Appendix, incorporated herein by reference. 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.

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 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 time for the receipt of objections to a petition for substantive certification has expired. 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 the Office of Administrative Law 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.

(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 participants to mediation shall have no more than three representatives, unless otherwise allowed by the Council. 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.

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

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

Case Notes

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. 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 and 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 report.

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

(d) The mediator shall present 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).

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 altered as a result of mediation

(a) 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.

(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 within 14 days of the date of the publication of the notice and give the Council's address where the objection or comment shall be filed.

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

5:91-7.5 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) Unless the municipality must publish notice pursuant to N.J.A.C. 5:91-7.4, 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. If the municipality must publish notice pursuant to N.J.A.C. 5:91-7.4, any request for a hearing shall be served upon all parties that participated in mediation within 14 days of the publication date of notice. 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 the Office of Administrative Law for adjudication as a contested case pursuant to the Administrative Procedure Act, N.J.A.C. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

5:91-7.6 Reopened mediation

(a) If during the 14 day 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 amended 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 to the Council advising the Council of the results of the reopened mediation. All procedures set forth in N.J.A.C. 5:91-7.5 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).

SUBCHAPTER 8. REFERRAL TO OFFICE OF ADMINISTRATIVE LAW

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 Office of Administrative Law (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).

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 the Office of Administrative Law, 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.

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.

SUBCHAPTER 11. REGIONAL CONTRIBUTION AGREEMENTS

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 a contractual regional contribution agreement pursuant to N.J.S.A. 52:27D-312 between the two municipalities. The 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 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 contract upon its review of the regional contribution agreement and prior to the Council's approval.

(b) A regional contribution agreement 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.

5:91-11.2 Statements of intent

(a) Municipalities which intend to enter into a regional contribution agreement 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.

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

(a) The receiving municipality shall submit a proposed project plan to the New Jersey Housing and Mortgage Finance 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 certify the feasibility of the proposed project.

5:91-11.4 Review by county planning board or agencies

(a) Regional contribution agreements 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 regional contribution agreement is in accordance with sound comprehensive regional planning, in accordance with the terms of the master plan and zoning ordinance of both the sending and receiving municipalities, its own county master plan, and the State Development and Redevelopment Plan (SDRP).

(b) All determinations of a county planning board or agency shall be in writing and shall be made within such time 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) 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).

5:91-11.5 Review by the Council

(a) The Council shall approve a regional contribution agreement 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.

(b) Upon recommendation of the Agency, the Council may approve as part of the regional contribution agreement,

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 regional contribution agreements 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.

5:91-11.6 Monitoring and enforcement

(a) All regional contribution agreements shall require receiving municipalities to file annual reports with the Council and the Agency setting forth the progress in implementing the project plan to be produced with the funds from the regional contribution agreement. This report shall be in such form as the Council and the Agency may from time to time require.

(b) The Council shall take such actions as may be necessary to enforce a regional contribution agreement 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).

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 Office of Administrative Law pursuant to N.J.A.C. 1:1-12.

5:91-12.2 Oral argument

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

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 16 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.

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, increase in density on a specific site or a fundamental change in approach to its low and moderate income housing obligation must 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, an increase in density 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.

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 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.

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, CN 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).

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

5:91-14.1 Interim substantive certification

(a) A municipality that has received substantive certification from the Council for a housing element and fair share

plan addressing the municipality's affordable housing obligation for 1987-1993 may move for an interim substantive certification if its certification expires prior to or by March 6, 1995. If a municipality's judgment of repose has expired, the municipality may, by October 6, 1994, also file such a motion providing no exclusionary zoning lawsuit has been filed against the municipality. The motion seeking interim certification must:

1. Comply with the requirements of N.J.A.C. 5:91-12;
2. Be served upon all objectors and/or litigants that participated in the substantive certification or court settlement process; and
3. Be accompanied by:
 - i. The municipality's current housing element and fair share plan;
 - ii. A resolution of the governing body of the municipality expressing the intention to submit to the Council, by March 6, 1995, a housing element and fair share plan addressing the municipality's fair share housing obligation;
 - iii. A proposed schedule for this submission;
 - iv. A statement as to the progress of the municipality's compliance with the terms of substantive certification; and
 - v. Any additional information the Council may require.

