

CHAPTER 94

SUBSTANTIVE RULES OF THE NEW JERSEY COUNCIL ON AFFORDABLE HOUSING FOR THE PERIOD BEGINNING DECEMBER 20, 2004

Authority

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

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SUBCHAPTER 1. GENERAL PROVISIONS

5:94-1.1 Introduction

(a) The New Jersey Supreme Court stated in *Mount Laurel II* that, "The lessons of history are clear, even if

rarely learned. One of those lessons is that unplanned growth has a price. . . .” Further, the Court stated that, “Communities that are growing and creating jobs have a responsibility to house the poor who will arrive in these locations in pursuit of jobs.” The Court wanted municipalities to depend on long range land use planning rather than on purely economic forces to drive development.

(b) The Council’s third round rules in this chapter which implement a “growth share” approach to affordable housing represent a significant departure from the Council’s first and second round methodologies in that they link the actual production of affordable housing with municipal development and growth. The Council believes that this approach will hew more closely to the doctrinal underpinning of *Mount Laurel* in that municipalities will provide a realistic opportunity for construction of a fair share of low and moderate income housing based on sound land use and long range planning. These rules will harness future growth to produce affordable housing by deeming that all growth-related construction generates an obligation.

(c) Both the Court and the Legislature wanted to establish a system that would provide a realistic opportunity for housing, not litigation. As the Court stated in upholding the Fair Housing Act, “The legislative history of the Act makes it clear that it had two primary purposes: first, to bring an administrative agency into the field of lower income housing to satisfy the *Mount Laurel* obligation; second, to get the courts out of that field.” The Council’s “growth share” methodology allows each municipality to determine its capacity and desire for growth in a way that is consistent with the policies of the State Development and Redevelopment Plan; its *Mount Laurel* obligation arises as a share of that growth. These rules are, therefore, designed to be both more flexible and less negotiable.

(d) There are three components to the Third Round Methodology: the rehabilitation share, any remaining Prior Round obligation for the period 1987–1999, and the “growth share.” Growth share is generated by Statewide residential and non-residential growth during the period from 1999 through 2014, and delivered from January 1, 2004 to January 1, 2014. As a result, for every eight market-rate residential units constructed, the municipality shall be obligated to provide one unit that is affordable to households of low or moderate income. Job creation carries a responsibility to provide housing as well. For every 25 newly created jobs as measured by new or expanded non-residential construction within the municipality in accordance with Appendix E, the municipality shall be obligated to provide one unit that is affordable to households of low and moderate income. This method tightens the working definition of “realistic opportunity” to meet the constitutional obligation with not merely a good faith attempt, but with the actual provision of housing for low and moderate income households.

5:94-1.2 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 on December 20, 2004.”

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

(c) All municipalities within the jurisdiction of the Council are subject to evaluation in accordance with the provisions of this chapter.

(d) For a municipality’s 1999–2014 rehabilitation share, the remaining balance of the prior rounds portion of any affordable housing obligation assigned by the Council for the 1987 through 1999 cumulative period, and the growth share obligation from 1999 through 2014, the following shall apply:

1. A municipality’s rehabilitation share as of April 1, 2000, based on the 2000 census, shall be governed by the provisions of this chapter.

2. A municipality’s remaining balance of the prior rounds portion of any affordable housing obligation previously assigned by the Council for the 1987 through 1999 cumulative period shall be governed by the provisions of N.J.A.C. 5:93. However, municipal minimum subsidy amounts for accessory apartments, buy-down units, and regional contribution agreements shall be governed by the provisions of this chapter if:
 - i. The municipality has not petitioned the Council for second round (1993–1999) substantive certification or interim substantive certification; or
 - ii. The municipality is including one of these housing activities for the first time to address a 1987–1999 affordable housing obligation.

3. The growth share obligation from 1999 through 2014 shall be governed by the provisions of this chapter.

5:94-1.3 Severability clause

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

5:94-1.4 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 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.).

“Affordable” means a sales price or rent within the means of a low or moderate income household as defined in N.J.A.C. 5:94-7.

“Affordable housing development” means a development included in the Housing Element and Fair Share Plan, and includes, but is not limited to, an inclusionary development, a municipal construction project or a 100 percent affordable development.

“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.).

“Age-restricted housing” means housing designed to meet the needs of, and exclusively for, the residents of an age-restricted segment of the population where the head of the household is a minimum age of either 62 years, or 55 years and meets the provision of the 42 U.S.C. §§ 3601 et seq. The developer determines the minimum age as permitted under 42 U.S.C. §§ 3601 et seq.

“Alternative living arrangement” means a structure in which households live in distinct bedrooms, and may share kitchen and plumbing facilities, central heat and common areas as delineated in N.J.A.C. 5:94-4.8.

“Assisted living residence” means a facility licensed by the New Jersey Department of Health and Senior Services to provide apartment-style housing and congregate dining and to assure that assisted living services are available when needed for four or more adult persons unrelated to the proprietor. Apartment units offer, at a minimum, one unfurnished room, a private bathroom, a kitchenette and a lockable door on the unit entrance.

“Assisted living services” means a coordinated array of supportive personal and health services, available 24 hours per day. Assisted living promotes resident self-direction and participation in decisions that emphasize independence, individuality, privacy and dignity in a homelike surrounding.

“Buy-down” means paying down the cost of market-rate units and offering them in sound condition at affordable prices to low and moderate income households to address all or a portion of the municipal share of affordable housing.

“Congregate living arrangements” means residential housing that consists of private dwelling units with an individual

bathroom and an optional individual food preparation area, in addition to central dining facilities, and within which congregate housing supportive services such as meals, housekeeping, laundering, and personal care are provided.

“Conversion” means the conversion of existing commercial, industrial or residential structures for affordable housing purposes.

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

“Cross-acceptance” or “cross-acceptance process” means the process of comparing planning policies among government levels with the purpose of obtaining consistency between municipal, county, regional, and State plans and the State Development and Redevelopment Plan. This definition is in accord with and derived from the State Development and Redevelopment Plan.

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

“Deficient 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, roofing, plumbing (including wells), heating, electricity, sanitary plumbing (including septic systems), lead paint abatement and/or load bearing structural systems.

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

“Designated center” means a center that has been officially recognized as such by the State Planning Commission.

“Developer” means any person, partnership, association, company or corporation that is the legal or beneficial owner or owners of a lot or any land proposed to be included in a proposed development including the holder of an option to contract or purchase, or other person having an enforceable proprietary interest in such land.

“Development” means the division of a parcel of land into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any use or change in the use of any building or other structure, or of any mining, excavation or landfill, and any use or change in the use of any building or other structure, or land or extension of use of land, for which permission may be required pursuant to N.J.S.A. 40:55D-1 et seq.

“Development fee” means money paid by a developer for the improvement of property as permitted in N.J.A.C. 5:94-6.

"Elder cottage housing opportunities (ECHO) units" means modular, self-contained units erected on sites containing an existing dwelling. ECHO units are restricted to individuals aged 55 years or older and/or the disabled and the units must be moved to another site when the unit is vacated.

"Endorsed plan" means a municipal, county or regional plan which has been approved by the State Planning Commission for initial or advanced plan endorsement as a result of finding it consistent with the State Development and Redevelopment Plan, pursuant to N.J.A.C. 5:85-7. This definition is in accord with and derived from the State Development and Redevelopment Plan.

"Equalized assessed value" means the assessed value of a property divided by the current State equalization ratio for the municipality. Estimates at the time of building permit may be obtained by the tax assessor utilizing estimates for construction cost. Final equalized assessed value shall be determined at project completion by the municipal assessor.

"Fair share," for purposes of the period 1999-2014, means, in accordance with the provisions of N.J.A.C. 5:94-2, the sum of:

1. A municipality's 1999-2014 rehabilitation share;
2. The remaining balance of the prior rounds portion of any affordable housing obligation previously assigned by the Council for the 1987 through 1999 cumulative period and not addressed by the municipality; and
3. The growth share obligation.

