

TO: Mayors and Municipal Governing Body Members

FROM: Michael Cerra, Director, Government Affairs  
NJ State League of Municipalities

RE: Summary, COAH's Proposed Substantive Rules

Date: May 22, 2014

Below is a working document, summarizing the proposed Substantive Rules of the NJ Council on Affordable Housing Chapter 99 ("Substantive Rules").

**This is a working document, which will be modified from time to time,** including after the regulations are published in the *June 2 New Jersey Register*.

This document is meant to provide a section by section summary of the regulations, which we hope will assist you in assessing the impact of the regulations on your municipality.

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**STATUS:**

- Approved for publication by COAH on April 30, 2014
- Will be published in *June 2 New Jersey Register*, commencing 60-day comment period.
- July 2 public hearing at NJ HMFA, 9:30 am.
- Presumably, COAH will schedule the regulations for a vote at its October meeting.
- Effective upon publication in November *New Jersey Register*.

**I. SUMMARY OF SUBSTANTIVE RULES**

- New "3<sup>rd</sup> round regulations" for time period of 1987-2024.
- Substantive rules established 3 components to municipal obligation
  - Rehabilitation Need, or present need.
  - "Unanswered" prior round obligation for the periods (i) 1987 through 1999; and (ii) 1999 through 2014.
  - Fair Share of Prospective Need, estimated growth projections for period 2014 through 2024.
- Regulations account for a buildable limit.

- Primary means of compliance is “inclusionary zoning” with a presumed 10% set-aside.
- 10% set-aside may be adjusted based on an economic feasibility analysis.
- Regulations do not establish presumptive densities. Densities may also be adjusted based on economic feasibility analysis.

## **II. REVIEW OF MAJOR COMPONENTS OF SUBSTANTIVE RULES**

### **SUBCHAPTER 1**

#### **GENERAL PROVISION**

- Proposed regulations establish a ten-year (2014-2024) housing cycle, effective November 17, 2014.

### **SUBCHAPTER 2**

#### **MUNICIPAL DETERMINATION OF AFFORDABLE HOUSING OBLIGATION**

- Three components to a municipality’s affordable housing obligation:
  1. **Rehabilitation Share**, i.e. the number of existing housing units that are both deficient and occupied by low and moderate income households, as of July 1, 2014. (*See 5:99-2.2 and Technical Appendices, Appendix B, pages 21—47.*)
  2. **Unanswered Prior Round Obligations**, i.e. “...the sum of the new construction obligation for the 1987—1999 period and the prior need for 1999-2014...” in Appendix D.
    - “Municipalities...shall not be required to address more than 50 percent of the Prior Round Obligation until such time as the entire Fair Share of Prospective Need has been constructed.” (*See 5:99-2.3 and Technical Appendices, Appendix D, pages 85-113.*)
  3. **Fair Share of Prospective Need**, i.e. “...a projection of low and moderate housing needs in a municipality based on development and growth that is reasonably likely to occur in the region or municipality for the period of 2014-2024...” (*See 5:99-2.4 and Technical Appendices, Appendix C, pages 48—84.*)

### **SUBCHAPTER 3**

#### **REDUCTIONS, LIMITS AND SUBSTANTIAL COMPLIANCE**

- A municipal affordable housing obligation may be reduced by the following:
  - 1000 unit cap reduction, *See 5:99-3.2*
  - Buildable Limit, “A municipality that does not have the development capacity to meet its Fair Share of Prospective Need and/or Unanswered Prior Obligation may have its obligations for new construction reduced to that which can be accommodated...” based on Appendix E. In these

circumstances, the municipality shall evaluate the land use map and inventory to develop or redevelop opportunities for affordable, including, but not limited to,

1. Zoning amendments to permit apartments or accessory apartments;
2. Market to affordable program;
3. Overlay zoning requiring including inclusionary development;
4. Redevelopment area including affordable housing.

