

2. The Council shall encourage and may require the use of sites within Planning Area 3 prior to approving inclusionary sites in Planning Areas 4 and 5 that would require the expansion of existing infrastructure; and

3. The Council shall encourage and may require the use of sites to which existing infrastructure can easily be extended prior to approving inclusionary sites that require the creation of new infrastructure in an area not presently serviced by infrastructure.

5:93-5.5 Municipally sponsored construction and gut rehabilitation

(a) A municipality may elect to provide low and moderate income units through a municipally sponsored construction program. A municipally sponsored construction program shall address four major areas of concern. It shall document that there is municipal control of the site(s); an administrative mechanism to construct the proposed housing; a funding plan and evidence of adequate funding capacity; and timetables for construction of the units. More specifically, the following minimum documentation shall be submitted.

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1. The municipality shall demonstrate that it has control or has the ability to control the site(s). Control may be in the form of outright ownership or an option on the property;

2. An administrative mechanism shall be submitted for the development indicating who will income qualify applicants and administer the units once they are occupied. The municipality may contract with an outside agency to provide these functions, provided a written agreement between the administrative agency and the municipality is submitted to the Council.

3. The municipality shall submit detailed information demonstrating that it has adequate funding capabilities. The documentation shall include:

- i. A pro forma statement for the project; and
- ii. Evidence that the municipality has adequate and stable funding. If State or Federal funds will be used, the municipality shall provide documentation indicating the funding available to the municipality and any applications still pending. In the case where an application for outside funding is still pending, the municipality shall provide a stable alternative source, such as municipal bonding, in the event that the funding request is not approved. As outside funds become available, the municipality may reduce its reliance on municipal resources; and

4. A construction schedule, or timetable, shall be submitted for each step in the development process: including preparation of a site plan, granting of municipal approvals, applications for State and Federal permits, selection of a contractor and construction. The construction schedule shall provide for construction to begin within two years of substantive certification. The municipality shall indicate the entity responsible for monitoring the construction and overall development activity.

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

5:93-5.6 Zoning for inclusionary development

(a) Municipalities that choose to provide zoning for inclusionary development shall select sites that conform to the criteria in N.J.A.C. 5:93-5.3 and shall submit the information required in N.J.A.C. 5:93-5.3.

(b) The Council's review of municipal plans to zone for inclusionary development shall include, but not necessarily be limited to: the existing densities surrounding the proposed inclusionary site; the need for a density bonus in order to produce low and moderate income housing; whether the site is approvable, available, developable and suitable pursuant to N.J.A.C. 5:93-1.3; the site's conformance with the SDRP pursuant to N.J.A.C. 5:93-5.4; the existence of steep slopes, wetlands and floodplain areas on the site; the present ability of a developer to construct low and moderate income housing at a specific density; the length of time an inclusionary site has been zoned at a specific density and set-aside without being developed; and the number of

inclusionary sites that have developed within the municipality at specific densities and set-asides.

1. When a municipality is receiving an adjustment pursuant to N.J.A.C. 5:93-4.2, the municipality shall be required to zone inclusionary sites at a minimum gross density of six (6) units per acre with a 20 percent set-aside.

2. In all other municipalities, when the review described in (b) indicates that such densities are appropriate, the Council shall require that a substantial percentage of inclusionary sites be zoned to allow market units within an inclusionary development to be constructed as single family detached units. For these sites, the Council shall generally favor a gross density of four units per acre with a 15 percent set-aside. Municipalities may also seek to zone sites for a gross density of five (5) units per acre with a 17.5 percent set-aside and six (6) units per acre or more with a 20 percent set-aside. The Council shall determine set-asides for densities between four (4) and five (5) and between five (5) and six (6) through a process of interpolation.

(c) The Council may require higher densities in circumstances including, but not limited to:

- 1. Where the existing zoning exceeds the density proposed by the municipality; or
- 2. When the Council determines that higher densities are required to provide an opportunity for inclusionary development in a specific municipality, based on the particular circumstances of that municipality.