"Fair share round" means any one of three periods in time during which the Council has established municipal obligations to provide a fair share of affordable housing. The first fair share round includes the period 1987 through 1993. The second fair share round includes the first fair share round and adds the period 1993 through 1999. The third fair share round includes the first and second fair share rounds and adds the period from 1999 through 2014 for which municipal affordable housing needs are estimated, projected, actualized and/or addressed.

"Fair Share Plan" means that plan that describes the projects, strategies and the funding sources, if applicable, by which a municipality proposes to address its affordable housing obligation as set forth in N.J.A.C. 5:94-2.4, and also includes the draft fair share ordinances necessary to implement that plan, and addresses the requirements of this chapter.

"Growth share" means the affordable housing obligation generated in each municipality by both residential and non-residential development from 2004 through 2014 and represented by a ratio of one affordable housing unit for every eight market-rate housing units constructed plus one affordable housing unit for every 25 newly created jobs as measured by new or expanded non-residential construction within the municipality in accordance with Appendix E pursuant to the methodology detailed in N.J.A.C. 5:94-2.

"Gut rehabilitation" means the same as "reconstruction."

"Household" means the person or persons occupying a housing unit.

"Housing Element" means that portion of a municipality's master plan, as required by N.J.S.A. 40:55D-28b(3), consisting of at least those items identified in N.J.S.A. 52:27D-310 and the supporting information pursuant to N.J.A.C. 5:94-2.2(b) when part of a petition for substantive certification.

"Housing region" means a geographic area, determined by the Council, of no less than two nor more than four contiguous, whole counties, which exhibits significant social, economic and income similarities and which constitutes, to the greatest extent practicable, a Primary Metropolitan Statistical Area (PMSA) as last defined by the United States Census Bureau.

"Housing unit" means a house, apartment, room or group of rooms occupied or intended to be occupied by a household living independently of other households. The term shall also mean and include a unit occupied or intended to be occupied by a household in an alternative living arrangement.

"Inclusionary development" means a housing development containing both affordable units and market-rate units. This term includes, but is not necessarily limited to: new construction, the conversion of a non-residential structure to residential and the creation of new affordable units through the reconstruction of a vacant residential structure.

"Judgment of compliance" means a determination issued by the Superior Court approving a municipality's plan to satisfy its fair share obligation.

"Low income" means 50 percent or less of the median gross household income for households of the same size within the housing region in which the household is located, based upon the U.S. Department of Housing and Urban Development's (HUD) Section 8 Income Limits (uncapped) averaged across counties for COAH's housing region.

"Low income housing" means housing affordable according to Federal Department of Housing and Urban Development or other recognized standards for home ownership and rental costs and 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.

"Market-rate units" means housing not restricted to low and moderate income households that may sell at any price determined by a willing seller and a willing buyer.

“Medicaid waiver” means a term used to designate a form of insurance payment for certain assisted living care, health and medical services paid through the Enhanced Community Options (ECO) waiver program implemented in response to the Omnibus Budget Reconciliation Act (OBRA) of 1981, Section 2176, Public Law 97-35. The New Jersey Department of Health and Senior Services licenses Medicaid providers of assisted living services and allocates Medicaid waivers to specific licensed assisted living residences.

“Moderate income” means more than 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 household is located, based upon the U.S. Department of Housing and Urban Development’s (HUD’s) Section 8 Income Limits (uncapped) averaged across counties for COAH’s housing regions.

“Moderate income housing” means housing affordable according to Federal Department of Housing and Urban Development or other recognized standards for home ownership and rental costs and occupied or reserved for occupancy by households with a gross household income equal to more than 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.

“Office of Smart Growth” means the Office in the Department of Community Affairs that staffs the State Planning Commission and provides planning and technical assistance as requested. This definition is in accord with and derived from the State Development and Redevelopment Plan.

“Order of repose” means the protection a municipality has from builder’s remedy lawsuits for a period of time from the entry of a judgment of compliance from the Superior Court. A judgment of compliance most usually results in an order of repose.

“Petition for substantive certification” means a request made by municipal resolution which a municipality files, or is deemed to have filed in accordance with N.J.A.C. 5:95, which engages the Council’s review process seeking a determination as to whether the Housing Element and Fair Share Plan of the municipality are consistent with the Act and compliant with rules promulgated by the Council.

“Plan endorsement,” “plan endorsement process” or “endorsement” means the process undertaken by a municipality, county or regional agency, counties and municipalities or any grouping thereof, to petition the State Planning Commission for a determination of consistency of the submitted planning documents with the State Development and Redevelopment Plan. This definition is in accord with and derived from the State Development and Redevelopment Plan.

“Planning area” means an area defined by a set of common criteria that 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.

“Plan Projections” mean municipal population, household and employment growth projections for 2015 as adopted by the State Planning Commission and identified as such in the most recent State Development and Redevelopment Plan after December 20, 2004.

“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. 5:95-11.4 in at least one of four housing categories established in N.J.A.C. 5:95-11.4(b).

“Realistic opportunity” means a reasonable likelihood that the affordable housing in a municipality’s Housing Element and Fair Share Plan will actually be constructed or provided during the 10-year period of certification based upon a careful analysis of the elements in the municipality’s plan, including the financial feasibility as set forth in N.J.A.C. 5:94-4.2(a) and the suitability of specific sites as set forth in N.J.A.C. 5:94-4.5.

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

“Reconstruction” means a project to render an unoccupied, deficient housing unit habitable, where the extent and nature of the work is such that the work area cannot be occupied while the work is in progress; where a new certificate of occupancy is required before the work area can be reoccupied; and where the cost exceeds 50 percent of the physical value of the unit or structure, or where the electrical, plumbing and heating systems of the unit or structure must be totally replaced to meet municipal or other applicable housing code standards.

“Regional asset limit” means the maximum housing value affordable to a four-person household with an income at or above 80 percent of the regional median as defined by the Council’s adopted Regional Income Limits as published annually by the Council.

“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 growth share obligation to another municipality within its housing region by means of a contractual agreement into which two municipalities voluntarily enter. Housing units developed pursuant to an RCA shall be included in the total number of affordable units developed in the sending municipality.

"Rehabilitation" means the renovation of a deficient housing unit, which is occupied by a low or moderate income household, to meet municipal or other applicable housing code standards as further described in N.J.A.C. 5:94-4.3.

"Rehabilitation share" means the number of deficient housing units occupied by low and moderate income households within a municipality, established in accordance with the provisions of N.J.A.C. 5:94-2.1(b) that must be addressed in a Fair Share Plan.

"Section 8 income limits" means a schedule of income limits according to Federal Department of Housing and Urban Development standards 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 that transfers a portion of its growth 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" means the plan prepared and adopted by the State Planning Commission pursuant to the State Planning Act, P.L. 1985, c.398 (N.J.S.A. 52:18A-196 et seq.).

"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 run for a period of 10 years beginning on the date that a municipality files a Housing Element and Fair Share Plan with the Council in accordance with N.J.S.A. 52:27D-313, but shall not extend beyond a period of 10 years from December 20, 2005.

"Suitable site" means a site that has clear title and is free of encumbrances which preclude development of affordable housing; is adjacent to compatible land uses; has access to appropriate streets, water and sewer infrastructure; can be developed consistent with the Residential Site Improvement Standards and the rules or regulations of all agencies with jurisdiction over the site; is consistent with the Memorandum of Understanding (Appendix D) with the State Planning Commission; and is consistent with the site suitability criteria delineated in N.J.A.C. 5:94-4.5. A site may be deemed suitable although not currently zoned for affordable housing.

"Weatherization" means building insulation (for attic, exterior walls and crawl space), siding to improve energy efficiency, replacement storm windows, replacement storm doors, replacement windows and replacement doors, and is considered a major system for rehabilitation.