*See 5:99-3.3 & Technical Appendices, Appendix E, pgs. 114—142)*

- 20 Percent Cap Limit, (*See 5:99-3.4*)
- Substantial Compliance Reduction (*see 5:99-3.5*)

#### **SUBCHAPTER 4 MUNICIPAL SUBMISSION REQUIREMENTS AND FAIR SHARE PLAN PREPARATION**

- Submission Requirements for Municipalities
  - Housing Element (*See 5:99-4.2*)
  - Fair Share Plan (*See 5:99-4.3*)

#### **SUBCHAPTER 5 VACANT LAND ADJUSTMENTS**

- Vacant Land Adjustments, “...instances where a municipality does not have adequate resources (land, water and/or sewer) to provide a realistic opportunity for addressing the need for low and moderate income housing...”
  - Shall not be used to reduce or defer rehabilitation need.

(*See 5:99-5.1 et al*)

#### **SUBCHAPTER 6 REHABILITATION PROGRAM**

- Rehabilitation Program, “...renovate deficient housing units that are occupied by low-and-moderate income households.  
(*See 5:99-6.1 et al*)

#### **SUBCHAPTER 7 FAIR SHARE OF PROSPECTIVE NEED**

- Fair Share/Prospective Need.  
New Construction Requirements
  - A municipality shall consider the following techniques to address prospective need:
  - Rezoning for necessary densities, mandatory set-asides and density bonuses and other incentives for developers;

1. Municipality shall provide an economic feasibility study for each site zones for inclusionary development.
  2. Zoning shall include a plan for infrastructure expansion and rehabilitation if necessary.
    - Donation of/use of municipal owned land or land condemned for the provision of affordable housing;
    - Units for developmentally disabled;
    - Tax abatements;
    - Use of public monies for donations, grants, loans for new or substantially rehabilitated housing;
    - Municipal funding for construction.
- (See 5:99-7.[a]I)*

New Construction Site criteria

1. Municipalities shall designate suitable sites; infrastructure must be or is imminently available.
  2. Municipalities must provide a general description of each site, description of any environmental constraints, documentation regarding infrastructure, total number of housing units, etc.
  3. 1<sup>st</sup> floor and all newly constructed multistory dwelling units subject to Barrier Free Subcode.
  4. Developers to pay equivalent of 10% of units constructed without accessible entrances to be held for use to adopt an entrance when a person with a disability is moving into unit and makes the request.
- (See 5:99-7.1[b])*

➤ Inclusionary Zoning Requirements

General Requirements

1. Inclusionary zoning ordinances shall be accompanied by an Economic Feasibility study, "...demonstrating a rational nexus between the density and affordable housing set-asides contained in the zoning and that the zoning provides adequate compensatory benefits to developers..."
  2. Ordinances premised on a 10% set-aside that can be adjusted based on the feasibility study.
  3. COAH can approve a joint request from the municipality and developer to reduce the set-aside or densities to ensure the economic viability of a project.
- (See 5:99-7.2[a])*

Economic Feasibility and Compensatory Benefits

1. All sites proposed for inclusionary development shall be accompanied by an economic feasibility study which considers densities and set-asides that are sufficient to address the prospective need. Study shall include:
  - a. Assessment of the cost to build market rate units
  - b. Assessment of the cost to build affordable units
  - c. Assessment of the cost to build and operate rentals

- d. Assessment of capital markets
  - e. Assessment of whether the rate of return will attract developers
  - f. Identification of set asides and density bonuses and other affirmative planning and zoning devices
  - g. Analysis of unnecessary cost drivers that can be eliminated
  - h. Assessment for market demand of particular housing types
  - i. Assessment of how the development will affect the character of the community
  - j. Other factors to determine if the site provides a realistic opportunity for affordable housing
  - k. Certification from person(s) who prepared economic feasibility study.
2. Compensatory Benefits shall be available to developers of inclusionary sites and reviewed in the economic feasibility study. Municipalities bear the burden of demonstrating need for more stringent standards.
  3. Failure to provide an appropriate density or remove unnecessary cost generators shall be considered a reason for determination that the zoning on a site is not realistic.