(d) Municipalities zoning for inclusionary development shall require low and moderate income housing units to be built in accordance with the following schedule:

| Minimum Percentage of Low and Moderate Income Units Completed | Percentage of Market Housing Units Completed |
|---|--|
| 0 | 25 |
| 10 | 25 + 1 unit |
| 50 | 50 |
| 75 | 75 |
| 100 | <u>90</u> |
| | <u>100</u> |

(e) A newly constructed unit is considered complete when the certificate of occupancy is issued.

(f) The Council encourages a design of inclusionary developments that integrates the low and moderate income units with the market units.

Amended by R.1994 d.563, effective November 7, 1994.
See: 26 N.J.R. 2514(a), 26 N.J.R. 4349(b).
Amended by R.1998 d.21, effective January 5, 1998.
See: 29 N.J.R. 3665(a), 30 N.J.R. 194(b).
Inserted (e) and renumbered (e) as (f).

Case Notes

Market demand for particular type of housing must be considered in determining whether municipality has provided constitutionally-mandated "realistic" likelihood of production of affordable housing. Toll Bros., Inc. v. Township of West Windsor, 303 N.J.Super. 518, 697 A.2d 201 (L. 1997).

Settlement of *Mount Laurel* litigation which required developer to construct ten percent of all units to be affordable units, to pay \$800,000 to municipality, and to construct affordable units within specific period of time irrespective of when construction of market-rate units was commenced was fair and reasonable. *East/West Venture v. Borough of Fort Lee*, 286 N.J.Super. 311, 669 A.2d 260 (A.D.1996).

5:93-5.7 Regional contribution agreements (RCAs)

A municipality may address its housing obligation by entering into an RCA in accordance with N.J.A.C. 5:93-6.

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

5:93-5.8 Alternative living arrangements

(a) Alternative living arrangements may be used to address a municipal housing obligation by entering into an agreement for the location of such a facility with the provider of the facility or by granting preliminary approval to a developer of an alternative living arrangement.

(b) The unit of credit for an alternative living arrangement shall be the bedroom.

(c) Alternative living arrangements 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.

(d) Controls on affordability on alternative living arrangements 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.

(e) Transitional facilities for the homeless shall not be dormitories and shall have separate bedrooms; those that do not shall have one year to complete the necessary rehabilitation to create separate bedrooms.

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 (c) substituted "age restricted" for "reserved for senior citizens"; inserted (e).

Case Notes

When evidence at fairness hearing on proposed settlement in *Mount Laurel* litigation involving conditions reasonably calculated to result in construction of municipality's fair share of affordable housing shows that proposed settlement satisfies criteria established by Council on Affordable Housing, settlement is entitled to preliminary approval. *Livingston Builders, Inc. v. Township of Livingston*, 707 A.2d 186, 309 N.J.Super. 370.

5:93-5.9 Accessory apartments

(a) Up to 10 accessory apartments may be used to address a municipal housing obligation. A municipality using an accessory apartment program shall:

1. Demonstrate that the housing stock lends itself to accessory apartments. The Council will favor a large (measured in square feet), older housing stock;

2. Provide at least \$10,000 per unit to subsidize the creation of the accessory apartment;

3. Demonstrate that rents of accessory apartments will average 57.5 percent of median income, including utilities. The rent shall be based on the number of bedrooms in accordance with N.J.A.C. 5:93-7.4;

4. Demonstrate that accessory apartments will be affirmatively marketed, in accordance with N.J.A.C. 5:93-11; and

5. Designate an agency to administer the program.

(b) Accessory apartments shall be exempt from Council bedroom mix requirements (N.J.A.C. 5:93-7.3).

(c) Accessory apartments which have been constructed prior to the municipal adoption of a municipal accessory apartment ordinance or are otherwise illegal may be eligible to address a fair share obligation if a municipality addresses the criteria listed in (a) above and (e) below except that no municipal subsidy shall be required. In addition, the occupant's income must be below 80 percent of median income and the rent must be a Council permitted rent.

(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.