

CHAPTER 93

**SUBSTANTIVE RULES OF THE NEW JERSEY
COUNCIL ON AFFORDABLE HOUSING FOR
THE PERIOD BEGINNING JUNE 6, 1994**

Authority

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

Source and Effective Date

R.1999 d.171, effective May 5, 1999.
See: 31 N.J.R. 578(a), 31 N.J.R. 1479(a).

Executive Order No. 66(1978) Expiration Date

Chapter 93, Substantive Rules of the New Jersey Council on Affordable Housing for the Period Beginning June 6, 1994, expires on May 5, 2004.

Chapter Historical Note

Chapter 93, Substantive Rules of the New Jersey Council on Affordable Housing for the Period Beginning June 6, 1994, was adopted as R.1994 d.290, effective June 6, 1994. See: 25 N.J.R. 5763(a), 26 N.J.R. 2300(a).

Pursuant to Executive Order No. 66(1978), Chapter 93, Substantive Rules of the New Jersey Council on Affordable Housing for the Period Beginning June 6, 1994, was readopted as R.1999 d.171, effective May 5, 1999. See: Source and Effective Date.

Law Review and Journal Commentaries

Ruling Could Trigger New *Mount Laurel* Skirmishes. Ann Snider, 146 N.J.L.J. No. 6, 477 (1996).

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SUBCHAPTER 1. GENERAL PROVISIONS

5:93-1.1 Short title; purpose; scope

(a) The provisions of this chapter shall be known as the "Substantive Rules of the New Jersey Council on Affordable Housing for the Period Beginning June 6, 1994."

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

(c) All municipalities within the jurisdiction of the Council are subject to evaluation, in accordance with the provisions of this chapter, for the period beginning on June 6, 1994.

5:93-1.2 Severability clause

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

5:93-1.3 Definitions

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

“Accessory apartment” means a self-contained residential dwelling unit with a kitchen, sanitary facilities, sleeping quarters, and a private entrance, which is created within an existing home, or through the conversion of an existing attached accessory structure on the same site, or by an addition to an existing home or accessory building.

“Act” means the Fair Housing Act of 1985, P.L. 1985, c.222 (N.J.S.A. 52:27D-301 et seq.).

“Active recreation” means leisure time activities usually of a more formal nature and performed with others, often requiring equipment and taking place at prescribed places, sites or fields. Active recreation sites include swimming areas; playgrounds; tot lots; play fields; and tennis and other court game facilities. Active recreation shall not include areas designated for bike riding, hiking, walking and picnicking.

“Adjustment” means a modification and/or deferral of the municipal low and moderate income housing obligation, pursuant to N.J.S.A. 52:27D-307(c)(2) and N.J.A.C. 5:93-4.

“Affordable” means a sales price or rent within the means of a low or moderate income household as defined in N.J.A.C. 5:93-7.4.

“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.).

“Alternative living arrangement” means a structure in which households live in distinct bedrooms, yet share kitchen and plumbing facilities, central heat and common areas. Alternative living arrangement includes, but is not limited to: transitional facilities for the homeless, Class A, B, C, D, and E boarding homes as regulated by the New Jersey Department of Community Affairs; residential health care facilities as regulated by the New Jersey Department of Health; group homes for the developmentally disabled and mentally ill as licensed and/or regulated by the New Jersey Department of Human Services; and congregate living arrangements.

“Approvable site” means a site that may be developed for low and moderate income housing in a manner consistent with the rules or regulations of all agencies with jurisdiction over the site. A site may be approvable although not currently zoned for low and moderate income housing.

“Areawide plan” or “areawide Water Quality Management (WQM) plan” means any water quality management plan adopted pursuant to Sections 208 and 303 of the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq., and Section 5 of the New Jersey Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq.

“Available site” means a site with clear title, free of encumbrances which preclude development for low and moderate income housing.

“Calculated need” means the low and moderate income housing obligation resulting from the procedures in N.J.A.C. 5:93-2. It is the result of subtracting adjustments, reductions, credits, bonuses, prior cycle credits and the 20 percent cap from the precredited need. To the extent that the Council has knowledge of prior cycle credits and eligible reductions, these credits and reductions have been applied to the municipal housing obligation.

“Census subregion” means a geographic subdivision of the State as determined by the United States Bureau of the Census.

“Center” means a compact form of development with a core or node (focus of residential, commercial and service development) and a community development area that ranges in scale from an urban center to a regional center, town, village, and hamlet. This definition is in accord with and derived from the State Development and Redevelopment Plan.

“Certified household” means a household determined to be income eligible for a low or a moderate income housing unit by a municipal authority after the authority has verified the household’s gross annual income, credit history and compared the household’s family size to the occupancy requirements delineated in N.J.A.C. 5:93-9.1(b)14.

“Community capacity” means an estimate based on 20 percent of a municipality’s existing 1993 housing stock, pursuant to N.J.A.C. 5:93-2.17.

“Conversion” means the conversion of existing commercial, industrial or residential structures for low and moderate income housing purposes.

“Council” means the New Jersey Council on Affordable Housing established under the Act and which has primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations in the State.

“DCA” means the New Jersey Department of Community Affairs.

“DEP” means the New Jersey Department of Environmental Protection.

“Developable site” means a site that has access to appropriate water and sewer infrastructure, and is consistent with the applicable areawide water quality management plan (including the wastewater management plan) or is included in an amendment to the areawide water quality management plan submitted to and under review by DEP.

“Development fees” means money paid by an individual, person, partnership, association, company or corporation for the improvement of property as permitted in N.J.A.C. 5:93-8.

“DOT” means the New Jersey Department of Transportation.

“Durational adjustment” means a deferral of the municipal low and moderate income housing obligation based on the lack of infrastructure pursuant to N.J.S.A. 52:27D-307(c)(2) and N.J.A.C. 5:93-4.