SUBCHAPTER 2. PREPARING A HOUSING ELEMENT AND DETERMINING MUNICIPAL FAIR SHARE OBLIGATION

5:94-2.1 General

(a) The need for affordable housing in the State, and in each of the State's six housing regions, is determined on a municipal basis as explained in Appendix A, incorporated herein by reference, and is the sum of:

1. Deficient housing units occupied by low and moderate income households which is referred to as rehabilitation share;
2. Remaining Prior Round (1987-1999) Obligation assigned to a municipality by the Council or the court for the period 1987 through 1999; and
3. The share of the affordable housing need generated by a municipality's actual growth (2004-2014) based upon the number of new housing units constructed and the number of new jobs created as a result of non-residential development.

(b) The rehabilitation share for affordable housing is the number of existing housing units as of April 1, 2000 that are both deficient and occupied by households of low or moderate income as determined through the methodology provided in Appendix A, or through a survey of the municipal housing stock conducted in accordance with the provisions of N.J.A.C. 5:93. Each municipality's rehabilitation share is calculated in Appendix C, incorporated herein by reference.

(c) Remaining Prior Round (1987-1999) Obligations from the first and second fair share rounds have been recalculated to include data from the 2000 Census and are displayed for each municipality in Appendix C.

(d) The "growth share" for the period January 1, 2004 through January 1, 2014 shall initially be calculated based on municipal growth projections pursuant to N.J.A.C. 5:94-2.2. Projections of population and employment growth shall be converted into projected growth share affordable housing obligations by applying a ratio of one affordable unit for every eight new market-rate residential units projected, plus one affordable unit for every 25 newly created jobs as measured by new or expanded non-residential construction within the municipality in accordance with Appendix E, as projected in the municipality pursuant to N.J.A.C. 5:94-2.4. The growth share projections shall be converted into actual growth share obligation when market-rate units and newly constructed and expanded non-residential developments receive permanent certificates of occupancy, pursuant to N.J.A.C. 5:94-2.5. Although the overall Statewide need calculations are figured from the last year of the prior round (1999) to the last year of the new round (2014), the municipality's portion of the Statewide need is compressed into a delivery period that runs from January 1, 2004 to January 1, 2014.

2. A municipality that received a durational adjustment pursuant to N.J.A.C. 5:93-4.3 or by Court order may continue to rely on the adjustment to address its 1987-1999 cumulative fair share obligation provided it has implemented all the terms of the substantive certification granted by the Council or the Judgment of compliance ordered by the Court. If the conditions that warranted the imposition of the durational adjustment still exist, all components of said certification or judgment that are designed to assure affordable housing development on the site(s) affected by the durational adjustment shall continue in full force and any affordable housing units created hereunder shall be deemed to be credited toward the municipality's second round obligation until such time as the municipality has provided for its entire second round obligation associated with the affected site(s) prior to being used to address the growth share obligation.

SUBCHAPTER 4. PREPARING A FAIR SHARE PLAN

5:94-4.1 Overview of a Fair Share Plan

(a) A municipality shall develop a Fair Share Plan that meets the requirements of this subchapter to address the municipality's total 1987-2014 fair share obligation, including implementing ordinances designed to ensure that the fair share of affordable housing for the 1987-2014 period is met. The Fair Share Plan shall include the estimated growth share need based upon residential and non-residential development patterns that are likely to occur that are outlined in the Housing Element pursuant to N.J.A.C. 5:94-2.

(b) The Fair Share Plan shall be adopted by the Planning Board and endorsed by the governing body prior to the municipal petition for substantive certification.

(c) The Fair Share Plan shall include a strategy for ensuring the development of one affordable housing unit for every eight market-rate units of new construction and/or one affordable unit for every 25 newly created jobs as measured by new or expanded non-residential construction within the municipality in accordance with Appendix E, pursuant to N.J.A.C. 5:94-2.4.

(d) The Fair Share Plan shall be reviewed by the Council to verify the construction or provision of affordable housing in proportion to the actual residential growth and employment growth at the end of three years, five years and eight years after the date on which the municipality had filed for substantive certification in accordance with N.J.A.C. 5:94-9 and 5:95-9, and the municipality shall be directed to adjust its plan as necessary.

5:94-4.2 Fair Share Plan

(a) A Fair Share Plan describes the projects, strategies and funding sources, if applicable, that will be utilized to address a municipality's affordable housing obligation as set forth in N.J.A.C. 5:94-2.4. The Fair Share Plan shall include at least the following requirements:

1. Descriptions of the operational and financial feasibility of any specific project(s) intended to provide for the total 1987-2014 municipal fair share of affordable housing, which shall include rehabilitation programs, municipally sponsored construction projects, regional contribution agreements, alternative living arrangements, buy-down programs, accessory apartments, municipally sponsored rental programs, ECHO programs, assisted living residences, affordable housing partnership programs and expanded crediting opportunities. The municipality shall also submit a municipal resolution appropriating funds from general revenue or a resolution of intent to bond in the event there is a shortfall of funding from the initial identified source(s). Zoning pursuant to N.J.A.C. 5:94-4.4 shall be exempt from this requirement;

2. Draft fair share ordinances necessary for the implementation of the programs and projects designed to satisfy the fair share need. The governing body shall formally adopt the final version of the fair share ordinances within 45 days of the Council's grant of substantive certification; and

3. An accounting of any development fees collected and the amount and purpose for which any fees have been expended current to the date of petition.

(b) The Fair Share Plan may include the collection of development fees pursuant to N.J.A.C. 5:94-6. Any municipality that includes the collection of development fees in its Fair Share Plan shall prepare a plan to spend development fees pursuant to N.J.A.C. 5:94-6.5.

(c) The Fair Share Plan shall include a plan for the rehabilitation component pursuant to N.J.A.C. 5:94-4.3, and may include any of the new construction options outlined in N.J.A.C. 5:94-4.

5:94-4.3 Rehabilitation

(a) The estimate of each municipality's substandard units occupied by low and moderate income households as determined through the methodology provided in Appendix A incorporated herein by reference is provided in Appendix C. This rehabilitation number may also be provided through a survey of the municipal housing stock conducted in accordance with the provisions of N.J.A.C. 5:93. Where the municipality or objector performs the structural conditions survey, the Council shall review the results of the data collected and shall modify the rehabilitation share number if it determines a modification is warranted.

(b) The purpose of a rehabilitation program is to renovate deficient housing units as defined in N.J.A.C. 5:94-1.4 that are occupied by low and moderate income households. Upon rehabilitation, housing deficiencies shall be corrected and the unit shall comply with the New Jersey State Housing Code, N.J.A.C. 5:28. For construction projects that require the issuance of a construction permit pursuant to the Uniform Construction Code, the unit must also comply with the requirements of the Rehabilitation Subcode (N.J.A.C. 5:23-6). In these instances, the more restrictive requirements of the New Jersey State Housing Code or the Rehabilitation Subcode shall apply. For projects that require construction permits, the rehabilitated unit shall be considered complete at the date of final approval pursuant to the Uniform Construction Code.

(c) The municipality shall demonstrate the capability to administer the program. The municipality shall either designate an experienced employee to administer the program or enter into an agreement for a governmental agency or private consultant to administer all or some of the program.

(d) Rental units shall not be excluded from a municipal rehabilitation program.

(e) The Council shall require 10-year controls on affordability on both owner-occupied units and rental units. On owner-occupied units, the controls on affordability may be in the form of a lien filed with the appropriate property's deed. For rental units, the controls on affordability shall be in the form of a deed restriction and may also include a lien. If a unit is vacant upon initial rental subsequent to rehabilitation, or if a renter-occupied unit is re-rented prior to the end of controls on affordability, the deed restriction shall require the unit to be rented to a low or moderate income household at an affordable price and affirmatively marketed pursuant to the N.J.A.C. 5:94-7. Rents in rehabilitated units may increase annually based on the standards in N.J.A.C. 5:94-7.

