

Example: If the municipal housing element and fair share plan that received substantive certification designated 100 units to be constructed in the municipality and another 75 units to be transferred to a receiving municipality via an RCA, the reduction shall be based on the percentage of the 100 units that were to be constructed within the municipality that received substantive certification.

(b) The reduction in (a) above shall only be applied to the inclusionary component of the 1987-1999 calculated need, as determined by the Council. This reduction shall be applied to the remaining inclusionary component after the Council has accepted all other reductions and credits (including any rental bonus).

Example: A municipality has a 1987-1999 precertified need of 200. It had a 1987-1993 inclusionary component of 100. All 100 new units were actually constructed or received building permits within the municipality. The reduction for substantial compliance is 20 percent. The remaining calculated need is 100. However, the rehabilitation component is 20, leaving an inclusionary component of 80. The 20 percent reduction is applied to the 80 remaining new units, leaving an inclusionary component of 64.

New Rule, R.1994 d.563, effective November 7, 1994.

See: 26 N.J.R. 2514(a), 26 N.J.R. 4349(b).

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

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

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

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

Substituted "RCA" for "regional contract agreement".

## SUBCHAPTER 4. MUNICIPAL ADJUSTMENTS

### 5:93-4.1 Purpose and background

(a) Subchapters 2 and 3 delineate the criteria for determining the municipal housing obligation. However, there may be instances where a municipality can exhaust an entire resource (land, water or sewer) and still not be able to provide a realistic opportunity for addressing the need for low and moderate income housing as determined by the Council. This subchapter outlines standards and procedures for municipalities to demonstrate that the municipal response to its housing obligation is limited by the lack of land, water or sewer. The procedures in this subchapter shall not be used to reduce or defer the rehabilitation component.

(b) Where a municipality attempts to demonstrate that it does not have the capacity to address the housing obligation calculated by the Council, the municipality shall identify sites that are realistic for inclusionary development in order to calculate the realistic development potential (RDP) of the community, in accordance with N.J.A.C. 5:93-4.2. Where the RDP is less than the, precertified need minus the rehabilitation component the municipality shall provide a

response toward the obligation not addressed by the RDP. Examples of such a requirement include, but are not necessarily limited to, a redevelopment ordinance, an ordinance permitting apartments in developed areas of the municipality and a mandatory development fee ordinance.

(c) With the concept of RDP, the Council is recognizing that some sites are more realistic and/or appropriate than others for the location of inclusionary development. For example, some sites may lack infrastructure or be surrounded by incompatible land uses. However, these sites and others have the potential to develop or redevelop over time and, as such development takes place, the Council has determined that such sites shall contribute toward the housing obligation.

(d) A municipality seeking an adjustment due to available land capacity shall base the number of units that may be age restricted and the number of units that may be transferred via an RCA on the calculated need which is the RDP plus the rehabilitation component. If both an RCA and senior units are proposed, then the formula is based on the RDP and does not include the rehabilitation component. The RDP shall equal the calculation pursuant to N.J.A.C. 5:93-4.2 (f). If additional low and moderate income housing opportunities develop pursuant to N.J.A.C. 5:93-4.2(h) (describing the municipal response in addition to the RDP), the municipality may seek a plan amendment, pursuant to N.J.A.C. 5:91-13 to age restrict or transfer more units, based on a demonstrated increased RDP.

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

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

### 5:93-4.2 Lack of land

(a) Municipalities that request an adjustment due to available land capacity shall submit an existing land use map at an appropriate scale to display the land uses of each parcel within the municipality. Such a map shall display the following land uses: single family, two-to-four family, other multi-family, commercial, industrial, agricultural, parkland, other public uses, semipublic uses and vacant land.

(b) Municipalities that request an adjustment due to available land capacity shall submit an inventory of vacant parcels by lot and block that includes the acreage and owner of each lot.

(c) Municipalities shall exclude from the vacant land inventory:

1. Any land that is owned by a local government entity that, as of January 1, 1997, has adopted, prior to the filing of a petition for substantive certification, a resolution authorizing the execution of an agreement that such land shall be utilized for a public purpose other than housing; and

2. Any vacant contiguous parcels of land in private ownership of a size which would accommodate less than five dwelling units as per the COAH standard in (f) below;

i. In preparing a housing plan, a municipality may designate land in (c)2 above for affordable housing infill purposes, but is not required to do so.

(d) The Council shall review the existing land use map and inventory to determine which sites are most likely to develop for low and moderate income housing. All vacant sites shall initially be presumed to fall into this category. In addition, the Council may determine that other sites, that are devoted to a specific use which involves relatively low-density development would create an opportunity for affordable housing if inclusionary zoning was in place. Such sites include, but are not limited to: golf courses not owned by its members; farms in SDRP planning areas one, two and three; driving ranges; nurseries; and nonconforming uses. The Council may request a letter from the owner of sites that are not vacant indicating the site's availability for inclusionary development.