“Elder cottage housing opportunities (ECHO) units” means modular, self-contained units erected on sites containing an existing dwelling. ECHO units are restricted to senior citizens and/or the disabled and are moved to another site when the unit is vacated.

“Environ” means that area of a municipality outside the development boundaries of a center. This definition is in accord with and derived from the State Development and Redevelopment Plan.

“Equalized assessed value” means the value of a property determined by the municipal tax assessor through a process designed to ensure that all property in the municipality is assessed at the same assessment ratio or ratios required by law. Estimates at the time of building permit may be obtained by the tax assessor utilizing estimates for construction cost. Final equalized assessed value will be determined at project completion by the municipal assessor.

“Exempt sales” means and shall include the transfer of ownership between husband and wife; the transfer of ownership between former spouses ordered as a result of a judicial decree of divorce or judicial separation, but not including sales to third parties; the transfer of ownership between family members as a result of inheritance; the transfer of ownership through an executor’s deed to a class A beneficiary; and the transfer of ownership by court order.

“Fair market value” means the unrestricted price of a low or moderate income housing unit if sold at a current real estate market rate.

“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 proposed to satisfy its obligation to create a realistic opportunity to meet its fair share of low and moderate income housing needs 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, addresses the development regulations necessary to implement the housing element, and addresses the requirements of N.J.A.C. 5:93-7 through 11.

“Gross density” means the total number of dwelling units existing or permitted on a housing site divided by the total area of the tract. The result is expressed as dwelling units per acre.

“Gut rehabilitation” means the rehabilitation of vacant residential units or buildings where the cost exceeds 50 percent of the physical value of the unit or structure as determined in accordance with per square foot construction cost guides such as those published by W.S. Means and Company, and F.W. Dodge Company, or where the electrical, plumbing and heating systems of the unit or structure have been totally replaced.

“Head of household” means a person under whose name a housing unit is owned or rented.

“Household” means the person or persons occupying a housing unit.

“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 and which contains at least those items identified in section 10 of the Act.

“Housing market area” means the geographic region from which it is likely that buyers or renters would be drawn for inclusionary development. The housing market area is the “housing region” as determined by the Council, in which an inclusionary development is located.

“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 (PMSA) as last defined by the United States Census Bureau.

“Inclusionary component” means the result of subtracting the rehabilitation component, credits (granted pursuant to N.J.A.C. 5:93-3), the impact of the 20 percent cap (pursuant to N.J.A.C. 5:93-2.16) and the impact of the 1,000 unit limitation (pursuant to N.J.A.C. 5:93-14) from the precredited need, provided the result shall not be less than zero. For a municipality that receives a vacant land adjustment pursuant to N.J.A.C. 5:93-4, the inclusionary component shall be initially synonymous with the realistic development potential.

“Inclusionary development” means a development containing low and moderate income units. This term includes, but is not necessarily limited to, new construction, the conversion of a non-residential structure to a residential structure and the creation of new low and moderate income units through the gut rehabilitation of a vacant residential structure.

“Indigenous need” means deficient housing units occupied by low and moderate income households within a municipality and is a component of present need. Municipal indigenous need, as a percentage of the total 1993 occupied housing stock, shall not exceed the percentage derived from dividing the deficient housing units occupied by low and moderate income households by the total 1993 occupied housing stock for the housing region in which the municipality is located.

“Initial occupancy” means the period beginning with the date on which the developer is granted permission by the local government to begin occupancy and ending on the date 95 percent occupancy is attained.

“Inventory” means that calculation undertaken by a municipality in accordance with the Fair Housing Act, N.J.S.A. 52:27D-329, in developing its housing element which accounts for its housing stock by age, condition, purchase or rental value, occupancy characteristics and type, including the number of units affordable to low and moderate income households in substandard housing capable of being rehabilitated, as provided for in section 10a of the Act.

“Judgment of repose” means a judgment issued by the Superior Court approving a municipality’s plan to satisfy its fair share obligation.

“Landsat” means a satellite that maps land cover by interpreting spectral information reflected from the earth’s surface.

“Low income housing” means housing affordable according to Federal Department of Housing and Urban Development or the standards included in this chapter for home ownership and rental costs, occupied or reserved for occupancy by households with a gross household income equal to 50 percent or less of the median gross household income for households of the same size within the housing region in which the housing is located, and which is subject to affordability controls promulgated by the Council.

“Low income tax credit” means an income tax credit granted for investing in a Federal program designed to produce low and moderate income rental units.

“Market rate units” means housing within an inclusionary development, not restricted to low and moderate income households, that may sell at any price determined by a willing seller and a willing buyer.

“Median aggregate household income above the floor” means the result of multiplying the number of households in the municipality as of 1990 by the 1989 municipal median household income above the floor.

“Median household income above the floor” means the result of subtracting the regional household floor income from the 1989 median municipal household income.

“Minority” means an individual who is a member of one of the following racial or ethnic groups:

1. Black: An individual having origins in any of the black racial groups of Africa, but not of Hispanic origin;
2. American Indian or Alaskan Native: An individual having origins in any of the original people of North America, and who maintains cultural identification through tribal affiliation or community recognition;
3. Hispanic: An individual of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin regardless of race; or
4. Asian or Pacific Islander: An individual having origin in any of the original peoples of the Far East, southeast Asia, and the Indian subcontinent or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands and Samoa.

“Moderate income housing” means housing affordable according to Federal Department of Housing and Urban Development or the standards in this chapter for home ownership and rental costs, occupied or reserved for occupancy by households with a gross household income in excess of 50 percent but less than 80 percent of the median gross household income for households of the same size within the housing region in which the housing is located, and which is subject to the Council affordability controls in this chapter.

“Multifamily unit” means a structure containing five or more dwelling units.

“Municipal estimated land capacity” means an estimate based on Landsat data, tax data and assumptions pertaining to density and set-asides used in developing the undeveloped land cap pursuant to N.J.A.C. 5:93-2.16 and assumptions pertaining to density and set-asides.