(b) The Council will issue interim substantive certification for a period of time not to exceed March 6, 1995 that responds to the submitted municipal schedule for filing its housing element and fair share plan if no objection is filed to the municipality's motion for interim substantive certification. The Council will condition its grant of substantive certification with any conditions it deems necessary or appropriate in order to insure continued compliance with the terms of substantive certification and the satisfaction of the municipal fair share obligation.

(c) Objections filed to a municipality's motion for interim substantive certification shall set out how the municipality has failed to comply with the terms of substantive certification or otherwise failed to satisfy its fair share obligation and also articulate what relief is requested of the Council.

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

(e) If a municipality received a judgment of repose that expires on or before March 6, 1995, the municipality should apply to the Court that issued the judgment for relief prior to the expiration of its judgment of repose. The Council

will consider a motion for interim certification if the Court transfers the request to the Council. In such cases, the procedures and criteria set forth above shall apply.

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

5:91-14.2 Municipalities that have not received substantive certification

(a) A municipality that has petitioned for substantive certification of a housing element and fair share plan designed to address its 1987-1993 obligation, but has not received a final determination of the Council on its plan by June 6, 1994, may either:

1. Move to amend its housing element and fair share plan to address its 1987-1999 obligation pursuant to N.J.A.C. 5:93 and repetition for certification of the amended plan; or
2. Choose to continue to seek substantive certification on its 1987-1993 obligation.

(b) A municipal motion to amend its housing element and fair share plan to address its 1987-1999 obligation pursuant to N.J.A.C. 5:93 shall be accompanied by a resolution of the governing body of the municipality expressing the intention to submit to the Council, by March 6, 1995, an amended housing element and fair share plan addressing the municipality's 1987-1999 obligation pursuant to N.J.A.C. 5:93; a proposed schedule for this submission; and the intention to repetition for substantive certification by March 6, 1995.

(c) When granting such motion, the Council will set out a schedule for the municipal submission of its housing element and fair share plan and will require the municipality to repetition for substantive certification of the new housing element and fair share plan upon this filing.

(d) The Council will condition any grant of substantive certification for a municipal housing element and fair share plan that addresses only the 1987-1993 fair share obligation by a requirement that the municipality file a housing element and fair share plan addressing its 1987-1999 obligation pursuant to N.J.A.C. 5:93 and petition for the substantive certification of that housing element and plan within two years of the date of the granting of substantive certification of the 1987-1993 plan.

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

5:91-14.3 Other municipalities

(a) A municipality that filed its housing element and fair share plan with the Council on or before June 6, 1992, but did not petition for substantive certification prior to June 6, 1994, must file a new housing element and fair share plan addressing its 1987-1999 obligation pursuant to N.J.A.C. 5:93 and petition for substantive certification prior to an exclusionary lawsuit to re-enter the Council's process.

(b) A municipality that has filed a housing element and fair share plan after June 6, 1992 may seek to extend the period of protection afforded by N.J.S.A. 52:27D-313 for up to March 6, 1995 in order to address its 1987-1999 obligation pursuant to N.J.A.C. 5:93. To seek such an extension, the municipality shall file a resolution of the governing body within whichever of the following dates occurs earlier: two years of the initial filing of the municipal housing element and fair share plan; or October 6, 1994. In addition to a schedule for submitting a housing element and fair share plan, the governing body's resolution shall state an intent to petition for substantive certification upon filing the housing element and fair share plan.

(c) The Council shall review the municipality's resolution of intent and grant a schedule for the municipal submission of the housing element and fair share plan conditioned on the municipality's petitioning for substantive certification upon filing its submission. The schedule for submitting the housing element and fair share plan shall require the filing and petition to occur by March 6, 1995.

