

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 Chapter 91, Procedural Rules of the New Jersey Council on Affordable Housing, was repealed and a new Chapter 91, Procedural Rules of the New Jersey Council on Affordable Housing, was adopted by R.1992 d.491, effective December 7, 1992.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 Subchapter 14, Interim Substantive Certification, was repealed and a new Subchapter 14, Interim Procedures, was adopted by R.1993 d.407, effective August 16, 1993.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 which has primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations in this State.

“Days” means calendar days.

“Fair Share Plan” means that plan or proposal, which is in a form that may readily be converted into an ordinance, by which a municipality proposes to satisfy its obligation to create a realistic opportunity to meet the low and moderate income housing need of its region, and which details the affirmative measures the municipality proposes to undertake to achieve its fair share of low and moderate income housing, as provided in sections 9 and 14 of the Act, and as further described and defined in N.J.A.C. 5:93.

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

“Housing element” means that portion of a municipality’s master plan, consisting of reports, statements, proposals, maps, diagrams and text, designed to meet the municipality’s fair share of its region’s present and prospective housing needs, particularly with regard to low and moderate income housing, as further described by N.J.A.C. 5:93.

“Housing region” means a geographic area, determined by the Council, of no less than two nor more than four contiguous, whole counties which exhibit significant social, economic and income similarities, and which constitute to the greatest extent practicable the primary metropolitan statistical areas as last defined by the United States Census Bureau prior to July 2, 1985.

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

“OAL” means the Office of Administrative Law.

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

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

“Petition for Substantive Certification” means that petition which a municipality files, or is deemed to have filed, which engages the Council’s mediation and review process.

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

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

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

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

5:91-6.5 Substantive certification action

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

1. The municipality's proposed housing element and fair share plan complies with this chapter and N.J.A.C. 5:93;

2. The housing element and fair share plan is not inconsistent with the achievement of the low and moderate income housing need of its region as adjusted pursuant to this chapter and N.J.A.C. 5:93; and

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

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

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

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

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

Amended by R.1995 d.491, effective September 5, 1995.

See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).

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

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

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

SUBCHAPTER 7. MEDIATION

5:91-7.1 General

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

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

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

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

Deleted reference to Chart 5 of the Appendix.

Case Notes

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

5:91-7.2 Scope of mediation

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

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

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

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

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

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

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

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

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

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

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

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).
Amended by R.1998 d.21, effective January 5, 1998.
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).
Inserted (g)1 and (i).

Case Notes

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

5:91-7.3 Mediation report

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

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

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

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

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).
Amended by R.1998 d.21, effective January 5, 1998.
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).
Inserted references to owners of sites.

Case Notes

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

5:91-7.4 Publication of notice housing element and fair share plan to be amended 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 and state the nature of any and all amendments to the plan as a result of mediation.

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

(c) If there are no objections to the mediation report, and the amended housing element as a result of mediation does not involve a new site or a fundamental change in approach, the planning board shall amend the housing element at a public meeting and forward the adopted amendment to the governing body. The governing body shall endorse the amendment and forward the amendment to the Council for review and approval.

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).
Amended by R.1998 d.21, effective January 5, 1998.
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

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

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

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

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

5:91-7.6 Reopened mediation

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

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

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

(d) At the end of the reopened mediation, the mediator shall prepare another mediation report and serve the municipality, objectors and other participants to the mediation with a copy of the written mediation report. The report shall list all issues that remain in dispute between the municipality and the objectors and shall present the stipulations or other agreements reached by the municipality and the objectors. The municipality, objectors and participants to the mediation may file comments regarding the second mediation report within 14 days. The mediator shall present the second mediation report together with any comments or objections to the Council advising the Council of the results of the reopened mediation.

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

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).
Amended by R.1998 d.21, effective January 5, 1998.
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

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

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

5:91-8.1 General

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

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

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

Amended by R.1995 d.491, effective September 5, 1995.
See: 27 N.J.R. 2134(a), 27 N.J.R. 3329(a).
Amended by R.1998 d.21, effective January 5, 1998.
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).

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

Case Notes

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

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

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

SUBCHAPTER 9. COUNCIL'S REVIEW OF THE INITIAL DECISION

5:91-9.1 Review

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

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

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

SUBCHAPTER 10. GENERAL POWERS

5:91-10.1 Restraining orders

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

Case Notes

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

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

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

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

5:91-10.2 Accelerated denial of substantive certification

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

5:91-10.3 Administrative orders

At any time, upon its own determination, or upon the application of an interested party, the Council may issue an administrative order for a municipality to provide information or take an action that expedites the Council's administrative process and/or the production of low and moderate income housing. The Council may dismiss a municipal housing element and fair share plan by administrative order when the order sets forth in detail the reasons for the dismissal and the actions the municipality must take before it may refile its housing element and fair share plan.

SUBCHAPTER 11. REGIONAL CONTRIBUTION AGREEMENTS (RCA)

5:91-11.1 Terms of agreement

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