“Municipal need for new construction” means a calculation used to determine the 20 percent cap pursuant to N.J.A.C. 5:93-2.16.

“Municipal present need” means the sum of indigenous need and the municipal share of reallocated present need.

“Net density” means the total number of dwelling units within a designated portion of a tract divided by the total land area of the designated portion of the tract, including the open-space, roadways, parking areas and common facilities devoted exclusively to that portion of the tract. The result is expressed as dwelling units per acre.

“Non-conforming use” means a use or activity which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption, revision or amendment.

“Open-space” means any parcel or area of water or land essentially unimproved and set aside, dedicated, designated or reserved for public or private use or enjoyment or for the use and enjoyment of owners and occupants of land adjoining or neighboring such open space; provided that such areas may be improved with only those buildings, structures, streets and offstreet parking and other improvements that are designed to be incidental to the natural openness of the land.

“Overlay zone” means a zoned area of a municipality in which low and moderate income housing may be built as a matter of right in addition to another use. In approving such a zone, the Council may allow the existing use to continue and expand as a conforming use, but provide that when the prior use on the site is changed, the site shall produce low and moderate income housing or a development fee.

“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.

“Planning area” means an area defined by a set of common criteria which focus on the degree and type of development or natural resources. Planning areas serve as organizing mechanisms for growth and development planning throughout the State. This definition is in accord with and derived from the State Development and Redevelopment Plan.

“Pre-credited need” means the municipal low and moderate income housing obligation resulting from subtracting filtering, residential conversion and spontaneous rehabilitation from the sum of indigenous need, reallocated present need, prior cycle prospective, prospective need and demolitions.

“Present need” means the sum of indigenous need and reallocated present need as determined by N.J.A.C. 5:93-2.5.

“Price differential” means the difference between the controlled unit sale price and the fair market value as determined at the date of a proposed contract of sale, after reasonable real estate broker fees have been paid.

“Prior cycle credits” means credits granted by the Council for low and moderate income units constructed after April 1, 1980 as part of granting substantive certification for the 1987-1993 housing obligation. Prior cycle credits may be requested for eligible units, except for rehabilitated units, constructed between April 1, 1980 and December 15, 1986 in petitioning to address the 1987-1999 obligation.

“Prior cycle fair share” means the responsibility for low and moderate income housing established by the Council when the Council granted substantive certification for the 1987-1993 housing obligation.

“Prior cycle prospective need” means that portion of the 1987-1993 prospective need included in the 1987-1999 low and moderate income housing need calculations.

“Priority” means a system of selecting applicants.

“Prospective need” means a projection of low and moderate housing needs based on development and growth which is reasonably likely to occur in a region or a municipality. See N.J.S.A 52:27D-304(j).

“Qualified non-profit” means an organization granted non-profit status in accordance with section 501(c)(3) of the Internal Revenue Service code.

“RCA recipient certification” means the determination of the Council that a receiving municipality in an RCA has met the criteria in N.J.A.C. 5:91-11.4 in at least one of four housing categories established in N.J.A.C. 5:91-11.4(b).

“Realistic development potential” (RDP) means the municipal obligation as calculated pursuant to N.J.A.C. 5:93-4.2 (f).

“Reallocated present need” means that portion of a housing region’s present need that is redistributed throughout the housing region.

“Receiving municipality” means, for purposes of an RCA, a municipality which agrees to assume a portion of another municipality’s fair share obligation.

“Reduction” means a one for one deduction of precredited need based on a fair share plan to construct low and moderate income units, transfer low and moderate income units via a regional contribution agreement and/or zone for low and moderate income housing that implements a housing element that has been certified by the Council or the Superior Court. A reduction also includes bonus rental credits.

“Regional aggregate weighted median household income above the floor” means the result of adding the median aggregate household income above the floor for municipalities in the housing region.

“Regional contribution agreement” (RCA) means the transfer pursuant to N.J.S.A. 52:27D-312 of up to 50 percent of a municipality’s fair share obligation to another municipality within its housing region by means of a contractual agreement into which two municipalities voluntarily enter.

“Regional household floor income” means 100 dollars less than the lowest municipal median household income in the housing region.

“Regional median household income above the floor” means the result of adding the median household income above the floor for each municipality in the housing region.

“Rehabilitated unit” means a previously deficient housing unit which has undergone significant renovation to meet municipal or other applicable housing code standards as further described in N.J.A.C. 5:93-5.2(b).

“Rehabilitation component” means the result of subtracting spontaneous rehabilitation from indigenous need. For a municipality where filtering and conversions exceed reallocated present, prior cycle prospective need, prospective need and demolitions, the rehabilitation component equals calculated need.

“Repayment clause” means the obligation of a seller exercising a repayment option to pay 95 percent of the price differential to a municipality at closing for use in the municipal housing plan.

“Repayment option” means the option of a seller of a low or moderate income unit to sell a unit pursuant to N.J.A.C. 5:93-12.7 at fair market value subject to compliance with the terms of a repayment clause.

“Resolution of Participation” means a resolution adopted by a municipality in which the municipality chooses to prepare a fair share plan and housing element in accordance with the Act.

“Section 8 income limits” means a schedule of income limits that define 50 percent and 80 percent of median income by household size. When used herein, Section 8 income limits shall refer to the “uncapped” schedule as published by the Council, in accordance with its rules.

“Sending municipality” means, for purposes of an RCA, a municipality which transfers a portion of its fair share obligation to another willing municipality.

“Set-aside” means the percentage of housing units devoted to low and moderate income households within an inclusionary development.

“State Development and Redevelopment Plan (SDRP)” means the State plan for development promulgated by the State Planning Commission pursuant to P.L. 1985, c.398 (N.J.S.A. 52:18A-196 et seq.).

“Substandard housing unit” means a housing unit with health and safety code violations that require the repair or replacement of a major system. A major system includes weatherization, a roof, plumbing (including wells), heating, electricity, sanitary plumbing (including septic systems) and/or a load bearing structural system.