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

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

CHART 1

VOLUNTARY TOWNS
NO OBJECTORS

N.J.A.C. 5:91-5.2

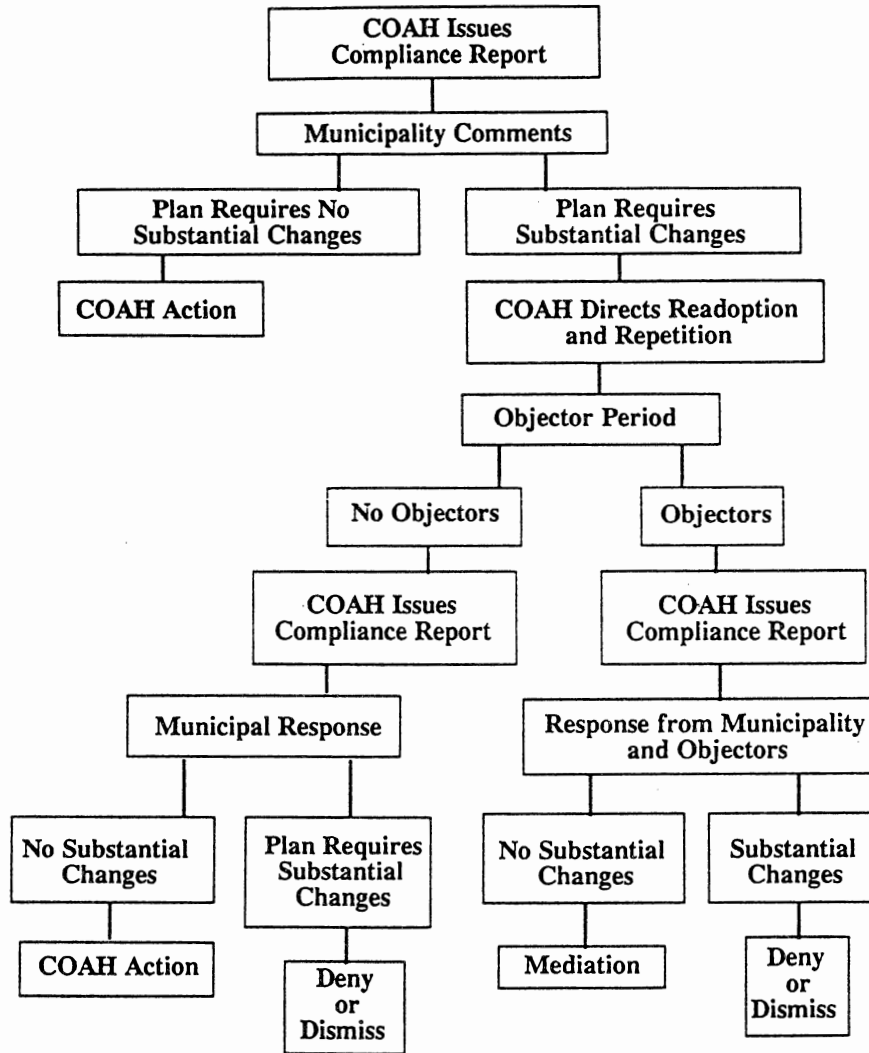