(f) Municipal rehabilitation investment shall average at least \$10,000 per unit, of which no more than \$2,000 may be used toward administration costs. The municipality shall submit documentation demonstrating funding source(s).

(g) Municipalities shall provide sufficient dollars to fund no less than half of the municipal rehabilitation component by the fifth year anniversary review pursuant to N.J.A.C. 5:95-9. At the time of the fifth year anniversary review, the Council may require the municipality to enact its municipal resolution appropriating funds from general revenue or its resolution of intent to bond, as provided by the municipality pursuant to N.J.A.C. 5:94-4.2(u)1, in the event there is a shortfall.

(h) Financing of rehabilitation programs shall be structured to encourage rehabilitation and continued occupancy. Low interest rates and forgivable loans are encouraged. Leveraging of private financing is also encouraged if the result is low interest loans that encourage rehabilitation. If an owner-occupied housing unit is sold prior to the end of the controls on affordability, at least part of the loan shall be recaptured and used to rehabilitate another housing unit, unless the unit is sold to a low or moderate income household at an affordable price pursuant to N.J.A.C. 5:94-7.

(i) If the municipality structures a loan program to recapture funds, recaptured funds shall be used for another low and moderate income housing purpose or to repay a municipal bond issued to finance a low and moderate income housing activity.

(j) The municipality shall submit a rehabilitation manual to the Council that complies with the requirements of this section and summarizes the administration of the rehabilitation program, including the affirmative marketing plan.

(k) The administrator of the rehabilitation program shall maintain files on each program applicant. The files may be used in responding to monitoring requests and periodic programmatic and fiscal audits conducted by the Council, and to protect the municipality against charges of irregularity. The files shall include:

1. The name of each applicant;
2. If the applicant is not approved, the reasons for the disapproval; and
3. If the applicant is approved:
 - i. Proof of income eligibility (Federal tax return);
 - ii. The initial inspection by the building inspector;
 - iii. Bids by contractors;
 - iv. The final contract to do the work;
 - v. Progress reports;
 - vi. A copy of the final inspection; and
 - vii. The lien and/or deed on the property.

(l) Municipalities that adopt a rehabilitation program shall complete monitoring reports in accordance with N.J.A.C. 5:94-9.2. Failure to submit monitoring reports to the Council or respond to direction designed to increase rehabilitation activity may result in further Council action.

(m) A municipality receiving State aid pursuant to P.L. 1978, c.14 (N.J.S.A. 52:27D-178 et seq.) may seek a waiver from addressing its entire rehabilitation share through rehabilitation in one 10-year period of substantive certification. A municipality seeking such a waiver shall demonstrate that it is not feasible to meet the entire need through rehabilitation in 10 years.

(n) If a municipality received a rehabilitation credit for the rehabilitation of a unit prior to April 1, 2000, as part of a previous round Fair Share Plan, and the controls on affordability have expired, but that same unit currently meets the criteria for rehabilitation set forth in this section, including rehabilitation of a major system, the municipality may earn another rehabilitation credit if it brings the unit back to code standard and new controls on affordability are put in place pursuant to N.J.A.C. 5:94-4.3(e).

(o) A municipality can claim a rehabilitation credit if it renovates a deed restricted affordable unit that was built between 1987 and 1993 for which it claimed a new construction credit in its first round plan. If rehabilitation of a major system is necessary and the unit meets the rehabilitation criteria, then that rehabilitation is consistent with the Council's regulations and shall receive a rehabilitation credit.

(b) Notwithstanding the provisions of (a) above, pursuant to N.J.S.A. 52:27-311(g), a municipality that has received substantive certification for the 1987-1999 period and which has effected the construction of its entire affordable housing obligation of that period may amend its Housing Element or zoning ordinances with respect to sites being used to address its 1987-1999 affordable housing obligation. Prior to amending the Housing Element or zoning ordinances, the municipality shall obtain a determination from the Council as to whether the municipality has effected construction of its entire affordable housing obligation. To make such a determination, the Council shall require the municipality to submit the filed deeds with the appropriate deed restrictions, certificates of occupancy for units constructed and evidence of the transfer of RCA funds, if applicable.

5:94-4.18 Low/moderate income split of the growth share obligation

(a) With the exception of affordable housing developments constructed under the low income tax credit regulations pursuant to Internal Revenue Code Section 42h, at least 50 percent of a municipality's growth share obligation shall be affordable to low income households.

(b) An odd number shall always be split in favor of the low income unit.

5:94-4.19 Age-restricted housing

Not more than 50 percent of the growth share obligation addressed within a municipality may be met with age-restricted housing in the Fair Share Plan. In no event shall a municipality receive credit for age-restricted units in excess of 50 percent of the municipality's actual growth share obligation addressed within a municipality at the end of the certification period.

5:94-4.20 Rental housing

(a) In addressing the housing need, the Fair Share Plan shall create a realistic opportunity to construct rental units. At least 25 percent of a municipality's growth share obligation shall be addressed with rental housing. This rental obligation shall be provided in proportion to the growth share obligation generated by the actual growth as monitored at the third, fifth and eighth year anniversary pursuant to N.J.A.C. 5:95-9.

(b) Any rental obligation pursuant to N.J.A.C. 5:93-5.15 that was a condition of substantive certification in addressing the 1987-1999 municipal fair share shall be considered as an ongoing obligation in addressing the total 1987-2014 housing need pursuant to this chapter.

(c) The plan for a rental housing component 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. 5:94-4.8;

2. A municipally sponsored, for-profit or non-profit sponsored affordable rental development;

3. Agreements with developers for the municipality to purchase affordable units and maintain them as rental units;

4. The creation of accessory apartments pursuant to N.J.A.C. 5:94-4.9;

5. Municipally sponsored rental program units pursuant to N.J.A.C. 5:94-4.11;

6. Assisted living residences pursuant to N.J.A.C. 5:94-4.13;

7. Density bonuses that encourage the construction of affordable rental housing; and

8. Agreements with developers to construct and administer affordable rental units as part of an inclusionary development.

(d) A municipality shall receive two units of credit for each affordable rental unit provided in the municipality and available to the general public in excess of the rental obligation pursuant to (a) above. No rental bonuses shall be granted for rental units that address the municipality's rental obligation.

(e) Municipalities that choose to transfer the rental obligation via an RCA shall do so by creating new rental units in the receiving municipality. Reconstruction of units as defined in N.J.A.C. 5:94-1.4 may address the rental component. Municipalities that transfer the rental obligation shall receive a one-unit credit for each rental unit transferred.

(f) Not more than 50 percent of the rental housing obligation addressed within a municipality may be met with age-restricted housing in the Fair Share Plan.

5:94-4.21 Accessible townhouse units

Ten percent of all affordable townhouse units proposed in a Fair Share Plan shall be accessible in accordance with the accessibility requirements set forth at N.J.A.C. 5:23-7.5(b) and (c) in the Barrier Free Subcode, N.J.A.C. 5:23-7. Townhouse units in projects that have received development approvals up to June 20, 2005 shall be exempt from this requirement.

5:94-4.22 Bonus credit for very low income units

Notwithstanding the provisions of N.J.A.C. 5:94-4.20(d), a municipality shall receive two units of credit for affordable units available to households of the general public earning 30 percent or less of median income by region.

5:94-4.23 Credits

In no event shall a municipality receive more than two units of credit for one unit.

SUBCHAPTER 5. REGIONAL CONTRIBUTION AGREEMENTS

5:94-5.1 General provisions

(a) Municipalities may propose the transfer of up to 50 percent of their growth share obligation based on the procedures in N.J.A.C. 5:95-11.

(b) 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. A municipality may not transfer any portion of its rehabilitation share.