“Substantial compliance” means a municipality has actually constructed or issued building permits for at least 70 percent of the new units that were part of the municipal 1987-1993 housing obligation.

“Substantive certification” means a determination by the Council approving a municipality’s housing element and fair

share plan in accordance with the provisions of the Act and the rules and criteria as set forth in this chapter. A grant of substantive certification shall be valid for a period of six years in accordance with the terms and conditions contained therein, in accordance with N.J.S.A. 52:27D-322.

“Suitable site” means a site that is adjacent to compatible land uses, has access to appropriate streets and is consistent with the environmental policies delineated in N.J.A.C. 5:93-4.

“Surrogate” means a census indicator of deficient housing used in the calculation of present need as defined in N.J.A.C. 5:93-2.

“Survey” means that independent determination of need undertaken by a municipality in preparing its housing element, which is developed and produced in a manner and in such form as is required by this chapter.

“Target group” means identifiable organizations that may aid in attracting low and moderate income households to inclusionary developments. Examples of target groups include: public housing authorities, non-profit organizations, departments of aging, Section 8 programs, religious organizations, urban community action groups and personnel departments of local employers.

“Total need” means the sum of present and prospective need.

“Utility allowance” means those expenses that are in addition to the base rent, such as heat, electricity and cooking fuel that are included in the 30 percent utility allowance as outlined in the lease.

“Vacant land” means undeveloped and unused land area.

“Water quality management plans” or “WQM plans” means the plans prepared pursuant to Sections 208 and 303 of the Clean Water Act, 33 U.S.C. §§ 1251 et seq., and the Water Quality Planning Act, N.J.S.A. 58:11A-1 et seq., including the Statewide, areawide and county WQM plans.

“Weatherization” means building insulation (for attic, exterior walls, crawl space), replacement storm windows, replacement storm doors, replacement windows and replacement doors and is considered a major system for rehabilitation.

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).

Amended “Calculated need”, “Developable site”, “Gut rehabilitation”, “Realistic development potential”, “Receiving municipality”, and “Sending municipality”; deleted “Authority” and “Senior citizen”; inserted “Elder cottage housing opportunities (ECHO) units”, “RCA recipient certification”, and “Regional contribution agreement”.

Amended by R.1999 d.107, effective April 5, 1999.

See: 30 N.J.R. 3719(a), 31 N.J.R. 868(a).

Inserted "Areawide plan"; rewrote "Developable site"; in "Sub-standard housing unit", inserted "weatherization" in the second sentence; and added "Water quality management" or "WQM plans" and "Weatherization".

Case Notes

Developer that paid fee into township's affordable housing fund in lieu of constructing required percentage of low-income housing units in proposed development could not compel adjoining municipality to allow access to its sewer system for proposed development; proposed development did not qualify as Fair Housing Act (FHA) "inclusionary development," and only the actual builders of low-income housing had right to elimination of undue cost generating expenses. *Bi-County v. Borough of High Bridge*, 775 A.2d 182 (2001).

Development of single family houses sold at market rates is not a development in which a substantial percentage of the housing units are provided for or contain low and moderate income units, as required to receive benefits as an "inclusionary development" under Fair Housing Act (FHA). *Bi-County v. Borough of High Bridge*, 775 A.2d 182 (2001).

Amended regulations permitting State Council on Affordable Housing (COAH) to grant certification of municipal fair share plans relying on inclusionary development sites lacking access to sewer infrastructure approved by the Department of Environmental Protection (DEP), which regulations had a built-in safeguard requiring review of situation if Department did not approve sewer infrastructure within two years, were reasonable and bore a reasonable relationship to goal of providing low and moderate income housing, and thus, amended regulations were facially constitutional. In re Adoption of Amendments to N.J.A.C., 772 A.2d 9 (2001). In re Adoption of Amendments to N.J.A.C., 772 A.2d 9 (2001).

Amended regulations permitting the State Council on Affordable Housing (COAH) to grant certification of municipal fair share plans relying on inclusionary development sites lacking access to sewer infrastructure approved by Department of Environmental Protection (DEP) did not weaken Council's reliance on State Development and Redevelopment Plan (SDRP) or its efforts at consistency with Plan's goals; it merely gave municipalities some flexibility in applying for DEP sewer approval at the same time they submitted their housing element to COAH for certification, and if DEP denied approval, municipality would still have to find an alternative way to satisfy its fair share obligation. In re Adoption of Amendments to N.J.A.C., 772 A.2d 9 (2001).

Amended regulations permitting the State Council on Affordable Housing (COAH) to grant certification of municipal fair share plans relying on inclusionary development sites lacking access to sewer infrastructure approved by Department of Environmental Protection (DEP), which regulations had a built-in safeguard requiring review of situation if Department did not approve sewer infrastructure within two years, were not unconstitutionally vague. In re Adoption of Amendments to N.J.A.C., 772 A.2d 9 (2001).

Objectors' contention that widespread delays in construction of affordable housing would result from amended regulations permitting the State Council on Affordable Housing (COAH) to grant certification of municipal fair share plans relying on inclusionary development sites lacking sewer access approved by Department of Environmental Protection (DEP) was speculation which was not enough to overcome presumption of constitutionality in legislative determinations. In re Adoption of Amendments to N.J.A.C., 772 A.2d 9 (2001).

Where facts were not at issue, and there was a constitutional challenge to amendments to regulations promulgated by the State Council on Affordable Housing (COAH) to ensure that municipalities met obligation to provide a fair share of their regions's need for low and moderate income housing, Superior Court, Appellate Division was required to focus its analysis on whether amended regulations bore a reasonable relationship to legislative goal of providing low and moderate income housing. In re Adoption of Amendments to N.J.A.C., 772 A.2d 9 (2001).