CHART 2
PETITION WITHIN TWO YEARS/OBJECTIONS
N.J.A.C. 5:91-6.2

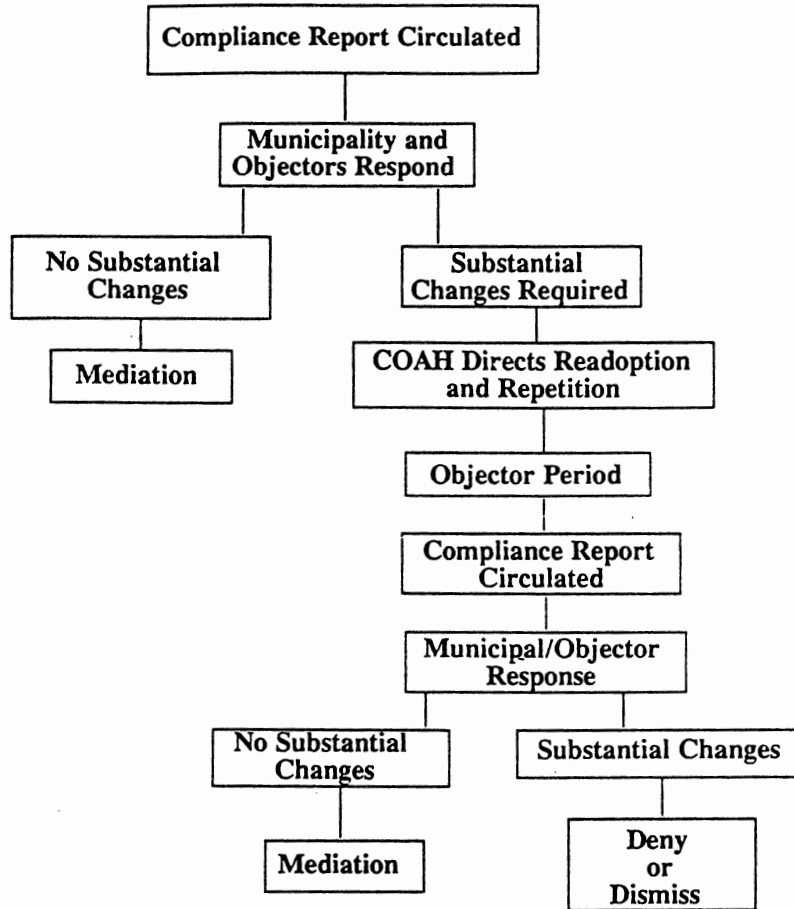


CHART 3
PETITION AFTER TWO YEARS, BUT BEFORE LAWSUIT
N.J.A.C. 5:91-6.3