(c) The Council shall maintain current lists of municipalities which have notified it of an intent to enter into regional contribution agreements (RCAs) as receiving municipalities and shall provide copies of such lists to potential sending municipalities as requested. Receiving municipalities with a history of demonstrated experience in housing production may request RCA recipient certification in accordance with N.J.A.C. 5:95-11.4.

5:94-5.2 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) Not more than 50 percent of the units transferred via an RCA may be met with age-restricted units in the receiving municipality's project plan.

(c) 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. 5:94-4. Rental obligations required by N.J.A.C. 5:94-4.20(a) or portions thereof that are transferred to a receiving municipality via an RCA must either create new rental housing units or meet the criteria for reconstruction as defined in N.J.A.C. 5:94-1.4.

(d) All RCAs shall specify payment schedules that conform to a construction or rehabilitation schedule, which relate to the receiving municipality's ability to deliver housing units in a timely fashion, and which take place within the period of substantive certification.

(e) 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. 5:94-5.4(a), or there are funds in excess of the amount necessary to implement the RCA, which includes interest earned, the difference shall be used within the receiving municipality to produce additional low and moderate income housing units or for capital expenditure benefiting low and moderate income households. 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 15 percent of the RCA principal shall be expended on administration in the receiving municipality. 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 15 percent, but the total amount permitted for the term of the contract, including any excess first year amount, shall not exceed 15 percent of the total amount of the principal.

5:94-5.3 Credits

(a) In no event shall a municipality receive credit for RCA units transferred in excess of 50 percent of the municipality's actual growth share obligation at the end of the certification period.

(b) No receiving municipality shall receive credit toward its fair share obligation for units provided pursuant to an RCA.

(c) No municipality shall receive credit for any units provided in the receiving municipality in excess of the units transferred pursuant to the RCA.

5:94-5.4 Amount and duration of contributions

(a) A sending municipality that petitions for substantive certification or amends a certified plan to include an RCA, shall transfer at least \$35,000 to a receiving municipality for each unit transferred as part of an RCA. This threshold has been established after consideration of:

1. The housing stock in New Jersey;
2. The average cost of an RCA since 1986;
3. The maximum subsidies available under the Neighborhood Preservation Balanced Housing Program established pursuant to N.J.S.A. 52:27D-320; and
4. The average internal subsidization required for a developer to provide each affordable unit within an inclusionary development.

(b) The minimum transfer amount shall be reconsidered by the Council on a bi-annual basis to determine the continued reasonableness of the amount.

(c) An RCA may be entered into at any time during the sending municipality's period of substantive certification. However, all RCA funds must be transferred from the sending municipality prior to the expiration of the sending municipality's substantive certification.

(d) All RCAs that include a scattered site rehabilitation program shall be structured so that the final transfer payment occurs at least one year prior to the end of the sending municipality's period of substantive certification.

(e) For RCA scattered site rehabilitation programs, the cumulative cost of major systems shall be no less than \$12,000 per unit. After this \$12,000 threshold on major systems is met, additional repairs may be undertaken.

(f) For a sending municipality that is transferring a rental obligation, the per unit transfer cost shall be substantially greater than \$35,000. The cost shall be negotiated between the sending municipality and the receiving municipality and shall include consideration of:

1. The cost of providing new or reconstructed rental housing in New Jersey;
2. The other subsidies committed to financing the new or reconstruction rental project; and
3. The RCA amount needed to complete the financing package for the new or reconstruction project.

(g) In the case of a transfer of the rental obligation, a payment schedule reflective of the timing of the receiving municipality's rental project is required.

5:94-5.5 Monitoring and enforcement

(a) All RCA contracts shall require receiving municipalities to file monitoring reports with the Council and with the Agency setting forth fiscal accountability and the progress in implementing the project to be produced under the RCA. This report shall be in such form as the Council and the Agency may from time to time require.

(b) The Council shall take such actions as may be necessary to enforce an RCA with respect to the timely implementation of a project by the receiving municipality.

SUBCHAPTER 6. DEVELOPMENT FEES

5:94-6.1 Purpose

(a) Development fees are intended to better enable municipalities to meet the low and moderate income housing needs in their communities. The funds generated by the collection of development fees are to be applied directly toward implementation of a municipality's Fair Share Plan.

(b) The New Jersey Supreme Court, in *Holmdel Builders Association v. Holmdel Township*, 121 N.J. 550 (1990), determined that mandatory development fees are both statutorily and constitutionally permissible. The Court further anticipated that the Council would promulgate appropriate development fee rules specifying, among other things, the standards for these development fees.

(c) Except as otherwise provided in this chapter, a municipality may impose, collect and spend development fees through participation in the Council's substantive certification process or through a comprehensive review designed to achieve a judgment of compliance.

(d) The rules that follow shall govern those municipalities that petition for substantive certification and urban aid municipalities. The Council shall review development fee ordinances and plans to spend money upon the request of the court in an exclusionary zoning lawsuit.

5:94-6.2 Basic requirements

(a) Except as set forth in N.J.A.C. 5:94-6.3, the Council shall not review or approve any development fee ordinance unless the municipality has petitioned for substantive certification.

(b) No municipality, except urban aid municipalities complying with N.J.A.C. 5:94-6.3 or municipalities seeking to achieve or that have received a judgment of compliance, shall impose or collect development fees unless the municipality has petitioned the Council with an adopted Housing Element and Fair Share Plan and the Council has approved the municipality's development fee ordinance. Upon adoption of the development fee ordinance by the municipality's governing body, the ordinance shall be filed with the Council within seven days.

(c) No municipality under the Council's jurisdiction shall spend development fees unless the Council has approved a plan for spending such fees. With the exception provided for in N.J.A.C. 5:94-6.3, municipalities that have not received substantive certification or a judgment of compliance shall not spend development fees until they have received substantive certification or a judgment of compliance.

5:94-6.3 Urban aid municipalities

Municipalities that qualify for State aid pursuant to P.L. 1978, c.14 (N.J.S.A. 52:27D-178 et seq.) may impose, collect or spend development fees by filing a development fee ordinance and spending plan and requesting approval by the Council. Council approval of the municipal development fee ordinance shall allow the municipality to impose and collect development fees for a period specified by the Council, not to exceed 10 years or such longer period as may be approved by the Council, commencing with the Council's approval of the development fee ordinance. Notwithstanding any other provision of this chapter, these municipalities shall have one year from the Council's approval of their develop-

ment fee ordinance to submit a plan for spending development fees. These municipalities may impose, collect and spend development fees without petitioning for substantive certification.

5:94-6.4 Development fee ordinance review

(a) The Council shall not review a development fee ordinance unless the municipality has submitted:

1. A copy of an adopted Housing Element that complies with the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.;
2. A copy of the proposed ordinance designed to collect development fees;
3. A description of any changes to the municipal zoning ordinance during the previous two years;
4. A request in the form of a resolution by the governing body for the Council to review the development fee ordinance;
5. If applicable, a copy of the compliance plan, implementation ordinances information regarding the period of time encompassed by the judgment of compliance and a request for review by the court if the municipality has received a court ordered judgment of compliance. The court shall indicate if the Council is to monitor the development fees;
6. A description of the types of developments that will be subject to fees; and
7. A description of the amount and nature of the fees imposed.

5:94-6.5 Content of a spending plan

(a) A plan to spend development fees and payments in lieu of constructing affordable units on site shall include the following:

1. A projection of revenues anticipated from imposing fees on development, based on actual proposed and approved developments and historic development activity;
2. A description of the administrative mechanism that the municipality will use to collect and distribute revenues;
3. A description of the anticipated use of all development fees pursuant to N.J.A.C. 5:94-6.12;
4. A description of the anticipated use of funds from payments in lieu of constructing affordable housing units on site pursuant to N.J.A.C. 5:94-6.12;
5. A schedule for the expenditure of all development fees and payments in lieu of constructing affordable units on site;
6. A schedule for the creation or rehabilitation of housing units;

7. If the municipality envisions being responsible for public sector or non-profit construction of housing, a pro-forma statement of the anticipated costs and revenues associated with the development; and

8. The manner through which the municipality will address any expected or unexpected shortfall if the anticipated revenues from development fees are not sufficient to implement the plan.