SUBCHAPTER 2. MUNICIPAL DETERMINATION OF PRESENT AND PROSPECTIVE NEED

5:93-2.1 General provisions

(a) Municipal present need and prospective need shall be calculated by summing municipal indigenous need and the municipal share of the appropriate housing region's reallocated present need and prospective need. The resulting total shall be modified by: prior-cycle prospective need; secondary sources of supply and demand; reduction for 1987-1993 housing activities; prior-cycle credits; and the 20-percent cap (see Appendix A, incorporated herein by reference). The end product of this process is the determination of municipal calculated need. This is the figure municipalities shall address in their housing elements. An example for a hypothetical municipality in the Southwest Region (Region 5)—Johnsonville—is provided to illustrate each of the individual calculations. The following flow diagram summarizes the sequence of calculations en route to the determination of calculated need.

FLOW DIAGRAM FOR THE CALCULATION OF LOW- AND MODERATE-INCOME HOUSING NEED

			Using the Johnsonville Example			
INDIGENOUS NEED	+	REALLOCATED PRESENT NEED	=	PRESENT NEED		
33		95		128		
PRESENT NEED	+	PROSPECTIVE NEED	=	TOTAL NEED		
128		568		695		
TOTAL NEED	+	PRIOR-CYCLE PROSPECTIVE NEED	+	DEMOLITIONS		
695		248		9		
(-) FILTERING	(-)	RESIDENTIAL CONVERSION	(-)	SPONTANEOUS REHABILITATION	=	PRE-CREDITED NEED
89		16		8		839
(-) REDUCTION	(-)	PRIOR-CYCLE CREDITS	(-)	20% CAP	=	CALCULATED NEED *

439

101

0

299

* Prior-cycle vacant land adjustment communities are indicated by "VL" even though their number is calculated. This indicates that although there is not much vacant land left in these communities, the affordable housing number may be met in other ways and is retained as part of overall Calculated Need.

(b) Exhibit 1 in the Technical Appendix A provides municipal-specific base data that may be employed to determine municipal Present and Prospective Need. Data for a hypothetical municipality, "Johnsonville," precedes the municipal base data for illustrative purposes in both Exhibits 1 and 3. Exhibit 2 in Appendix A duplicates the base data for each housing region that is presented in Columns A through L herein. Exhibit 3 is included for the convenience of the user of this guide. It provides a variety of data for each community, often from the 1990 Census, which would otherwise have to be researched in the process of undertaking this calculation.

(c) Selected municipalities receiving State aid (urban aid cities) pursuant to P.L. 1978, c.14 (N.J.S.A. 52:270-178 et seq.) as refined by the criteria in N.J.A.C. 5:93-2.3(b) shall calculate municipal calculated need as per the procedures delineated in N.J.A.C. 5:93-2.17.

5:93-2.2 Indigenous need—1993

(a) Indigenous need in a municipality is actual or capped deficient housing occupied by low- and moderate-income households as further defined in N.J.A.C. 5:93-1.3. Municipal indigenous need shall be determined from the total of deficient housing units occupied by low- and moderate-income households for the U.S. Census subregion in which the municipality is located. The data, derived from a multiple-index approach, are not available at the municipal level. To determine the municipal share of need from the U.S. Census subregion total, it is necessary to employ a single-index approach using surrogates of deficient housing available at both the municipal and U.S. Census subregion level. To calculate municipal indigenous need:

1. Locate the appropriate municipality in Exhibit 1 in Appendix A. Example: Johnsonville in Region 5 (Southwest).

2. Divide Column 2 (municipal single-index need) by Column 3 (subregional single-index need). The resulting percentage yields the municipal share of the U.S. Census subregion's total of deficient housing units occupied by low- and moderate-income households.

Example:

$$\frac{\text{Johnsonville single index need (Column 2)}}{\text{Subregional single index need (Column 3)}} = 410 \div 4544 = .090$$

(Municipal Share of Regional Need)

3. Multiply the result of the quotient obtained in (a)2 above by the number in Column 1 (subregional multiple index need).

Example:

Subregional Multiple Index Need (Column 1)	364	×	Municipal Share of Regional Need	.090	=	33
--	-----	---	--	------	---	----

This is the count of estimated low- and moderate-income deficient units in a municipality.

4. Column A from Appendix A, Exhibit 2, reproduced below displays the percentage for each housing region that is obtained by dividing the actual deficient housing units occupied by low- and moderate-income households in the region by the estimated total of 1993 occupied housing units in the region.

TABLE 1
(COLUMN A, FROM APPENDIX A, EXHIBIT 2)
1993 REGIONAL AVERAGE PERCENT
DEFICIENT HOUSING

Region	Percent Deficient
1. Northeast	.0290
2. Northwest	.0250
3. West Central	.0180
4. East Central	.0120
5. Southwest	.0150
6. South-Southwest	.0220

Multiply this percentage by the municipal projection of 1993 occupied housing stock in Exhibit 1, Column 4.

Example:

Johnsonville Total 1993% %*	Region 5 Percentage of Low- and Moderate-Income Deficiency (Column A)	×	=	190
Occupied Housing Estimate (Column 4) 12,695	.015			

* Estimate as of July 1, 1993

5. Municipal Indigenous Need shall be the smaller number resulting from the calculations in (a)3 and 4 above.

Example: Johnsonville's Indigenous Need = 33.

6. If the calculation in (a)3 above is larger than (a)4 above, the difference between the two shall be distributed throughout the housing region as Reallocated Present Need as per N.J.A.C. 5:93-2.3 and 5:93-2.4. The results of this calculation are displayed for each housing region in Column B.

(b) Municipal indigenous need may also be determined through a survey of the municipality's housing stock as indicated in Appendix C incorporated herein by reference, when such survey is deemed adequate and accepted by the Council for identifying deficient housing units occupied by low- or moderate-income households.



(d) Accessory apartments that are age restricted shall be included with the 25 percent that may be age restricted pursuant to N.J.A.C. 5:93-5.14.

