

CHAPTER 92

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

Authority

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

Source and Effective Date

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

Executive Order No. 66(1978) Expiration Date

Chapter 92, Substantive Rules of the Council on Affordable Housing for the Period August 4, 1986 through June 5, 1994, expires on February 7, 1996.

Chapter Historical Note

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

See section annotations for specific rulemaking activity.

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SUBCHAPTER 1. GENERAL PROVISIONS

5:92-1.1 Short title; purpose; scope

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

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

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

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

Case Notes

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

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

5:92-1.2 Severability clause

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

Case Notes

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

5:92-1.3 Definitions

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

(b) After receiving the crediting provided in N.J.A.C. 5:92-6, Credits, where a municipality's present and prospective fair share exceeds 1,000 low and moderate income housing units, the municipality may adjust its fair share to 1,000.

Amended by R.1987 d.314, effective August 3, 1987.
See: 19 N.J.R. 806(a), 19 N.J.R. 1431(a).

Added (b).

INVALIDITY ANNOTATION: See 23 N.J.R. 58(a).

N.J.A.C. 5:92-7.1(b) held invalid. *Calton Homes, Inc. v. Council on Affordable Housing, State of New Jersey, and the Township of Middletown*, N.J.Super., Dkt. No. A-3595-87T8 (App. Div. November 19, 1990).

Case Notes

Rule adopted by Council on Affordable Housing was not unreasonable exercise of Council's authority. *Calton Homes, Inc. v. Council on Affordable Housing*, 244 N.J.Super. 438, 582 A.2d 1024 (A.D.1990), certification denied 127 N.J. 326, 604 A.2d 601.

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

SUBCHAPTER 8. MUNICIPAL ADJUSTMENTS

5:92-8.1 General

This subchapter provides the criteria by which a municipal fair share may be adjusted. Adjustments shall be made to eliminate specific parcels of vacant land from consideration as sites for low and moderate income housing. Adjustments shall yield vacant, suitable, developable, available and approvable land within each municipality requesting and demonstrating that such adjustments to its fair share are in keeping with these criteria. Adjustments shall be made to municipal fair share when the Council determines that such adjustments are required due to available land capacity, public facilities or infrastructure. All municipalities requesting adjustments of present and prospective need shall submit an existing land use map at an appropriate scale to display the land uses of each parcel within the municipality. Such map shall display the following land uses: single family, two- to four-family, other multifamily, commercial, industrial, agricultural, parkland, other public uses, semipublic uses and vacant land. Municipalities seeking an adjustment based on historic sites, agricultural lands or environmentally sensitive areas shall submit transparent overlays drawn to the same scale as the existing land use map depicting those sites which the municipality maintains are inappropriate for development, as provided under this subchapter.

Case Notes

Council on Affordable Housing was required to follow mandates of both Administrative Procedure Act and Open Public Meetings Act. *Township of Bernards v. State, Dept. of Community Affairs*, 233

N.J.Super. 1, 558 A.2d 1 (A.D.1989), certification denied 118 N.J. 194, 570 A.2d 959, certification denied 118 N.J. 195, 570 A.2d 959.

Letter sent to newspapers by Council on Affordable Housing satisfied "adequate notice" requirement under Open Public Meetings Act. *Township of Bernards v. State, Dept. of Community Affairs*, 233 N.J.Super. 1, 558 A.2d 1 (A.D.1989), certification denied 118 N.J. 194, 570 A.2d 959, certification denied 118 N.J. 195, 570 A.2d 959.

Developer may question reliability of State Development Guide Plan as planning tool for determining township's growth area. *Van Dalen v. Washington Tp.*, 232 N.J.Super. 205, 556 A.2d 1247 (A.D.1989), certification granted 117 N.J. 631, 569 A.2d 1333, certification granted 117 N.J. 632, 569 A.2d 1333, affirmed in part, reversed in part 120 N.J. 234, 576 A.2d 819.

Factual questions regarding township's growth area to be resolved by mediation or by Council on Affordable Housing after adjudication in the Office of Administrative Law. *Van Dalen v. Washington Tp.*, 232 N.J.Super. 205, 556 A.2d 1247 (A.D.1989), certification granted 117 N.J. 631, 569 A.2d 1333, certification granted 117 N.J. 632, 569 A.2d 1333, affirmed in part, reversed in part 120 N.J. 234, 576 A.2d 819.