(b) By resolution, the governing body shall forward the spending plan for review and approval by the Council.

(c) In the event a municipality opts to acquire deed restricted units, extinguish affordability controls and sell the units at market value pursuant to N.J.A.C. 5:80-26, the spending plan shall be amended to include:

1. A description of the anticipated use of funds from the sale of units with extinguished controls pursuant to N.J.A.C. 5:94-6.12; and
2. A schedule for the expenditure of funds from the sale of units with extinguished controls.

5:94-6.6 Development fees; residential

(a) Residential development fees shall be a maximum of one percent of either the equalized assessed value for residential development, the coverage amount of the Home Owner Warranty document of a for-sale unit, or the appraised value on the document utilized for construction financing for a rental unit, provided no increased density is permitted.

(b) When a municipality approves an increase in residential density pursuant to N.J.S.A. 40:55D-70d(5) (known as a "d" variance), the municipality may impose a development fee of up to six percent of either the equalized assessed value for each additional unit that may be realized, the coverage amount on the Home Owner Warranty document for each additional for-sale unit, or the appraised value on the document utilized for construction financing for each additional rental unit. (Example: If an approval allows four units to be constructed on a site that was zoned for two units, the fees could equal one percent of either the equalized assessed value, the coverage amount on the Home Owner Warranty document, or the appraised value on the document utilized for construction financing on the first two units; and six percent of either the equalized assessed value, the coverage amount on the Home Owner Warranty document, or the appraised value on the document utilized for construction financing for the two additional units.) However, if the zoning on a site has changed during the two-year period preceding the filing of such a variance application, the density for the purposes of calculating the bonus development fee shall be the highest density permitted by right during the two-year period preceding the filing of the variance application.

5:94-6.7 Development fees; non-residential

(a) Non-residential development fees shall be a maximum of two percent of either the equalized assessed value for non-residential development or the appraised value on the document utilized for construction financing. Municipalities may also utilize any recognized industry standard to establish values of non-residential development that is acceptable to both the municipality and the Council.

(b) When a municipality approves an increase in floor area pursuant to N.J.S.A. 40:55D-70d(4) (known as a "d" variance), the municipality may impose a development fee of up to six percent on the additional floor area realized. However, if the zoning on a site has changed during the two-year period preceding the filing of such a variance application, the base floor area for the purposes of calculating the bonus development fee shall be the highest floor area permitted by right during the two-year period preceding the filing of the variance application.

(c) The imposition of payments in lieu or development fees pursuant to a development fee ordinance approved by the Council pursuant to N.J.A.C. 5:93-8 shall not be construed as a condition of preliminary or final site plan approval or as a stipulation included in a developers agreement for the purposes of calculating growth exclusions pursuant to N.J.A.C. 5:94-2.4(a)5.

5:94-6.8 Eligible exactions, ineligible exactions and exemptions

(a) Affordable housing developments shall be exempt from development fees. All other forms of new construction may be subject to development fees.

(b) Development fees may be imposed and collected when an existing structure is expanded or undergoes a change to a more intense use. The development fee that may be imposed and collected shall be calculated on the increase in the equalized assessed value of the improved structure.

(c) Developments that have received preliminary or final approval prior to the imposition of a municipal development fee shall be exempt from development fees unless the developer seeks a substantial change in the approval.

(d) Municipalities may exempt specific types of development from fees or may impose lower fees for specific types of development, provided each classification of development is addressed consistently. For example, all retail development or all development within a specific zoning district may be exempt from the imposition of fees.

(e) Municipalities may exempt specific areas of the municipality from the imposition of fees or reduce fees in order to promote development in specific areas of the municipality. For example, all development north of Main Street may be exempt from the imposition of fees.

5:94-6.9 Collection of fees

Municipalities may collect up to 50 percent of the development fee on any specific development at the time of issuance of the building permit. The remaining portion may be collected at the issuance of the certificate of occupancy. Municipalities may also collect the entire development fee at the issuance of the certificate of occupancy.

5:94-6.10 Contested fees

Imposed and collected development fees that are challenged shall be placed in an interest bearing escrow account by the municipality. If all or a portion of the contested fees are returned to the developer, the accrued interest on the returned amount shall also be returned.

5:94-6.11 Housing trust fund

(a) All development fees, payments in lieu of constructing affordable units on site and funds from the sale of units with extinguished controls shall be deposited in a separate, interest-bearing housing trust fund. In establishing the housing trust fund, the municipality shall provide written authorization, in the form of a three-party escrow agreement between the municipality, the bank and the Council, to permit the Council to direct the disbursement of the funds as provided for in N.J.A.C. 5:94-6.16(b). This authorization shall be submitted to the Council within seven days from the opening of the trust fund account. All interest accrued in the housing trust fund shall only be used on eligible affordable housing activities approved by the Council.

(b) With the approval of the Council and of the Division of Local Government Services, the municipality may invest development fee revenue, payments in lieu of constructing affordable units on site and funds from re-sales of units with extinguished controls in a cash management fund, provided that the amount of money in the cash management fund that comprises the funds and income attributable to such funds shall at all times be identifiable. The municipality shall provide written authorization, in the form of a two-party escrow agreement between the municipality and the Council, to permit the Council to direct the disbursement of development fees as provided for in N.J.A.C. 5:94-6.16(b). This authorization shall be submitted to the Council within seven days from the opening of the trust fund account. All interest attributable to such funds shall only be used on eligible affordable housing activities approved by the Council.

5:94-6.12 Use of money

(a) A municipality may use revenues collected from development fees, payments in lieu of constructing affordable units on site and funds from the sale of units with extinguished controls for any activity approved by the Council to address the municipal fair share. Such activities include, but are not limited to: rehabilitation, new construction, RCAs subject to the provisions of N.J.A.C.

5:94-4.4(d), ECHO housing, purchase of land for affordable housing, improvement of land to be used for affordable housing, purchase of housing, extensions or improvements of roads and infrastructure to affordable housing sites, financial assistance designed to increase affordability, or administration necessary for implementation of the Housing Element and Fair Share Plan. Municipalities are encouraged to use development fee revenues to attract other funds such as, but not limited to, available public subsidies and funds from private lending institutions.

(b) Funds shall not be expended to reimburse municipalities for past housing activities.

(c) After subtracting development fees collected to finance an RCA, a rehabilitation program or a new construction project that are necessary to address the municipality's affordable housing obligation, at least 30 percent of the balance remaining shall be used to provide affordability assistance to low and moderate income households in affordable units included in a municipal Fair Share Plan. One-third of the affordability assistance portion of development fees collected shall be used to provide affordability assistance to those households earning 30 percent or less of median income by region.

1. Affordability assistance programs may include down payment assistance, security deposit assistance, low interest loans, and rental assistance.

2. Affordability assistance to households earning 30 percent or less of median income may include buying down the cost of low income units in a municipal Fair Share Plan to make them affordable to households earning 30 percent or less than median income. The use of development fees in this manner shall entitle a municipality to bonus credits pursuant to N.J.A.C. 5:94-4.22.

3. Payments in lieu of constructing affordable units on site and funds from the sale of units with extinguished controls shall be exempt from the affordability assistance requirement.

(d) Municipalities may contract with a private or public entity to administer any part of its Housing Element and Fair Share Plan, including the requirement for affordability assistance, in accordance with N.J.A.C. 5:94-7.