(e) Controls on affordability on accessory apartments shall remain in effect for at least 10 years. To be eligible for a rental bonus pursuant to N.J.A.C. 5:93- 5.15, controls on affordability shall remain in effect for at least 30 years.

(f) The Council shall assess the municipality's accessory apartment program at the end of a two-year period from date of substantive certification and shall require any necessary changes to address a shortfall, including, but not limited to the zoning of an additional site.

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 (a)5 and (c); renumbered (c) and (d) as (d) and (e); amended N.J.A.C. references.

5:93-5.10 Purchase of housing units that have never been occupied and vacant housing units

(a) Purchasing housing units that have never been occupied and offering them in sound condition at affordable prices and/or rents to low and moderate income households may be used to address a municipal housing obligation. The sales price or rent of affordable units shall conform to the standards in N.J.A.C. 5:93-7.2 and 7.4. Municipalities that propose to purchase more than 30 percent but less than 100 percent of the market units in any one development and restrict them to low and moderate income households shall consider the impact of such a purchase on the value of the market units within the development. Municipalities shall also consider the impact of the purchase on the economic viability of any condominium or homeowners association.

(b) Purchasing housing units that have been vacant for at least 18 months and offering them in sound condition at affordable prices and/or rents to low and moderate income households may be used to address a municipal housing obligation. To be eligible, the municipality shall demonstrate to the Council's satisfaction, that the housing has been vacant for at least 18 months. The sales price or rent of the affordable units shall be consistent with the standards in N.J.A.C. 5:93-7.2 and 7.4.

(c) The Council shall review plans to purchase housing units that have never been occupied and housing units that the municipality has determined to be vacant for at least 18 months in a manner similar to its review of municipally sponsored construction, conversion and gut rehabilitation. Affordable low and moderate income housing created pursuant to this section shall, as best as practicable, conform to the Council's bedroom mix rules (N.J.A.C. 5:93-7.3) and shall be affirmatively marketed pursuant to N.J.A.C. 5:93-11.

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

5:93-5.11 Write-down/buy-down of previously owned units

(a) Writing-down or buying-down the cost of previously owned market rate units and offering them in sound condition at affordable prices to low and moderate income households may be used to address a municipal housing obligation. A municipality utilizing this program shall:

1. Propose up to 10 units but no more than 25 percent of a municipality's net inclusionary or new construction component;
2. Demonstrate that there are sufficient for-sale market rate units within the municipality on the multiple listing service for a viable program;
3. Provide at least \$20,000 per unit to subsidize the cost of the buy-down unit;
4. Ensure that the sales prices shall conform to the standards in N.J.A.C. 5:93-7.4;
5. Demonstrate that at least half of the proposed units will be affordable to low income households and that the sales prices will be affordable to households earning an average 57.5 percent of median or the range of affordability will be accommodated elsewhere in the housing plan. The sale prices shall be based on the number of bedrooms in accordance with N.J.A.C. 5:93-7.4;
6. Demonstrate that the program and buy-down units will be affirmatively marketed in accordance with N.J.A.C. 5:93-11;
7. Be exempt from bedroom mix requirements pursuant to N.J.A.C. 5:93-7.3;

8. Place the 30-year deed restriction and mortgage lien on each unit as per Technical Appendix E, N.J.A.C. 5:93;

9. Designate an administrative agency that will:

- i. Maintain an up-to-date inventory of units that meet the requirements of a buy-down program;
- ii. Qualify and place income eligible households in low and moderate income units upon initial occupancy;
- iii. Place income eligible households in low and moderate income units as they become available during the 30-year term of affordability controls;
- iv. Enforce the terms of the deed restriction and mortgage lien;
- v. Set up a separate interest bearing escrow account for the buy-down funds from each municipality; and
- vi. Sponsor a home ownership counselling program and post purchase session for prospective purchasers; and

10. Encourage the dispersment of these units throughout the municipality;

(b) The Council shall assess the municipality's write-down/buy-down program at the end of a two-year period from date of substantive certification and the municipality shall prepare a plan to address any unmet units at that time.

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

5:93-5.12 ECHO (elder cottage housing opportunities) housing units

(a) Municipalities shall receive one credit against their rehabilitation component for ECHO housing which complies with N.J.A.C. 5:91, 5:92, and 5:93.

(b) The municipality shall purchase the ECHO housing or lease ECHO housing for a minimum of six years.

(c) Municipalities may receive credit for up to 10 ECHO units or no more than 25 percent of the rehabilitation component, whichever is less.

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

5:93-5.13 Status of sites addressing the 1987-1993 municipal obligation

(a) Municipalities that received substantive certification for their 1987-1993 obligation based, in part, on the municipal choice to sponsor the construction of low and moderate income housing are responsible for constructing the low and moderate income housing. Failure of the community to satisfy the conditions of substantive certification and construct the housing shall not absolve the municipality from its responsibility.

(b) Sites zoned for inclusionary development in addressing the 1987-1993 housing obligation shall retain such zoning in the petition addressing a 1987-1999 fair share obligation if:

1. The site was subject to an agreement pursuant to the Council's mediation process or part of a negotiated settlement in court; or

2. The developer of the site has filed a development application with the municipality prior to the expiration of the 1987-1993 substantive certification period or the municipal petition for substantive certification whichever is later.

(c) A municipality may propose to eliminate a site under N.J.A.C. 5:93-5.13(b) if there is a 12 year petition and a signed agreement between the municipality and the affected property owner of the site on a new, proposed zoning.

(d) When petitioning to address a 12-year obligation, a municipality seeking to replace or delete a site used in addressing the 1987-1993 housing obligation that does not meet the criteria in (b) above shall provide notice at the time of petition to the owner of the site that the site is being replaced or deleted.

(e) A developer seeking an amendment to the density requirements of an inclusionary site shall follow the procedures set forth in N.J.A.C. 5:91-13. In submitting such requests, the developer shall demonstrate:

1. An ability to construct low and moderate income units within a defined period of time; and

2. A plan to address the low and moderate income units required of the site as a condition of substantive certification.

Recodified from N.J.A.C. 5:93-5.11 and amended by R.1995 d.491, effective September 5, 1995.