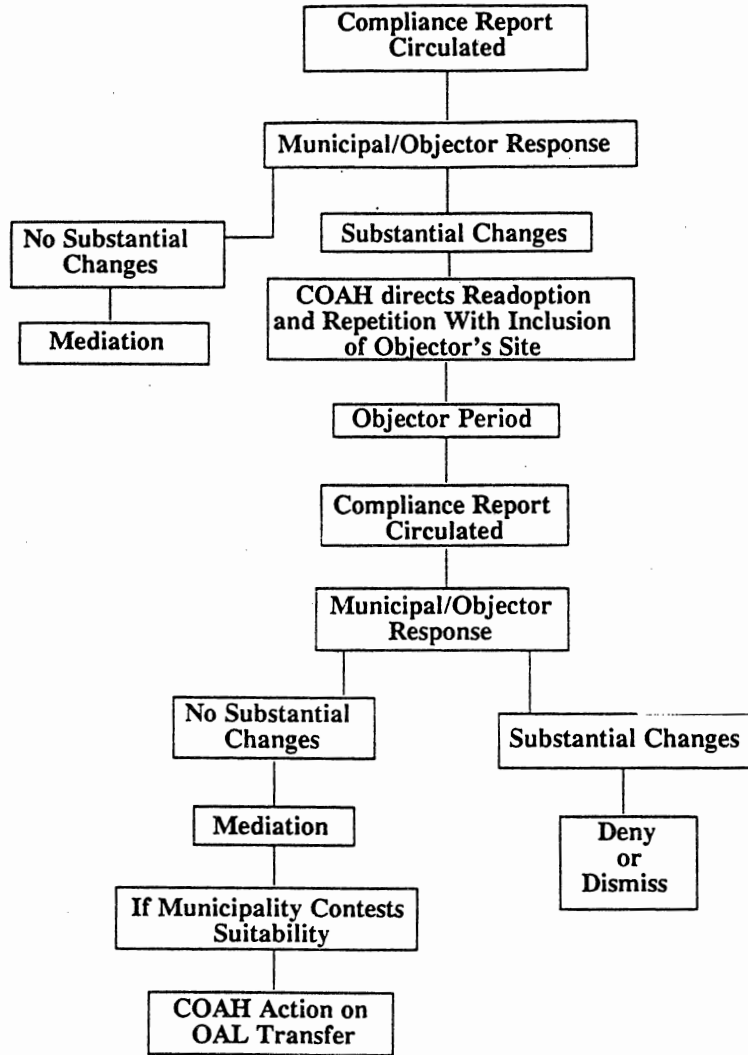
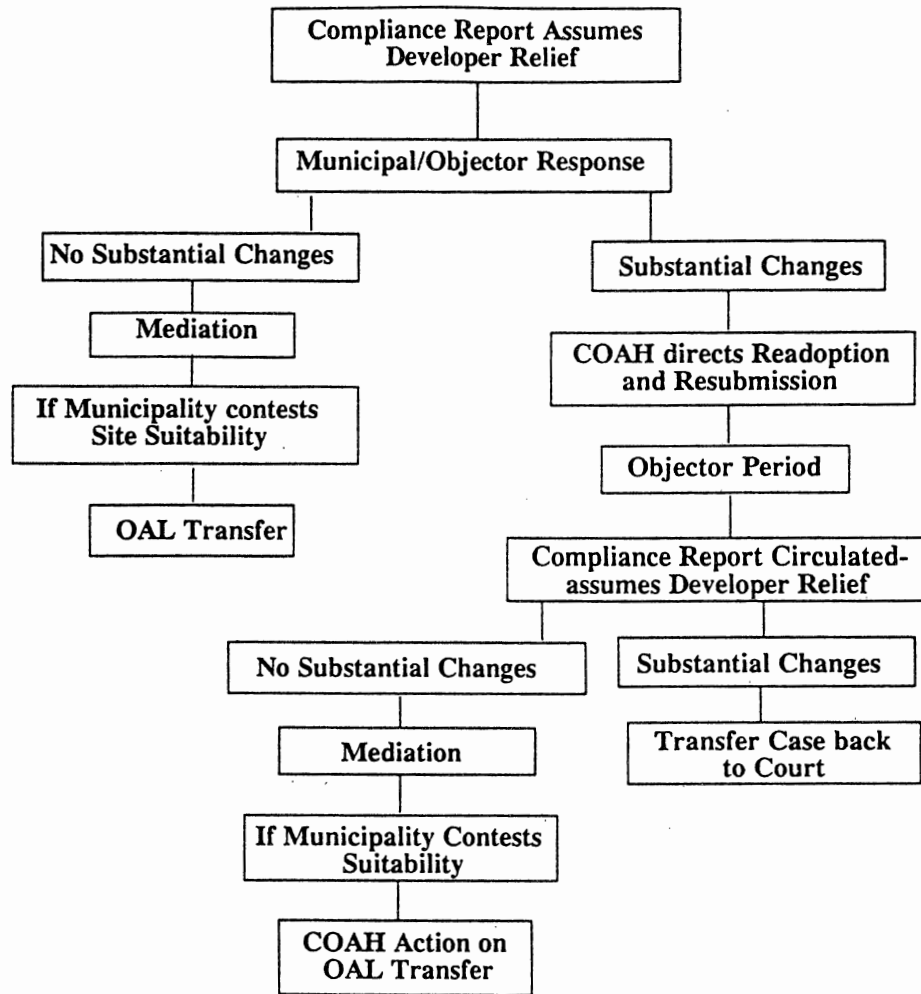


CHART 4
COURT TRANSFER OF BUILDERS REMEDEY CASES
N.J.A.C. 5:91-6.4



**CHART 5
MEDIATION
N.J.A.C. 5:91-7.3, 7.4, 7.5 AND 7.6**

