

**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.

**Source and Effective Date**

R.2004 d.482, effective December 20, 2004.  
See: 36 N.J.R. 3691(a), 36 N.J.R. 5748(a).

**Chapter Expiration Date**

Chapter 94, Substantive Rules of the New Jersey Council on Affordable Housing for the Period Beginning December 20, 2004, expires on December 20, 2009.

**Chapter Historical Note**

Chapter 94, Substantive Rules of the New Jersey Council on Affordable Housing for the Period Beginning December 20, 2004, was adopted as R.2004 d.482, effective December 20, 2004. See: Source and Effective Date.

**CHAPTER TABLE OF CONTENTS**

**SUBCHAPTER 1. GENERAL PROVISIONS**

- 5:94-1.1 Introduction
- 5:94-1.2 Short title; purpose; scope
- 5:94-1.3 Severability clause
- 5:94-1.4 Definitions

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

- 5:94-2.1 General
- 5:94-2.2 Preparing a Housing Element
- 5:94-2.3 Growth projection consistency with the State Development and Redevelopment Plan; Plan endorsement
- 5:94-2.4 Projecting growth share obligations
- 5:94-2.5 Comparing growth share projections to actual growth

**SUBCHAPTER 3. CREDITS, REDUCTIONS AND MUNICIPAL ADJUSTMENTS**

- 5:94-3.1 General
- 5:94-3.2 Credits
- 5:94-3.3 Reductions for unbuilt affordable housing sites
- 5:94-3.4 Adjustments

**SUBCHAPTER 4. PREPARING A FAIR SHARE PLAN**

- 5:94-4.1 Overview of a Fair Share Plan
- 5:94-4.2 Fair Share Plan
- 5:94-4.3 Rehabilitation
- 5:94-4.4 Municipal zoning options
- 5:94-4.5 New construction, site suitability criteria, and conformance with the State Development and Redevelopment Plan
- 5:94-4.6 Municipally sponsored and 100 percent affordable programs
- 5:94-4.7 Regional contribution agreements
- 5:94-4.8 Alternative living arrangements
- 5:94-4.9 Accessory apartments
- 5:94-4.10 Buy-down program
- 5:94-4.11 Municipally sponsored rental program

- 5:94-4.12 ECHO units
- 5:94-4.13 Assisted living residence
- 5:94-4.14 Affordable housing partnership program
- 5:94-4.15 Expanded crediting opportunities
- 5:94-4.16 Extension of expiring controls
- 5:94-4.17 Status of sites addressing 1987-1999 municipal obligation
- 5:94-4.18 Low/moderate income split of the growth share obligation
- 5:94-4.19 Age-restricted housing
- 5:94-4.20 Rental housing
- 5:94-4.21 Accessible and adaptable affordable units
- 5:94-4.22 Bonus credit for very low income units
- 5:94-4.23 Credits

**SUBCHAPTER 5. REGIONAL CONTRIBUTION AGREEMENTS**

- 5:94-5.1 General provisions
- 5:94-5.2 Terms
- 5:94-5.3 Credits
- 5:94-5.4 Amount and duration of contributions
- 5:94-5.5 Monitoring and enforcement

**SUBCHAPTER 6. DEVELOPMENT FEES**

- 5:94-6.1 Purpose
- 5:94-6.2 Basic requirements
- 5:94-6.3 Urban aid municipalities
- 5:94-6.4 Development fee ordinance review
- 5:94-6.5 Content of a spending plan
- 5:94-6.6 Development fees; residential
- 5:94-6.7 Development fees; non-residential
- 5:94-6.8 Eligible exactions, ineligible exactions and exemptions
- 5:94-6.9 Collection of fees
- 5:94-6.10 Contested fees
- 5:94-6.11 Housing trust fund
- 5:94-6.12 Use of money
- 5:94-6.13 Monitoring
- 5:94-6.14 Amendment to approved development fee ordinance
- 5:94-6.15 Amendment to approved spending plan
- 5:94-6.16 Remedies
- 5:94-6.17 Designation of entities to receive development fees
- 5:94-6.18 Ongoing collection of fees

**SUBCHAPTER 7. CONTROLS ON AFFORDABILITY AND AFFIRMATIVE MARKETING**

- 5:94-7.1 Controls on affordability
- 5:94-7.2 Establishing rents and sale prices of units
- 5:94-7.3 Affirmative marketing

**SUBCHAPTER 8. COST GENERATION**

- 5:94-8.1 Purpose and scope
- 5:94-8.2 Standards
- 5:94-8.3 Special studies/escrow accounts

**SUBCHAPTER 9. PROGRESS AND MONITORING REPORTING**

- 5:94-9.1 Review periods
- 5:94-9.2 Monitoring reports

**APPENDIX A**

**APPENDIX B**

**APPENDIX C**

**APPENDIX D**

**APPENDIX E**

## 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 oppor-

tunity” 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.

**Case Notes**

In a multifaceted challenge to the validity of the substantive rules of the New Jersey Council on Affordable Housing (COAH) for the third round that calculate affordable housing needs from 1999 to 2014 and establish criteria for satisfaction of the need between 2004 and 2014, the following COAH methodologies were upheld: calculating a municipality’s rehabilitation share, pursuant to N.J.A.C. 5:94-2.1(b); its decision to no longer reallocate present need, pursuant to N.J.A.C. 5:94, Appendix A at 94-35; its continued use of regional contribution agreements under N.J.A.C. 5:94-5.1 through 5:94-5.5; and its regulations awarding credits, bonus credits, and vacant land adjustments, pursuant to N.J.A.C. 5:94-4.20(d), 5:94-4.16(a), 5:94-4.22, 5:94-3.4(a)1. The following methodologies were invalidated: COAH’s use of filtering in calculating statewide and regional housing need, pursuant to N.J.A.C. 5:94, Appendix A at 94-42; the growth share rules to the extent that the methodology relied on unissued data, permitted voluntary compliance, and excluded job growth and housing growth resulting from rehabilitation and redevelopment; the regulations that permit municipalities to provide affordable housing without offsetting benefits; and N.J.A.C. 5:94-4.19, which permits municipalities to age-restrict 50 percent of affordable housing to be built in a municipality. In re Adoption of N.J.A.C. 5:94 & 5:95 By New Jersey Council on Affordable Housing, 390 N.J. Super. 1, 914 A.2d 348, 2007 N.J. Super. LEXIS 20 (App.Div. 2007).

**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 Buena Borough in Atlantic County, Washington Township in Morris County, and White Township in Warren County, for which substantive certification was granted by the Council prior to January 25, 2007 and upheld in *In re Adoption of N.J.A.C. 5:94 and 5:95 by the Council on Affordable Housing*, 390 N.J. Super. 1 (App. Div. 2007), *certif. denied*, 192 N.J. 71 (2007), in addressing their constitutional obligation to provide a fair share of affordable housing for low- and moderate-income households.

(c) All municipalities that did not receive third round substantive certification prior to January 25, 2007 shall be governed by the provisions of N.J.A.C. 5:97.

(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