(e) Municipalities may present documentation that the Council shall use to eliminate a site or part of a site from the inventory of sites described in (d) above. Partial elimination of a site shall not necessarily eliminate an entire site as unsuitable. Municipalities may seek to eliminate sites from the inventory described in (d) using the criteria set forth in 1 through 6 below. Municipalities shall submit transparent overlays drawn to the same scale as the existing land use map depicting those sites which the municipality maintains are unsuitable for development.

1. Agricultural lands shall be excluded when the development rights to these lands have been purchased or restricted by covenant.

2. Environmentally sensitive lands shall be excluded as follows:

i. Within the areas of the State regulated by the Pinelands Commission, Division of Coastal Resources of the DEP and the Hackensack Meadowlands Development Commission of DCA, 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 New Jersey Freshwater Wetlands Maps, or when unavailable, the U.S. Fish and Wildlife Service National Wetlands Inventory; or as delineated on-site by the U.S. Army Corps of Engineers or DEP, 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 flood 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 rule 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.

3. Historic and architecturally important sites may be excluded as follows:

i. Historic and architecturally important sites shall be excluded if such sites were listed on the State Register of Historic Places in accordance with N.J.A.C. 7:4 prior to the submission of the petition of substantive certification.

ii. Municipalities may apply to exempt a buffer area to protect sites listed on the State Register of Historic Places. The Council shall forward such request to the Office of New Jersey Heritage for a recommendation pertaining to the appropriateness and size of a buffer.

iii. Upon receipt of the Office of New Jersey Heritage's recommendation, the Council shall determine if any part of a site should be eliminated from the inventory described in (d) above.

iv. Within historic districts, a municipality may regulate low and moderate income housing to the same extent it regulates all other development.

**4. Active recreational lands may be excluded as follows:**

i. 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. However, all sites designated for active recreation must be designated for recreational purposes in the municipal master plan. 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 rules 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 when such lands are precluded from development at the time of substantive certification. Municipalities shall submit appropriate documentation demonstrating that such active recreational 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.

ii. Sites designated for active recreation must be purchased and limited to active recreational purposes within one year of substantive certification. Sites that are not purchased and limited to active recreational purposes shall, if determined necessary by the Council, be zoned to permit inclusionary development.

**5. Conservation, parklands and open space lands may be excluded as follows:**

i. Any land designated on a master plan of a municipality as being dedicated or which is dedicated by easement or otherwise for purposes of conservation, parklands or open space and which is owned, leased, licensed or in any other manner operated by a county, municipality or tax-exempt, nonprofit organization including a local board of education or by more than one municipality, by joint agreement pursuant to P.L. 1964, c.185 (N.J.S.A. 40:61-35.1 et seq.), for so long as the entity maintains such ownership, lease, license or operational control of such land.

ii. If less than three percent of the municipality's total land area is designated for conservation, parklands or open space, the municipality may reserve up to three percent of its total land area for such purposes. However, the acquisition of such sites must be initiated by the municipality within one year of substantive certification. Sites that are not purchased and limited to conservation, parklands or open space within that time-frame shall, if determined necessary by the Council, be zoned to permit inclusionary development.

iii. If sites designated for conservation, parklands or open space no longer serve those purposes and subse-

quently become available for residential or nonresidential development, these sites shall have an affordable housing obligation, if determined necessary by the Council.

6. Individual sites that the Council determines are not suitable for low and moderate income housing may also be eliminated from the inventory described in (d) above.

(f) The Council shall consider sites, or parts thereof, not specifically eliminated from the inventory described in (d) above, for inclusionary development. The Council shall consider the character of the area surrounding each site and the need to provide housing for low and moderate income households in establishing densities and set-asides for each site, or part thereof, remaining in the inventory. The minimum presumptive density shall be six units per acre and the maximum presumptive set-aside shall be 20 percent. The density and set-aside of each site shall be summed to determine the RDP of each municipality. Example: Low-mod Borough has three suitable sites. The sites are 10 acres, five acres and one acre. The larger sites may accommodate eight units/acre. The one acre site may accommodate six units/acre. All sites are assigned a 20 percent set-aside. The RDP equals 25 low and moderate income units.

$$\begin{array}{r}
 10 \text{ acres} \times 8 \text{ units/acre} \times .2 = 16 \\
 5 \text{ acres} \times 8 \text{ units/acre} \times .2 = 8 \\
 1 \text{ acre} \times 6 \text{ units/acre} \times .2 + \underline{1} \\
 \hline
 25
 \end{array}$$

A municipality that received an adjustment due to lack of vacant land in addressing its 1987-1993 need obligation shall be presumed to have addressed its RDP, provided the municipality continues to implement the terms of its previous substantive certification.