**(See 5:99-7.2[b])**

Phasing Criteria

1. Housing elements and fair share plans shall allow for phased construction and bonding of on-site, off-site and off-tract improvements.
2. Inclusionary zoning shall require low and moderate income units be built according to the following schedule:

Minimum % Completed	% of market rates completed
0	10
25	25+1
50	50
75	75
100	90

3. New constructed unit is complete when CO is issued.
4. If the phasing scheduled is not feasible due to the nature of the development, the municipality shall require a phasing schedule that assumes that the affordable units are completed before the market rate units.

**(See 5:99-7.2[c])**

Payments in lieu of construction

- Inclusionary development shall integrate low and moderate income units with market rate units, to the extent it's economically feasible; in the alternate an ordinance may allow the option of providing units offsite within the municipality or by making a payment in lieu:

1. Payments in lieu only permitted when the municipality demonstrates why a site that has been determined to be economically feasible for affordable housing should have housing built on site;
2. Payments in lieu may represent fractional affordable housing units for when the number of units does not result in a whole number amount;
3. A zoning ordinance may include specific criteria to be eligible for a payment in lieu.
4. Amount of payment in lieu to be established by ordinance and based on net cost of subsidizing affordable housing.
5. Payments in lieu shall be deposited to the affordable housing trust fund.
6. Payments in lieu not permitted in a zone or site without an affordable housing requirement.

*(See 5:99-7.2[d])*

➤ New construction; municipally owned land and 100% affordable construction

- Municipally sponsored and 100% affordable projects include, but not limited to:
  1. All units available are affordable housing;
  2. Units created through partnership with non-profit and affordable housing provider;
  3. Developments in which the municipality serves as the primary sponsor.

*(See 5:99-7.3[a])*

- Municipally sponsored and 100% affordable projects shall comply with NJAC 5:99-7.1.
  1. For community residence for developmentally disabled, NJAC 5:99-7.4 shall apply.

*(See 5:99-7.3[b])*

- Minimum documentation to be submitted:
  1. Demonstration that municipality or developer has site control, or has ability to control site.
  2. Description of site;
  3. Demonstration of suitability of site;
  4. RFPs or executed agreement or documentation that the development has received preliminary or final approvals;
  5. Demonstration that municipality/developer has adequate funding capabilities, including
    1. Pro forma statement for project;
    2. Evidence of adequate and stable funding;

*(See 5:99-7.3[c])*

- Documentation to be submitted prior to the marketing of the units:
  1. Draft/adopted operating manual that includes description of program procedures and administration in accordance with UHAC.
  2. Affirmative marketing plan in accordance with UHAC
  3. Designation of an experienced administrative agent, per NJAC 5:98-18.

(See 5:99-7.3[d])

➤ Community residences for development disabled

- The following shall apply to community residences for the developmentally disabled:
  1. Affordable unit shall be the bedroom
  2. Age-restricted housing shall be included with the maximum number of units that may be age-restricted pursuant to NJAC 5:99-4.3(a)(6) [“Fair Share Plan”]
  3. Occupancy shall not be restricted to youth under 18 years of age.
  4. Sites must meet suitability criteria per NJAC 5:99-4.3 and 7.1(b).
  5. Municipality or developer/sponsor shall have site control.
- Bedroom and/or units shall comply with NJAC 5:99-10 and UHAC regulation with the following **exceptions**:
  1. Community residences for the developmentally disabled shall be affirmatively marketed to individuals with special needs;
  2. Affordability average and bedroom distribution;
  3. Except for units established with capital funding through a 20-year operating contract with the Department of Human Services, Division of Developmental Disabilities, community residences for the developmentally disabled shall have affordability control per NJAC 5:99-10 and UHAC.
- Minimum documentation for community residences for the developmentally disabled:
  1. Information regarding development;
  2. Description of site
  3. Demonstration of suitability for site
  4. Executed agreement, including a schedule for the development;
  5. A pro forma for the development
  6. Documentation regarding funding;
  7. Municipal resolution appropriating funds or resolution of intent to bond in event of shortfall.
- Documentation to be submitted prior to marketing of these units:
  1. Affirmative marketing plan
  2. Proof that these residences will be regulated by NJ Department of Human Services or another state agency.

