

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

Amended by R.1987 d.314, effective August 3, 1987.

See: 19 N.J.R. 806(a), 19 N.J.R. 1431(a).

Added (b).

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

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

#### Case Notes

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

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

## SUBCHAPTER 8. MUNICIPAL ADJUSTMENTS

### 5:92-8.1 General

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

#### Case Notes

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

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

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

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

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

Site subject to a plan to construct inclusionary units in the backyards of existing structures was not suitable for inclusionary development and it was inappropriate to include site for purposes of determining fair share. *Petition for Substantive Certification of Fanwood Borough*, 92 N.J.A.R.2d (CAH) 1.

### 5:92-8.2 Adjustment process

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

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

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

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

3. Environmentally sensitive lands shall be excluded as follows:

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

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

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

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

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

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

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

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

Steep slope provisions added at (b)3ii.

#### Case Notes

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

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

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

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

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

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

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

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

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

1. The county has adopted appropriate language in its ordinances to secure specific areas for recreation, conservation or open space as part of the subdivision and site plan review process; or

2. The county has included specific areas for acquisition in a capital improvement program; or

3. The county has applied to the New Jersey Department of Environmental Protection Green Acres Program or other appropriate programs to acquire or otherwise permanently set aside specified areas.

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