(e) No more than 20 percent of the revenues collected from development fees each year, exclusive of the fees used to fund an RCA, shall be expended on administration, including, but not limited to, salaries and benefits for municipal employees or consultant fees necessary to develop or implement a new construction program, a Housing Element and Fair Share Plan, and/or an affirmative marketing program. In the case of a rehabilitation program, no more than 20 percent of the revenues collected from development fees shall be expended for such administrative expenses. Administrative funds may be used for income qualification of households, monitoring the turnover of sale and rental units, and compliance with Council monitoring requirements.

Development fee administrative costs are calculated and may be expended at the end of each year or upon receipt of the fees.

5:94-6.13 Monitoring

Municipalities that collect development fees, payments in lieu of constructing affordable units on site and funds from the sale of units with extinguished controls shall complete and return to the Council all monitoring forms included in the annual monitoring report related to the collection of these funds, expenditure of revenues and implementation of the plan certified by the Council or approved by the court. All monitoring reports shall be completed on forms designed by the Council.

5:94-6.14 Amendment to approved development fee ordinance

(a) A municipal amendment to an approved development fee ordinance pursuant to N.J.A.C. 5:94-6.2 and 6.4 must be reviewed and approved by the Council prior to the adoption and imposition of fees pursuant to the amendment.

(b) A municipality shall submit a request in the form of a resolution by the governing body for the Council to review an amendment to an approved development fee ordinance.

(c) A municipality that has received second round substantive certification that expires subsequent to December 20, 2005 may amend its approved 1987-1999 development fee ordinance to increase the fee percentages pursuant to N.J.A.C. 5:94-6.6(a) and 6.7(a). The municipality shall forward the prior approved ordinance and the proposed amended ordinance for Council approval pursuant to N.J.A.C. 5:94-6 together with a resolution from the governing body that:

1. Commits to petitioning for third round substantive certification in accordance with this chapter and N.J.A.C. 5:95 by the earlier of the expiration date of its second round substantive certification or May 15, 2007; and

2. Renders the ordinance null and void if the municipality fails to petition for third round substantive certification pursuant to (c)1 above.

(d) A municipality that qualifies for State aid pursuant to P.L. 1978, c. 14 (N.J.S.A. 52:27D-178 et seq.) may amend its approved 1987-1999 development fee ordinance to increase the fee percentages pursuant to N.J.A.C. 5:94-6.6(a) and 6.7(a). The municipality shall forward the prior approved ordinance and the proposed amended ordinance together with a resolution from the governing body requesting Council review and approval of the amendment pursuant to N.J.A.C. 5:94-6.

Amended by R.2006 d.175, effective May 15, 2006.
See: 37 N.J.R. 4608(a), 38 N.J.R. 2121(a).

Deleted "Except as set forth in (c) and (d) below" preceding "A municipal" in (a); and rewrote (c) and (d).

5:94-6.15 Amendment to approved spending plan

(a) An amendment to an approved spending plan must be reviewed and approved by the Council prior to the spending of fees pursuant to the amendment.

(b) A municipality shall submit a request in the form of a resolution by the governing body for the Council to review an amendment to an approved spending plan.

5:94-6.16 Remedies

(a) The municipality's ability to impose and collect development fees, payments in lieu of constructing affordable units on site and funds from the sale of units with extinguished controls and the Council's approval of a development fee ordinance and a spending plan shall be conditioned on compliance with all requirements of this subchapter. Occurrence of any of the following may result in the Council taking an action pursuant to (b) below:

1. Failure to meet deadlines for information required by the Council in its review of a Housing Element and Fair Share Plan, development fee ordinance or plan for spending fees;
2. Failure to address the Council's conditions for approval of a plan to spend development fees, payments in lieu of constructing affordable units on site and funds from re-sales of units with extinguished controls within the deadlines imposed by the Council;
3. Failure to address the Council's conditions for substantive certification within deadlines imposed by the Council;
4. Failure to submit accurate annual monitoring reports pursuant to N.J.A.C. 5:94-6.13(a) within the time limits imposed by the Council;
5. Failure to implement the spending plan and expend the funds within the time schedules specified in the spending plan;
6. Expenditure of development fees, payments in lieu of constructing affordable units on site and funds from the sale of units with extinguished controls on activities not permitted by the Council;
7. Revocation of certification; or
8. Other good cause demonstrating that the revenues are not being used for the approved purpose.

(b) Consistent with this section, any ordinance adopted by a municipality for the purpose of imposing and collecting development fees shall provide that, in the event any of the conditions described in (a) above occur, the Council shall be authorized, on behalf of the municipality, to direct the manner in which all funds in the affordable housing trust fund shall be expended. Such revenues shall immediately become available for expenditure once the Council has notified the municipal clerk and chief financial officer that such a condition has occurred. In furtherance of the forego-

ing, any such municipality shall, in establishing a trust fund pursuant to N.J.A.C. 5:94-6.11, ensure that the municipality has provided written authorization, in the form of an escrow agreement, to permit the Council to direct the disbursement of such revenues from the account following the delivery to the bank of the aforementioned written notification provided by the Council to the municipality's clerk and chief financial officer.

(c) The Council may, after a hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., revoke a development fee ordinance approval for any municipality that fails to comply with the requirements of this subchapter. Where such approval has been revoked, the Council shall not approve an ordinance permitting such municipality to impose or collect development fees for the remainder of the substantive certification period or judgment of compliance. With regard to municipalities that qualify for State aid pursuant to P.L. 1978, c.14 (N.J.S.A. 52:27D-178 et seq.), the Council shall not approve any ordinance permitting such municipalities to impose or collect development fees for the remainder of the approval period following a Council determination of failure to comply with this subchapter.

(d) Neither loss of funds from the affordable housing trust fund account, nor loss of the municipality's ability to impose and collect development fees shall alter the municipality's responsibilities pursuant to substantive certification or a court ordered judgment of compliance.

5:94-6.17 Designation of entities to receive development fees

(a) The Council shall designate agencies to receive funds from the affordable housing trust fund account when the Council takes an action pursuant to N.J.A.C. 5:94-6.16.

(b) To select agencies, the Council shall solicit plans from public sector entities and non-profit agencies to create or rehabilitate affordable housing.

(c) To the extent practicable, when the Council takes an action pursuant to N.J.A.C. 5:94-6.16 the Council shall assign funds from the affordable housing trust fund account to projects planned within the municipality that generated the revenues or within close proximity to the municipality, such as within the county or region.

5:94-6.18 Ongoing collection of fees

(a) Municipalities that qualify for State aid pursuant to P.L. 1978, c.14 (N.J.S.A. 52:27D-178 et seq.) and have received Council approval to impose and collect development fees, shall not impose or collect such fees for more than the period specified by the Council, shall submit a plan for spending development fees within one year of the Council's approval of the development fee ordinance, and shall file an updated plan at least once every three years. Municipalities that fail to update their plan within the three-year

period may resume the imposition and collection of development fees upon compliance with the requirements of this section.

(b) Except as provided for in (a) above, the ability for all other municipalities to impose, collect and expend development fees shall expire with their substantive certification or judgment of compliance unless the municipality has filed an adopted Housing Element and Fair Share Plan with the Council, has petitioned for substantive certification, and has received the Council's approval of its development fee ordinance. Municipalities that fail to renew their ability to impose and collect development fees prior to the expiration of their substantive certification or judgment of compliance may resume the imposition and collection of development fees by complying with the requirements of this section. A municipality shall not impose a development fee on a development that receives preliminary or final approval after the expiration of substantive certification or a judgment of compliance, nor shall a municipality retroactively impose a development fee on such a development. A municipality shall not expend development fees after the expiration of substantive certification or a judgment of compliance.

SUBCHAPTER 7. CONTROLS ON AFFORDABILITY AND AFFIRMATIVE MARKETING

5:94-7.1 Controls on affordability

Controls on affordability shall be established and maintained in accordance with the Uniform Housing Affordability Controls set forth in N.J.A.C. 5:80-26.

5:94-7.2 Establishing rents and sale prices of units

(a) Rents or sale prices of units for which credit is to be given shall be established in accordance with the Uniform Affordability Controls set forth in N.J.A.C. 5:80-26.