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

Recodified from N.J.A.C. 5:93-5.12 and amended by R.1998 d.21, effective January 5, 1998.

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

5:93-5.14 Age restricted housing

(a) Municipalities may age restrict housing based on the following formulae:

1. For municipalities that have received substantive certification or a judgment of repose and are not seeking a vacant land adjustment: age restricted units = $.25$ (municipal precertified need - prior cycle credits - credits pursuant to N.J.A.C. 5:93-3.4 - the impact of the 20 percent cap - the impact of the 1,000 unit limitation pursuant to N.J.A.C. 5:93-14) - any units age restricted in addressing the 1987-1993 housing obligation.

2. For municipalities that received or are receiving a vacant land adjustment: age restricted units = $.25$ (realistic development potential + rehabilitation component - credits pursuant to N.J.A.C. 5:93-3.4) - any age restricted units in addressing the 1987-1993 housing obligation.

3. For municipalities that have never received substantive certification or a judgment of repose and are not seeking a vacant land adjustment: age restricted units = $.25$ (municipal precertified need - prior cycle credits - credits pursuant to N.J.A.C. 5:93-3.4 - the impact of the 20 percent cap - the impact of the 1,000 unit limitation pursuant to N.J.A.C. 5:93-14.)

(b) If the municipality is transferring or has transferred housing units via an RCA, the maximum amount of age restricted units in the sending municipality is calculated in N.J.A.C. 5:93-6.1(b). Housing units transferred via an RCA may include age restricted housing units provided that the sum of the newly constructed age restricted units created in the sending and receiving municipalities does not exceed the total permitted above. However, if the sending municipality has received or is seeking a vacant land adjustment and is transferring or has transferred housing units via an RCA, the maximum amount of age restricted units in the sending municipality shall not exceed 25 percent of the calculated need minus transferred or proposed RCA units. This restriction shall not apply to the rehabilitation of existing age restricted units in either the sending or receiving municipality.

(c) A receiving municipality in an RCA may seek a waiver to age restrict more low and moderate income units than permitted by (a) above. In reviewing such a request, the Council shall consider the municipality's past inclusionary practices, measured by objective criteria, such as: jobs to housing ratio; municipal median income as compared to the regional median income; and the percentage of low and moderate income households in the municipality as compared to the percentage in the housing region. The Council shall also consider the waiver request within the context of the objectives of the receiving municipality's project plan.

Recodified from N.J.A.C. 5:93-5.12 and amended by R.1995 d.491, effective September 5, 1995.

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

Recodified from N.J.A.C. 5:93-5.13 and amended by R.1998 d.21, effective January 5, 1998.

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

5:93-5.15 Rental housing

(a) In addressing the 1987-1999 housing need, every municipality shall have an obligation to create a realistic opportunity to construct rental units. For a municipality not receiving an adjustment pursuant to N.J.A.C. 5:93-4.2, the rental obligation shall equal $.25$ (municipal precertified need - prior cycle credits - impact of the 20 percent cap - the impact of the 1,000 unit limitation pursuant to N.J.A.C. 5:93-14 - the rehabilitation component) or $.25$ (calculated need - the impact of the 1000 unit limitation pursuant to N.J.A.C. 5:93-14 - the rehabilitation component). For a municipality that receives an adjustment pursuant to N.J.A.C. 5:93-4.2, the rental obligation shall equal 25 percent of the RDP.

(b) Any rental obligation (pursuant to N.J.A.C. 5:92-14.4(a) and (b)) that was a condition of substantive certification in addressing the 1987-1993 municipal fair share shall be considered as an ongoing obligation in addressing the 1987-1999 housing need.

(c) The municipal approach to addressing the rental obligation may include, but not necessarily be limited to, any combination of the following:

1. Creation of alternative living arrangements pursuant to N.J.A.C. 5:93-5.8;
2. A municipally sponsored or non-profit sponsored rental development;
3. Agreements with developers for the municipality to purchase low and moderate income units and maintain them as rental units;
4. The creation of accessory apartments pursuant to N.J.A.C. 5:93-5.9;
5. Permitting inclusionary sites to be developed as sales or rental housing with a density increase if the developer chooses to build rental housing. The Council shall presumptively require a minimum density of ten units per acre and a maximum set-aside of 15 percent for rental housing. Municipalities that choose a zoning response to all or part of the rental obligation shall permit such densities and set-asides on all inclusionary sites until the requirement for rental housing has been addressed;
6. Agreements with developers to construct and administer low and moderate income rental units as part of an inclusionary development.

(d) The Council shall grant a rental bonus for rental units that are constructed and conform to the standards contained in N.J.A.C. 5:93-5.8(d) and 5.9(d) and 5:93-7. The Council may also grant the rental bonus prior to construction when it determines that the municipality has provided or received a firm commitment for the construction of rental units. A municipality may lose the benefit of the rental bonus granted in advance of the actual construction of the rental units if the municipality has not constructed the rental units within the time periods established as a condition of substantive certification; or granted preliminary or final approval for the construction of the rental units (where a developer agreed to construct the rental units). A municipality may also lose the benefit of a rental bonus if the preliminary or final approval is no longer valid or if the developer has abandoned the development.

1. A municipality shall receive two units (2.0) of credit for rental units available to the general public.
2. A municipality shall receive one and one-third (1.33) units of credit for age restricted rental units. However, no more than 50 percent of the rental obligation defined in (a) and (b) shall receive a bonus for age restricted rental units unless:

i. The rental units have been constructed prior to the effective date of this rule;

ii. The development has a valid preliminary or final approval from the municipality and the developer remains committed to building rental housing as of the effective date of this rule; or

iii. The time limit for constructing the rental units as per the conditions of substantive certification has not expired.