(See 5:99-7.4)

- Redevelopment and Rehabilitation, pursuant to Local Redevelopment and Housing Law
1. Following provisions apply to affordable units proposed in a redevelopment or rehabilitation area
    - Sites to meet suitability criteria per NJAC 5:99-4.3 and 7.1(b).
    - Municipality shall designate the site as an area in need of redevelopment or rehabilitation;
    - Municipality shall adopt a redevelopment plan;
    - Redevelopment agree per NJAC 5:99-7.2(b)
    - Municipality shall issue RFP for a designated developer, if applicable
  2. Units comply with NJAC 5:99-10 and UHAC
  3. Minimum documentation to be submitted by municipality with substantive certification petition:
    - Demonstration that resolution designating area in need of redevelopment/rehabilitation has been approved by DCA;
    - Redevelopment plan adopted by governing body including requirements for affordable housing;
    - Information/documentation required by NJAC 5:99-7.1(b) and 7.2.
    - Anticipated timeline and development process expected for the site.
  4. Minimum documentation to be submitted prior to the granting of substantive certification:
    - Demonstration that municipality or redeveloper has site control;
    - Executed redevelopment agreement that results in the creation of affordable housing, including
      - i. Description of the type, number, tenure of units;
      - ii. Schedule for overall redevelopment plan, including phasing of residential development per NJAC 5:99-7.2(c)
      - iii. Compliance with NJAC 5:97-6.4(i) through (k)
    - Demonstration that any affordable units being removed as a result of redevelopment
  5. Documentation to be submitted prior to marketing the completed units
    - Draft or adopted operating manual prior to marketing of completed units;
    - Affirmative marketing plan in accordance with UHAC, except that low-moderate income families displaced by redevelopment/rehabilitation may be provided a preference for referral to newly created units.

(See 5:99-7.5)

## **SUBCHAPTER 8 REVOCATION OF SUBSTANTIVE CERTIFICATION**

COAH may revoke certification, if it determines the municipality has delayed action on inclusionary development or required unnecessary cost generating standards.

(See 5:99-8)

## **SUBCHAPTER 9 REGIONAL CONTRIBUTION AGREEMENTS**

- COAH shall not consider any RCA agreements which were not granted approval by COAH or Court prior to July 17, 2008. If a receiving municipality intends to utilize such funding other than purposes for what was approved, it shall see a Project Plan Amendment;
- A Project Plan Amendment shall, at the least, include:
  1. Names of the projects and/or programs and the number of units funded by the RCA;
  2. Development costs, additional sources of funding;
  3. Applicability to COAH and UHAC regulations;
  4. Agent responsible for administering the affordable units

(See 5:99-9.1)

### ➤ General Provision, Regional Contribution Agreements

- Municipalities that received RCA approval shall continue to comply with terms of the RCA and approved project plan.
- RCA funds and recaptured RCA funds shall be escrowed;
- Receiving municipality shall enter into escrow agreement with COAH, with COAH granted access to account
- Receiving municipality shall continue to designate an RCA Administrator
- RCA Administrator of receiving municipality shall submit monitoring reports.

(See 5:99-9.2)

### ➤ Project Plan Amendments

- RCA Receiving municipality shall submit a completed RCA Project Plan Amendment application to COAH delineating how the municipality shall create or rehabilitate affordable housing in response to RCA
- COAH shall review and provide COAH board with recommendation regarding the feasibility of the RCA Project Plan Amendment prior to approval.
- RCA Project Plan Amendment shall be approved by resolution provided:
  1. Project Plan amendment is financially feasible

2. Created and rehabilitated units comply with NJAC 5:93-1 and UHAC
3. Council may approve reduction in the time length of a deed restriction.