(g) The municipality may address its RDP through any activity approved by the Council, pursuant to N.J.A.C. 5:93-5. The municipality need not incorporate into its housing element and fair share plan all sites used to calculate the RDP if the municipality can devise an acceptable means of addressing its RDP. The RDP shall not vary with the strategy and implementation techniques employed by the municipality.

(h) If the RDP described in (f) above is less than the precredited need minus the rehabilitation component, the Council shall review the existing municipal land use map for areas that may develop or redevelop. Examples of such areas include, but are not limited to: a private club owned by its members; publicly owned land; downtown mixed use areas; high density residential areas surrounding the downtown; areas with a large aging housing stock appropriate for accessory apartments; and properties that may be subdivided and support additional development. After such an analysis, the Council may require at least any combination of the following in an effort to address the housing obligation:

1. Zoning amendments that permit apartments or accessory apartments;

2. Overlay zoning requiring inclusionary development or the imposition of a development fee consistent with N.J.A.C. 5:93-8; in approving an overlay zone, the Council may allow the existing use to continue and expand as a conforming use, but provide that where the prior use on the site is changed, the site shall produce low and moderate income housing or a development fee; or

3. Zoning amendments that impose a development fee consistent with N.J.A.C. 5:93-8.

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.1996 d.238, effective May 20, 1996.

See: 28 N.J.R. 221(a), 28 N.J.R. 2595(a).

In (d)4 specified "active" recreational lands and in (d)5 provided for exclusion of conservation, parklands and open space lands.

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

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

Inserted (c) and renumbered (c) through (g) as (d) through (h).

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

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

In (e), inserted "in 1 through 6" in the third sentence of the introductory paragraph; in (e)3, substituted "excluded" for "included" in the introductory paragraph, inserted a new i, and recodified existing i to iii as ii to iv.

### 5:93-4.3 Lack of water and sewer

(a) When a community has sufficient land, but insufficient water and/or sewer to support inclusionary development, the Council shall review each possible site for inclusionary development to determine if it is realistic for the site to receive the required water and/or sewer during the period of substantive certification. The Council shall require sufficient information to determine the site's prospects of receiving infrastructure, and the site's prospects of inclusion in an areawide water quality management plan amendment, developed in accordance with the rules of the DEP. If the site had been zoned for inclusionary development, the Council shall consider how long the site had been zoned and if the developer had filed a development application.

(b) If the Council determines that a site may receive water and/or sewer during the period of substantive certification, it shall require the site to be zoned for inclusionary development, or, if the site had already been zoned for inclusionary development, it shall require the continuation of that zoning. If the Council determines that a site may not receive water and/or sewer during the period of substantive certification, the Council shall not require inclusionary zoning, but may require overlay zoning requiring inclusionary development (if water and sewer become available) and/or the imposition of a development fee consistent with N.J.A.C. 5:93-8.

(c) The lack of adequate capacity, in and of itself, shall constitute a durational adjustment of the municipal housing obligation. The requirement to address the municipal housing obligation shall be deferred until adequate water and/or sewer are made available. In order to provide water and/or sewer on sites the Council determines are realistic for inclusionary development, municipalities shall adhere to the following:

1. Notwithstanding the lack of adequate water and/or sewer at the time a municipality petitions for substantive certification, the municipality shall reserve and set aside new water and/or sewer capacity, when it becomes available, for low and moderate income housing, on a priority basis;

2. Municipal officials shall endorse all applications to the DEP or its agent to provide water and/or sewer capacity. Such endorsements shall be simultaneously submitted to the Council.

3. Where the DEP 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; and

4. Where a municipality has designated sites for low and moderate income housing that lack adequate water and/or sewer and where the DEP or its designated agent approves a proposal to provide water and/or sewer 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 DEP or its agent. The Council may waive these requirements when it determines that the municipality has a plan that will provide water and/or sewer to sufficient sites to address the municipal housing obligation within the substantive certification period.

(d) Municipalities may demonstrate that the cost of providing water and/or sewer to realistic sites identified in (a) and (b) is prohibitive by completing "The Costs of Providing Infrastructure" application provided by the Council (see Appendix D, incorporated herein by references) and submit it to the Council for its review. The Council shall forward "The Costs of Providing Infrastructure" application to the DCA 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 water and/or sewer to inclusionary sites. Where the Council determines the cost associated with providing water and/or sewer to inclusionary sites is prohibitive, it shall limit the municipality's fiscal responsibility of providing water and/or sewer. However, notwithstanding any limits placed on the municipality's fiscal responsibility to provide water and/or sewer, the Council may require the municipality to designate and zone appropriate sites to accommodate the municipal housing obligation or to adopt other approaches consistent with N.J.A.C. 5:93-4.2(h). The municipality shall also adhere to the requirements outlined in (c)1 to 4 above.