(b) In establishing prices and rents, the Uniform Housing Affordability Controls rely on the regional income limits determined by the Council as follows:

1. Median income by household size shall be established by a regional weighted average of the uncapped Section 8 income limits published by HUD. To compute this regional income limit, the HUD determination of median county income for a family of four is multiplied by the estimated households within the county. The resulting product for each county within the housing region is summed. The sum is divided by the estimated total households in each housing region. This quotient represents the regional weighted average of median income for a household of four. This regional weighted average is adjusted by household size based on multipliers used by HUD to adjust median income by household size.

2. The price and rent of low and moderate income units may be increased annually based on the percentage increase in the Housing Consumer Price Index for the United States. This increase shall not exceed nine percent in any one year. Rents for units constructed pursuant to low income tax credit regulations shall be indexed pursuant to the regulations governing low income tax credits.

5:94-7.3 Affirmative marketing

(a) Affirmative marketing shall be established and maintained in accordance with the Uniform Housing Affordability Controls set forth in N.J.A.C. 5:80-26.

(b) The affirmative marketing plan shall be a part of the Fair Share Plan and shall be referenced by ordinance.

(c) The Council shall review and assess the effectiveness of the municipal affirmative marketing program. If it is deemed that the affirmative marketing program is not effective, the municipality shall be required to amend the program.

SUBCHAPTER 8. COST GENERATION

5:94-8.1 Purpose and scope

(a) Section 14(b) of the Fair Housing Act (N.J.S.A. 52:27D-301 et seq.) incorporates the need to eliminate unnecessary cost generating features from municipal land use ordinances as a requirement of substantive certification. In order to receive and retain substantive certification, municipalities shall eliminate development standards that are not essential to protect the public welfare and to expedite municipal decisions on affordable housing development applications. In order to expedite the review of development applications, municipalities shall cooperate with developers of affordable housing developments in scheduling pre-application conferences. Municipal boards shall schedule regular and special monthly meetings as needed and provide ample time at these meetings to consider the merits of an affordable housing development application. The goal of such a schedule is to ensure that development applications are acted upon within time limits mandated in the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. Failure to expedite the decision upon an affordable housing development application shall be considered a reason for revoking substantive certification.

(b) Affordable housing developments that are included in a Housing Element and Fair Share Plan have proceeded through a public process. Therefore, the focus of municipal development application review shall not be whether the sites are properly zoned. The focus shall be whether the design of the affordable housing development is consistent with the municipal zoning, subdivision and site plan ordinances; the Residential Site Improvement Standards, N.J.A.C. 5:21; and the mandate of the Fair Housing Act regarding unnecessary cost generating features. Municipalities shall cooperate with developers of affordable housing developments in granting reasonable variances and waivers necessary to construct the affordable housing development.

5:94-8.2 Standards

(a) In its review of municipal ordinances, the Council shall give special attention to:

1. The impact of requirements that cumulatively prevent an affordable housing development from achieving the density and set-aside necessary to address the municipal fair share. Examples of such requirements include, but are not limited to: building setbacks, spacing between buildings, impervious surface standards, and open space requirements;
2. Requirements to provide oversized water and sewer mains to accommodate future development without a reasonable prospect for reimbursement;
3. Excessive culvert and pumping station requirements; and
4. Excessive landscape, buffering and reforestation requirements.

(b) Municipal Housing Elements and Fair Share Plans, and resolutions of approval as necessary, shall allow for phased construction and phased performance guarantees for on-site, off-site and off-tract improvements required of affordable housing developments.

(c) The Council shall not permit restrictions on the bedroom mix of the market-rate units within an affordable housing development.

5:94-8.3 Special studies/escrow accounts

(a) It is common for municipalities to require developers of affordable housing developments to conduct special studies related to the fiscal, traffic and environmental impacts of proposed inclusionary developments. These studies are then reviewed by municipal professionals who are paid from escrow accounts funded by the developer of affordable housing developments as a requirement of the municipal review of the development application pursuant to N.J.S.A. 40:55D-1 et seq. The Council has determined that these studies shall not be used to alter the permitted density, unless as part of a use variance application pursuant to N.J.S.A. 40:55D-70d(4) or N.J.S.A. 40:55D-70d(5). Such studies may be used to foster proper design and to deter-

mine pro-rata off-tract improvement costs. The Council has also determined that it is unnecessary for developers of affordable housing developments to pay for both the preparation of such a study and to pay into an escrow account for subsequent municipal review. Therefore, municipalities that receive substantive certification shall offer developers, affordable housing developments the option of preparing fiscal, traffic and environmental impact studies or choosing a consultant from a list of at least six professionals prepared by the municipality to prepare the studies. If the developer chooses a consultant from the municipally prepared list, the developer and municipality shall rely on the consultant's recommendations and no other reports shall be prepared.

(b) Fees to review development applications shall be estimated prior to payment of filing fees. Developers shall be entitled to review all charges against any escrowed fees and be provided with monthly accounting reports upon request as provided in N.J.S.A. 40:55D-1 et seq.

SUBCHAPTER 9. PROGRESS AND MONITORING REPORTING

5:94-9.1 Review periods

Municipalities that have received substantive certification shall complete annual monitoring reports in accordance with this subchapter. Pursuant to N.J.A.C. 5:95-9, for purposes of comparing pro-rated growth share projection and actual pro-rated growth share with the actual affordable housing units provided for in municipalities with substantive certification, each substantive certification shall to be subject to review on the third, fifth, and eighth anniversary on which a certified municipality filed its Housing Element and Fair Share Plan with the Council. When the actual growth share obligation differs from the actual number of affordable units constructed or provided, municipalities may be required to amend their Housing Element and Fair Share Plan pursuant to N.J.A.C. 5:95-13.

5:94-9.2 Monitoring reports

(a) Each municipality having substantive certification shall submit a monitoring report as requested by the Council on an annual basis.

(b) The monitoring report shall include, at a minimum, the following information, based upon certificates of occupancy issued and the provisions of N.J.A.C. 5:94-2:

1. The actual residential growth-related need, measured from January 1, 2004 up to and including the date that the review period ended;
2. The actual employment growth-related need measured from January 1, 2004 up to and including the date that the review period ended;

3. The status of the projects, strategies and the funding sources, if applicable, designed to meet the total affordable housing obligation (1987-2014), including:

i. The number of affordable units for which certificates of occupancy have been issued listed by address, block and lot, and dates of certificates of occupancy that were needed to address the growth share obligation; and

ii. The number of affordable units for which certificates of occupancy have been issued listed by address, block and lot, and dates of certificates of occupancy that were needed to address the municipality's 1987-1999 affordable housing need;

4. An accounting of any housing trust fund activity, including the source and amount of funds collected, and the amount and purpose for which any funds have been expended for the prior year and year-to-date totals;

5. The number of units that have been transferred pursuant to any RCAs and a statement showing actual cash disbursements;

6. A comparison of the estimated growth share and the actual need on the date of the report with the estimate contained in the certified Fair Share Plan and any supporting documentation citing the reasons for any shortfall;

7. Any revisions to the Fair Share Plan that are needed to address any shortfall between the actual growth-related need and the number of affordable units actually provided;

8. Demonstration at the three-year anniversary review that initial plan endorsement was granted by the State Planning Commission pursuant to N.J.A.C. 5:94-2.3(c);

9. An evaluation of the results of the municipality's affirmative marketing activities, including:

i. An evaluation of the income, demographic characteristics, and previous residential location of each applicant of affordable housing, as well as the occupants of the units; and

ii. An evaluation of any necessary adjustments in the affirmative marketing program as a result of the evaluation in (b)9i above; and

10. Any other information, detailed in the annual monitoring report, pertaining to the review of the municipality's progress in addressing its total (1987-2014) affordable housing obligation, as may be required by the Council.