5:92-8.2 Adjustment process

(a) The Council shall only adjust reallocated present and prospective need which the municipality proposes to address through inclusionary developments. The Council shall not adjust indigenous need.

(b) The Council shall determine the amount and location of vacant and undeveloped land within a municipality. Specific parcels of vacant and developable lands shall be excluded as potential sites for low and moderate income housing based on the following criteria:

1. Historic and architecturally important sites shall be excluded if listed on the State Register of Historic Places prior to substantive certification. All land within a 100-foot buffer area of an eligible historic site as described herein shall similarly be excluded.

2. Agricultural lands shall be excluded when the development rights to these lands have been purchased or restricted by covenant or when such lands are subject to restrictions as set forth in the "Agricultural Retention and Development Act", N.J.S.A. 32 (N.J.S.A. 4:1C-11 et seq.), P.L.1983, c.32).

3. Environmentally sensitive lands shall be excluded as follows:

- i. Within the areas of the State regulated by the Pinelands Commission, Division of Coastal Resources and the Hackensack Meadowlands Development Commission, the Council shall adhere to the policies delineated in The Pinelands Comprehensive Management Plan, N.J.A.C. 7:50; the Coastal Permit Program Rules, N.J.A.C. 7:7-1; Coastal Resource and Development Rules, N.J.A.C. 7:7E-1; and the Zoning Regulations of the Hackensack Meadowlands District, N.J.A.C. 19:4.

- ii. In areas of the State not regulated by the Pinelands Commission, the Division of Coastal Resources and the Hackensack Meadowlands Development Commission, municipalities may exclude as potential sites for low and moderate income housing: inland wetlands

as delineated on the U.S. Fish and Wildlife Service National Wetlands Inventory; or as delineated on-site by the U.S. Army Corps of Engineers or New Jersey Department of Environmental Protection, whichever agency has jurisdiction; when on-site delineation is required by the Council; flood hazard areas as defined in N.J.A.C. 7:13; and sites with slopes in excess of 15 percent as determined from the U.S.G.S. Topographic Quadrangles which render a site unsuitable for low and moderate income housing. In cases where part of a site is unsuitable for low and moderate income housing because of floor hazard areas or inland wetlands, the Council shall not permit low and moderate income housing to be constructed on that unsuitable part of the site; provided however, that this regulation shall not prohibit construction of low and moderate income housing on the remainder of the site. In the case of slopes in excess of 15 percent, a municipality may regulate inclusionary development through a steep slope ordinance provided the ordinance also regulates non-inclusionary developments in a consistent manner. The Council reserves the right to exclude sites in whole or in part when excessive slopes threaten the viability of an inclusionary development.

iii. Where the legislature adopts legislation that requires the mapping of other natural resources and provides a mechanism for their regulation, the Council shall include such resources in its criteria and guidelines for municipal adjustment.

Amended by R.1987 d.123, effective March 2, 1987.

See: 19 N.J.R. 3(a), 19 N.J.R. 407(a).

(b)3ii added text "on the U.S. . . . delineated on-site".

Amended by R.1990 d.254, effective May 21, 1990.

See: 22 N.J.R. 730(a), 22 N.J.R. 1557(b).

Steep slope provisions added at (b)3ii.

Case Notes

Downward adjustment of number of lower income housing units which borough was required to provide was proper. In re Borough of Roseland, 247 N.J.Super. 203, 588 A.2d 1256 (A.D.1991), certification denied 127 N.J. 557, 606 A.2d 369, reversed 132 N.J. 1, 622 A.2d 1257.

Calculation of municipality's obligation to provide lower income housing not subject to recalculation. In re Borough of Roseland, 247 N.J.Super. 203, 588 A.2d 1256 (A.D.1991), certification denied 127 N.J. 557, 606 A.2d 369, reversed 132 N.J. 1, 622 A.2d 1257.

Compensation for downward adjustment of locality's lower income housing obligation not required. In re Borough of Roseland, 247 N.J.Super. 203, 588 A.2d 1256 (A.D.1991), certification denied 127 N.J. 557, 606 A.2d 369, reversed 132 N.J. 1, 622 A.2d 1257.