3. No rental bonus shall be granted for rental units in excess of the rental obligation defined in (a) and (b).

(e) Municipalities that choose to transfer the rental obligation via an RCA shall do so by creating new rental units in the receiving municipality. Gut rehabilitation units as defined in N.J.A.C. 5:93-1.3 may address the rental component. Municipalities that transfer the rental obligation shall receive a one unit credit for each rental unit transferred.

Recodified from N.J.A.C. 5:93-5.13 and amended by R.1995 d.491, effective September 5, 1995.

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

Recodified from N.J.A.C. 5:93-5.14 and amended by R.1998 d.21, effective January 5, 1998.

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

SUBCHAPTER 6. REGIONAL CONTRIBUTION AGREEMENTS (RCA)

5:93-6.1 General provisions

(a) Municipalities may propose the transfer of up to 50 percent of their housing obligation based on the procedures in N.J.A.C. 5:91-11 and on the following formulae:

1. For municipalities that have received substantive certification or a judgment of repose and are not seeking a vacant land adjustment:

$$\text{RCA} = .5 (\text{municipal precertified need} - \text{prior cycle credits} - \text{credits pursuant to N.J.A.C. 5:93-3.4} - \text{the impact of the 20 percent cap} - \text{the impact of the 1,000 unit limitation to N.J.A.C. 5:93-14}) - \text{any units transferred as a result of a previously approved RCA.}$$

2. For municipalities that have received or are requesting a vacant land adjustment:

$$\text{RCA} = .5 (\text{realistic development potential} + \text{rehabilitation component} - \text{credits pursuant to N.J.A.C. 5:93-3.4}) - \text{any units transferred as a result of a previously approved RCA.}$$

3. For municipalities that have never received substantive certification or a judgment of repose and are not seeking a vacant land adjustment:

$$\text{RCA} = .5 (\text{municipal precertified need} - \text{prior cycle credits} - \text{credits pursuant to N.J.A.C. 5:93-3.4} - \text{the}$$

impact of the 20 percent cap - the impact of the 1000 unit limitation pursuant to N.J.A.C. 5:93-14)

(b) RCA municipalities may age restrict the following number of units within their municipalities:

1. For sending municipalities, the number of units that may be age restricted is:

RCA sender = .25 (municipal precertified need - rehabilitation component - prior cycle credits - transferred or proposed RCA units) - any first round age restricted units.

2. For sending municipalities that have received or are seeking a vacant land adjustment, the number of units that may be age-restricted is:

RCA sender = .25 RDP - transferred or proposed RCA units) - any first round age-restricted units.

3. For receiving municipalities, the number of units that may be age restricted with RCA funds is:

RCA receiver = sending municipality's age restricted component based on N.J.A.C. 5:93-5.14 - the number of age restricted units that have been constructed or are planned to be constructed in the sending municipality based on N.J.A.C. 5:93-6.1.

The sum of the maximum age restricted units in both the sending and receiving municipalities (those utilizing RCA funds) equals the sending municipality's maximum age restricted component as calculated according to N.J.A.C. 5:93-5.14. Age restricted units that are prior cycle credits are excluded from this calculation.

(c) A municipality may propose such a transfer to another municipality within its housing region by means of a contractual agreement into which two municipalities voluntarily enter. However, a municipality may not transfer any portion of its rehabilitation component. The Council shall not review an RCA without a contractual agreement between the two municipalities that, at a minimum, specifies the number of units to be transferred, the amount of compensation and the type of housing activity anticipated by the receiving municipality. In addition, the provisions of N.J.A.C. 5:93-6.2(a) through (d) shall be addressed in the final contract.

(d) Notwithstanding the contractual agreement that initiates the review of an RCA, described in (c) above, the Council may require any contractual amendments it deems necessary upon reviewing the RCA.

(e) The Council shall maintain current lists of municipalities which have stated an intent to enter into RCAs as receiving municipalities and shall provide copies of such lists to potential sending municipalities as requested.

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 (b)1-3 and recodified b, c, d as c, d, e.

5:93-6.2 Terms

(a) At least 50 percent of the units accepted by a receiving municipality shall be affordable to low income households. The Council may modify this requirement if it determines that the sending municipality has adequately provided for its low income housing obligation elsewhere in its housing element. In the case of RCAs for scattered site rehabilitation of occupied units, the receiving community shall ensure, as best as practicable, that 50 percent of the rehabilitated units are occupied by low income households.

(b) A receiving municipality may use revenues collected as a result of an RCA for any activity approved by the Council for addressing the low and moderate income obligation. Eligible activities shall include, but are not necessarily limited to, those activities outlined in N.J.A.C. 5:93-5.1.

(c) All RCAs shall specify payment schedules which conform to a construction or rehabilitation schedule and which relate to the receiving municipality's ability to deliver housing units in a timely fashion.

(d) All RCAs shall require that a receiving municipality submit a proposed project plan within 60 days of the sending municipality's petition for substantive certification which shall be in such form and contain such information as the Agency and the Council may require.

(e) Sending and receiving municipalities shall, as part of their contract negotiations, determine the use of transferred funds that may be in excess of the amount necessary to implement the RCA. Such funds shall either be returned to the sending community and/or utilized by the receiving community to produce additional low and moderate income housing units or for a capital expenditure ancillary to or benefiting low and moderate income households. However, if a receiving municipality can accomplish the housing activity approved as part of its project plan for less than the minimum per unit transfer pursuant to N.J.A.C. 5:93-6.4(b), the difference between the cost of the housing activity and the minimum per unit transfer shall be used within the receiving municipality. The specific use of excess funds by the receiving community need not be specified in the RCA contract, but shall be subject to Council approval.

(f) No more than 20 percent of the RCA principal shall be expended on administration. RCA administrative dollars may be calculated at the beginning of each year and expended, once available. In the first year of an RCA program, upon request to the Council, administrative funds may be in excess of the 20 percent but may not exceed the overall 20 percent permitted for the term of the RCA contract.