

**CHAPTER 94**

**SUBSTANTIVE RULES OF THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING FOR THE PERIOD BEGINNING DECEMBER 20, 2004**

**Authority**

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

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**Chapter Expiration Date**

Chapter 94, Substantive Rules of the New Jersey Council on Affordable Housing for the Period Beginning December 20, 2004, expires on December 20, 2009.

**Chapter Historical Note**

Chapter 94, Substantive Rules of the New Jersey Council on Affordable Housing for the Period Beginning December 20, 2004, was adopted as R.2004 d.482, effective December 20, 2004. See: Source and Effective Date.

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## SUBCHAPTER 1. GENERAL PROVISIONS

**5:94-1.1 Introduction**

(a) The New Jersey Supreme Court stated in *Mount Laurel II* that, “The lessons of history are clear, even if rarely learned. One of those lessons is that unplanned growth has a price. . . .” Further, the Court stated that, “Communities that are growing and creating jobs have a responsibility to house the poor who will arrive in these locations in pursuit of jobs.” The Court wanted municipalities to depend on long range land use planning rather than on purely economic forces to drive development.

(b) The Council’s third round rules in this chapter which implement a “growth share” approach to affordable housing represent a significant departure from the Council’s first and second round methodologies in that they link the actual production of affordable housing with municipal development and growth. The Council believes that this approach will hew more closely to the doctrinal underpinning of *Mount Laurel* in that municipalities will provide a realistic opportunity for construction of a fair share of low and moderate income housing based on sound land use and long range planning. These rules will harness future growth to produce affordable housing by deeming that all growth-related construction generates an obligation.

(c) Both the Court and the Legislature wanted to establish a system that would provide a realistic opportunity for housing, not litigation. As the Court stated in upholding the Fair Housing Act, “The legislative history of the Act makes it clear that it had two primary purposes: first, to bring an administrative agency into the field of lower income housing to satisfy the *Mount Laurel* obligation; second, to get the courts out of that field.” The Council’s “growth share” methodology allows each municipality to determine its capacity and desire for growth in a way that is consistent with the policies of the State Development and Redevelopment Plan; its *Mount Laurel* obligation arises as a share of that growth. These rules are, therefore, designed to be both more flexible and less negotiable.

(d) There are three components to the Third Round Methodology: the rehabilitation share, any remaining Prior Round obligation for the period 1987-1999, and the “growth share.” Growth share is generated by Statewide residential and non-residential growth during the period from 1999 through 2014, and delivered from January 1, 2004 to January 1, 2014. As a result, for every eight market-rate residential units constructed, the municipality shall be obligated to provide one unit that is affordable to households of low or moderate income. Job creation carries a responsibility to provide housing as well. For every 25 newly created jobs as measured by new or expanded non-residential construction within the municipality in accordance with Appendix E, the municipality shall be obligated to provide one unit that is affordable to households of low and moderate income. This

method tightens the working definition of “realistic opportunity” to meet the constitutional obligation with not merely a good faith attempt, but with the actual provision of housing for low and moderate income households.

**Case Notes**

In a multifaceted challenge to the validity of the substantive rules of the New Jersey Council on Affordable Housing (COAH) for the third round that calculate affordable housing needs from 1999 to 2014 and establish criteria for satisfaction of the need between 2004 and 2014, the following COAH methodologies were upheld: calculating a municipality’s rehabilitation share, pursuant to N.J.A.C. 5:94-2.1(b); its decision to no longer reallocate present need, pursuant to N.J.A.C. 5:94, Appendix A at 94-35; its continued use of regional contribution agreements under N.J.A.C. 5:94-5.1 through 5:94-5.5; and its regulations awarding credits, bonus credits, and vacant land adjustments, pursuant to N.J.A.C. 5:94-4.20(d), 5:94-4.16(a), 5:94-4.22, 5:94-3.4(a)1. The following methodologies were invalidated: COAH’s use of filtering in calculating statewide and regional housing need, pursuant to N.J.A.C. 5:94, Appendix A at 94-42; the growth share rules to the extent that the methodology relied on unissued data, permitted voluntary compliance, and excluded job growth and housing growth resulting from rehabilitation and redevelopment; the regulations that permit municipalities to provide affordable housing without offsetting benefits; and N.J.A.C. 5:94-4.19, which permits municipalities to age-restrict 50 percent of affordable housing to be built in a municipality. In re Adoption of N.J.A.C. 5:94 & 5:95 By New Jersey Council on Affordable Housing, 390 N.J. Super. 1, 914 A.2d 348, 2007 N.J. Super. LEXIS 20 (App.Div. 2007).

**5:94-1.2 Short title; purpose; scope**

(a) The provisions of this chapter shall be known as the “Substantive Rules of the New Jersey Council on Affordable Housing for the Period Beginning on December 20, 2004.”

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

(c) All municipalities within the jurisdiction of the Council are subject to evaluation in accordance with the provisions of this chapter.

(d) For a municipality’s 1999-2014 rehabilitation share, the remaining balance of the prior rounds portion of any affordable housing obligation assigned by the Council for the 1987 through 1999 cumulative period, and the growth share obligation from 1999 through 2014, the following shall apply:

1. A municipality’s rehabilitation share as of April 1, 2000, based on the 2000 census, shall be governed by the provisions of this chapter.

2. A municipality’s remaining balance of the prior rounds portion of any affordable housing obligation previously assigned by the Council for the 1987 through 1999 cumulative period shall be governed by the provisions of N.J.A.C. 5:93. However, municipal minimum subsidy amounts for accessory apartments, buy-down units, and regional contribution agreements shall be governed by the provisions of this chapter if:

i. The municipality has not petitioned the Council for second round (1993-1999) substantive certification or interim substantive certification; or

ii. The municipality is including one of these housing activities for the first time to address a 1987-1999 affordable housing obligation.

3. The growth share obligation from 1999 through 2014 shall be governed by the provisions of this chapter.

**Case Notes**

In a multifaceted challenge to the validity of the substantive rules of the New Jersey Council on Affordable Housing (COAH) for the third round, the court upheld COAH's methodology for calculating a municipality's rehabilitation share, pursuant to N.J.A.C. 5:94-2.1(b). In re Adoption of N.J.A.C. 5:94 & 5:95 By New Jersey Council on

Affordable Housing, 390 N.J. Super. 1, 914 A.2d 348, 2007 N.J. Super. LEXIS 20 (App.Div. 2007).

**5:94-1.3 Severability clause**

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

**5:94-1.4 Definitions**

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