Regulation indicating aggregate per capita income is factor in allocating burden of lower income housing was not arbitrary or capricious. Township of Bernards v. State, Dept. of Community Affairs, 233 N.J.Super. 1, 558 A.2d 1 (A.D.1989), certification denied 118 N.J. 194, 570 A.2d 959, certification denied 118 N.J. 195, 570 A.2d 959.

Regulation indicating that municipalities may reserve portion of total developed acreage for active municipal recreation was not arbitrary or capricious. Township of Bernards v. State, Dept. of Community Affairs, 233 N.J.Super. 1, 558 A.2d 1 (A.D.1989), certification denied 118 N.J. 194, 570 A.2d 959, certification denied 118 N.J. 195, 570 A.2d 959.

Regulation omitting vacant land as factor in determining distribution of need for lower income housing was not ultra vires. Township of Bernards v. State, Dept. of Community Affairs, 233 N.J.Super. 1, 558 A.2d 1 (A.D.1989), certification denied 118 N.J. 194, 570 A.2d 959, certification denied 118 N.J. 195, 570 A.2d 959.

5:92-8.3 Adequate recreation, conservation and open space

(a) Municipalities may reserve three percent of their total developed and developable acreage for active municipal recreation and exclude this acreage from consideration as potential sites for low and moderate income housing. In determining developable acreage, municipalities shall calculate their total vacant and undeveloped lands and deduct from that total number the lands excluded by the Council's policy regarding historic and architecturally important sites, agricultural lands and environmentally sensitive lands. Municipalities shall also exclude from this calculation of total vacant and undeveloped lands, those owned by nonprofit organizations, counties and the state or federal government and when such lands are precluded from development at the time of substantive certification. Municipalities shall submit appropriate documentation demonstrating that such lands are precluded from development. Existing active municipal recreation areas shall be subtracted from the three percent calculation of total developed and developable acreage to determine additional land that may be reserved for active municipal recreation.

(b) Municipalities may exclude further recreation, conservation and open space areas, beyond those calculated in (a) above, when such lands have been designated in an adopted county master plan and:

1. The county has adopted appropriate language in its ordinances to secure specific areas for recreation, conservation or open space as part of the subdivision and site plan review process; or
2. The county has included specific areas for acquisition in a capital improvement program; or
3. The county has applied to the New Jersey Department of Environmental Protection Green Acres Program or other appropriate programs to acquire or otherwise permanently set aside specified areas.

(c) Municipalities shall submit a transparent overlay drawn to the same scale as the existing land use map depicting eligible county and municipal recreation, conservation and open space sites to be eliminated from consideration for low and moderate income housing.

Case Notes

Council on Affordable Housing required to follow both Administrative Procedure Act and Open Public Meetings Act. Township of Bernards v. State, Dept. of Community Affairs, 233 N.J.Super. 1, 558 A.2d 1 (A.D.1989), certification denied 118 N.J. 194, 570 A.2d 959, certification denied 118 N.J. 195, 570 A.2d 959.

Letter sent to newspapers by Council on Affordable Housing satisfied "adequate notice" requirement under the Open Public Meetings Act. *Township of Bernards v. State, Dept. of Community Affairs*, 233 N.J.Super. 1, 558 A.2d 1 (A.D.1989), certification denied 118 N.J. 194, 570 A.2d 959, certification denied 118 N.J. 195, 570 A.2d 959.

5:92-8.4 Vacant sites

(a) Vacant sites not specifically excluded from consideration for low and moderate income housing as a result of the Council's policies regarding historic and architecturally important sites, agricultural lands, environmentally sensitive lands and recreation, conservation and open space shall be considered as potential sites for low and moderate income housing.

(b) The Council may, within its discretion and upon its own initiative, eliminate additional sites from consideration when the Council determines that such action is consistent with the public's general welfare.

(c) The Council shall determine the municipality's ability to absorb its fair share obligation through inclusionary developments. The Council shall presumptively require a 20 percent maximum set-aside and a minimum gross density of six units per acre on vacant and developable sites. The Council may modify this minimum gross density based on factors, including but not limited to, appraised land values, improvement costs, site conditions and municipal subsidy of project costs. The Council may also modify this density when required to satisfy the municipal present and prospective need or when the municipality and developer agree to a modification on a specific site or when the Council's minimum gross density policy conflicts with the land use policies adopted within the Pinelands, Coastal Zone or Hacksensack Meadowlands.