(See 5:99-9.3)

➤ Excess RCA funds

If there excess RCA funds, the balance may be used for other purposes, pursuant to a Project Plan Amendment.

(See 5:99-9.4)

➤ Enforcement

COAH shall take actions to enforce a previous RCA agreement, including, but not limited to,

- Litigation to enforce agreements
- Order receiving municipality's bank to cease disbursement from RCA escrow agreements
- Order receiving municipality to amends its RCA project plan
- Directing use of RCA funds to eligible housing activity
- Other actions deemed appropriate by COAH.

(See 5:99-9.5)

## **SUBCHAPTER 10 ADMINISTRATION OF AFFORDABLE UNITS**

➤ Applicability of UHAC

- Affordable housing in a Fair Share Plan shall comply with these regulations and UHAC with the following exceptions:
  1. Judgment of foreclosure or deed in lieu of foreclosure shall extinguish controls, provided in compliance with NJAC 5:99-10.2. Notice shall allow for the purchase of unit at negotiated price, not to exceed the maximum sales price and maintain it for the duration of the oriental deed restriction as part of the municipal affordable housing inventory.
  2. In event of foreclosure sale, the owner of the affordable housing unit shall be personally obligated to pay to the administrative entity responsible for assuring responsibility.
  3. Affordability controls amended by this subchapter shall be applied to units in the forms of the appendices attached to this subchapter.
  4. Condo/homeowner association fee must be proportionate to the square footage and/or lower cost of the affordable units relative to the market rate units.
  5. All units regulated by this subchapter must include the Housing Resource Center as part of the affirmative fair marketing plan.
  6. Administrative agents may grant a waiver of the income qualification requirements for units when a buyer has not been

identified for an extended period of time and has developed criteria to determine a waiver is necessary due to a lack of qualified applicants.

(See 5:99-10.1)

- Regional Income Limits
  1. Administrative agents shall unitize the regional income limits established by COAH
  2. Income limits shall be established by COAH based on median income by household size
  3. The Executive Director annually approves the regional income limits, not the COAH board. The income limits may not be less than the previous year.

(See 5:99-10.2)

- Established sale prices and rents of units
  1. Administrative agents shall follow UHAC and the regional income limits established by COAH.
  2. Price of units may increase annually based on the % increase in the regional median income limit for the region; maximum resale price cannot be lower than the last recorded purchase price
  3. Rent may be increased based on the % increase in the Housing Consumer Price Index, but shall not exceed 9% in any one year.

(See 5:99-10.3)

## **SUBCHAPTER 11**

### **AFFORDABLE HOUSING TRUST FUNDS**

**(significant changes or notable provisions)**

- Developers must be notified of the fee at the time of application for permit and approval including when payment is due.

(See 5:99-11.3(c)1)

- Municipalities must include a separate plan for the use of payments in lieu with their spending plans.

(See 5:99-11.6(d))

- Accessory apartments are specifically included as an eligible use of trust fund money.

(See 5:99-11.9(a)6)

- Green building strategies may also be the recipient of trust fund money.

(See 5:99-11.9(a)7)

- Up to 20% of trust funds may be used for administrative expenses.

(See 5:99-11.11)

- COAH has defined “committed for expenditure within four years of the date of collection.” One of the following must be met:
  1. Funds have been spent on a housing activity, per NJAC 5.99-11.9
  2. COAH has been provided an executed contract or legally enforceable agreement
  3. Municipality demonstrates a firm and binding obligation to spend funds for affordable housing
  4. For administrative costs, COAH is provided a municipal resolution or ordinance and an executed contract/agreement for expenses.

*(See 5:99-11.17(d))*

- COAH to notify the municipality of any unexpended and/or uncommitted funds. The municipality has 30 days to respond and then the Executive Director issues a written recommendation. After giving at least 15 days’ notice, the COAH board may consider the Executive Director’s recommendation and makes a decision. COAH may permit a party to speak or consider the matter on the written record only.