Amended by R.1988 d.335, effective July 18, 1988.

See: 20 N.J.R. 865(a), 20 N.J.R. 1689(b).

Added (d) through (f).

Amended by R.1989 d.534, effective October 16, 1989.

See: 21 N.J.R. 1185(c), 21 N.J.R. 3295(a).

Provisions made for deviations from presumptive requirements.

Amended by R.1992 d.45, effective January 21, 1992.

See: 23 N.J.R. 2813(b), 24 N.J.R. 235(a).

Text at (d)-(g) deleted.

Case Notes

Calculation of municipality's obligation to provide lower income housing is not subject to recalculation. In re *Borough of Roseland*, 247 N.J.Super. 203, 588 A.2d 1256 (A.D.1991), certification denied 127 N.J. 557, 606 A.2d 369, reversed 132 N.J. 1, 622 A.2d 1257.

Compensation for downward adjustment in locality's lower income housing obligation not required. In re *Borough of Roseland*, 247 N.J.Super. 203, 588 A.2d 1256 (A.D.1991), certification denied 127 N.J. 557, 606 A.2d 369, reversed 132 N.J. 1, 622 A.2d 1257.

Downward adjustment of number of lower income housing units which borough would be required to satisfy was proper. In re *Borough of Roseland*, 247 N.J.Super. 203, 588 A.2d 1256 (A.D.1991), certification denied 127 N.J. 557, 606 A.2d 369, reversed 132 N.J. 1, 622 A.2d 1257.

Inclusion of affordable and market rate housing units in a single development not required. In re *Township of Denville*, 247 N.J.Super.

186, 588 A.2d 1248 (A.D.1991), certification denied 127 N.J. 557, 606 A.2d 369, reversed 132 N.J. 1, 622 A.2d 1257.

Municipal inclusionary zoning measures must be adopted under duly promulgated regulations. *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 regarding exclusionary zoning was incomplete. *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990).

Development fees used as inclusionary zoning devices had basis under the Fair Housing Act. *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990).

Regulation permitting municipalities to reserve portion of developed acreage for active municipal recreation was not arbitrary or capricious. *Township of Bernards v. State, Dept. of Community Affairs*, 233 N.J.Super. 1, 558 A.2d 1 (A.D.1989), certification denied 118 N.J. 194, 570 A.2d 959, certification denied 118 N.J. 195, 570 A.2d 959.

Regulation omitting vacant land as factor to determine distribution of region's need for lower income housing was not ultra vires. *Township of Bernards v. State, Dept. of Community Affairs*, 233 N.J.Super. 1, 558 A.2d 1 (A.D.1989), certification denied 118 N.J. 194, 570 A.2d 959, certification denied 118 N.J. 195, 570 A.2d 959.

Rule regarding minimum gross density of lower income housing was not arbitrary or capricious. *Township of Bernards v. State, Dept. of Community Affairs*, 233 N.J.Super. 1, 558 A.2d 1 (A.D.1989), certification denied 118 N.J. 194, 570 A.2d 959, certification denied 118 N.J. 195, 570 A.2d 959.

Voluntary "in lieu" development fee for construction of affordable housing sustainable. *Holmdel Builders Ass'n v. Township of Holmdel*, 232 N.J.Super. 182, 556 A.2d 1236 (A.D.1989), certification granted 117 N.J. 150, 564 A.2d 871, certification granted 117 N.J. 150, 564 A.2d 872, certification granted 117 N.J. 151, 564 A.2d 872, affirmed in part, reversed in part 121 N.J. 550, 583 A.2d 277.

5:92-8.5 Adequate public facilities and infrastructure capacities

(a) The Council shall make durational adjustments to defer a municipality's fair share obligation due to the lack of adequate public facilities and infrastructure capacity. This adjustment shall remain totally or partially in effect until adequate infrastructure facilities are provided.

(b) Notwithstanding the lack of adequate public facilities and infrastructure, the municipality shall nonetheless designate and zone appropriate sites to accommodate its fair share obligation. The lack of adequate capacity, in and of itself, shall constitute a durational adjustment of the municipal obligation and that obligation shall be deferred until adequate infrastructure is made available as set forth in (c) through (f) below.

(c) Notwithstanding the lack of adequate public facilities and infrastructure in extant at the time a municipality petitions for substantive certification, the municipality shall reserve and set aside new infrastructure capacity, when it becomes available, for low and moderate income housing, on a priority basis.

(d) Municipal officials shall endorse all applications to the New Jersey Department of Environmental Protection or its agent to provide affordable infrastructure. Such en-

dorsements shall be simultaneously submitted to the Council.

(e) Where the New Jersey Department of Environmental Protection or its designated agent approves a proposal to provide infrastructure to a site for the development of low and moderate income housing identified in the housing element, the municipality shall permit such development.

(f) Where a municipality has designated sites for low and moderate income housing that lack adequate infrastructure and where the New Jersey Department of Environmental Protection or its designated agent approves a proposal to provide infrastructure to a site other than those designated for the development of low and moderate income housing in the housing element, the municipality shall amend its housing element and fair share housing ordinance to permit development of such site for low and moderate income housing. The amended housing element and fair share housing ordinance shall be submitted to the Council within 90 days of the site's approval by the New Jersey Department of Environmental Protection or its agent.

Case Notes

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

Council rule that municipal zoning ordinance was subject to approval by Dept. of Environmental Protection was not improper delegation. *Township of Bernards v. State, Dept. of Community Affairs*, 233 N.J. Super. 1, 558 A.2d 1 (A.D.1989), certification denied 118 N.J. 194, 570 A.2d 959, certification denied 118 N.J. 195, 570 A.2d 959.

5:92-8.6 Prohibitive costs of infrastructure

(a) The Council shall make an adjustment to the municipal present and prospective need due to prohibitive costs associated with providing public facilities and infrastructure. This adjustment shall remain totally or partially in effect until adequate, affordable infrastructure facilities are provided.

(b) Notwithstanding the prohibitive cost of adequate public facilities and infrastructure, the municipality shall nonetheless designate and zone appropriate sites to accommodate its fair share obligation. The lack of adequate capacity, in and of itself, shall constitute a durational adjustment of the municipal obligation and that obligation shall be deferred until adequate infrastructure is made available as set forth in (c) through (h) below.

(c) Notwithstanding the prohibitive cost of adequate public facilities and infrastructure at the time a municipality petitions for substantive certification, the municipality shall reserve and set aside new infrastructure capacity, when it becomes available for low and moderate income housing on a priority basis.

(d) Municipalities seeking an adjustment of their fair share due to prohibitive costs of infrastructure to the public shall complete "The Costs of Providing Infrastructure" application provided by the Council and submit it to the Council for its review.

(e) The Council shall forward "The Costs of Providing Infrastructure" application to the New Jersey Department of Community Affairs Division of Local Government Services for review. The Council shall consider the report of the Division of Local Government Services in determining whether to permit an adjustment due to prohibitive costs associated with providing public facilities and infrastructure.

(f) Municipal officials shall endorse all applications to the New Jersey Department of Environmental Protection or its agent to provide affordable infrastructure. Such endorsements shall be simultaneously submitted to the Council.

(g) Where the New Jersey Department of Environmental Protection or its designated agent approves a proposal to provide affordable infrastructure to a site for the development of low and moderate income housing in the housing element, the municipality shall permit such development.

(h) Where a municipality has designated sites for low and moderate income housing that lack adequate infrastructure and where the New Jersey Department of Environmental Protection or its designated agent approves a proposal to provide affordable infrastructure to a site other than those designated for the development of low and moderate income housing in the housing element, the municipality shall amend its housing element and fair share housing ordinance to permit development of such site for low and moderate income housing. The amended housing element and fair share housing ordinance shall be submitted to the Council within 90 days of the site's approval by the New Jersey Department of Environmental Protection or its agent.

Case Notes

Council rule that municipal zoning ordinance was subject to approval by Dept. of Environmental Protection was not improper delegation. *Township of Bernards v. State, Dept. of Community Affairs*, 233 N.J. Super. 1, 558 A.2d 1 (A.D.1989), certification denied 118 N.J. 194, 570 A.2d 959, certification denied 118 N.J. 195, 570 A.2d 959.

SUBCHAPTER 9. PRIORITIZING

5:92-9.1 Prioritizing vacant and developable sites

(a) Municipalities shall establish priorities for low and moderate income sites. Sites should be available, suitable, developable and approvable as defined in N.J.A.C. 5:92-1.3.