

On July 23, 2014, the Affordable Housing Professionals of New Jersey Board of Directors approved comments to COAH's most recent set of proposed Third Round Rules.

We not only want to share with you the consensus that the AHPNJ Board arrived at on each of these comments, but also welcome and encourage each of you to use any or all of these comments to submit to COAH before the August 1 deadline. It is useful to have your personal opinions, and/or the opinions of your own municipality or organization count as well. Keep in mind that numerous and varied sources making the same or similar comments is not only appropriate, but actually strengthens the credibility and hoped for impact of those comments. Therefore, please take whatever you want from these comments (included below in their entirety) either as is, or revised as you see fit.

The instructions to submit comments to COAH as to the proposed rules are simple. COMMENTS SHOULD BE SUBMITTED TO COAH ELECTRONICALLY, SENT TO COAHAdmin@dca.state.nj.us, AND SHOULD INCLUDE THE WORDS, "Rule Comments", in the subject box.

**Comments to Proposed COAH Rules: NJAC 5:98 (procedural) and NJAC 5:99
(substantive)
as published at 46 N.J. Register 912 and 924**

July 24, 2014

Filed on behalf of: The Affordable Housing Professionals of New Jersey (AHPNJ)

Comments on NJAC 5:99 (substantive rules) -

"5:99-1.1(c). Comment: COAH should clarify that inclusionary zoning is just one of a number of compliance mechanisms that may be used to address Prospective Need as set forth in subchapter 7." Municipalities should continue to be permitted to satisfy their affordable housing obligation pursuant to the Fair Housing Act, at NJSA 52:27D-311.a, which clearly states that a municipality may address its affordable housing obligation 'by means of any technique or combination of techniques which provide a realistic opportunity for the provision of the fair share.' This section appears to allow only inclusionary zoning but subchapter 7 allows three (3) other techniques plus more under subsection 7.1(a).

"5:99-2.2. Comment: It is inconsistent with the Prior Round rules, which the NJ Supreme Court required COAH to follow, to eliminate rental bonuses." The Court required COAH to follow the Prior Round rules and this is a significant difference from those rules.

"5:99-2.2. Comment: COAH should accept units that have been rehabilitated or subject to an executed contract for rehabilitation after April 1, 2010." To do otherwise would penalize municipalities that established or participated in third round rehabilitation programs and expended municipal revenue or affordable housing trust funds in good faith. In the Appellate

Division's 2010 decision invalidating portions of COAH's rules, the court charged municipalities with continuing to address its fair share affordable housing obligations. Rehabilitations completed after the April 1, 2010 Census date should count as they have counted in every prior round.

"5:99-2.3. Comment: Please confirm that COAH will honor affordable credits created through a rental market to affordable program. Also, COAH should permit a municipality to administer and propose a 'rental' market to affordable program to address Prior Obligation." Although COAH's second round rules at NJAC 5:93-5.11 permit a municipality to use a write-down/buy-down program (market to affordable program) for only for-sale units as an eligible affordable housing program, COAH's previous third round rules had expanded such market to affordable program to include rental units. In addition, COAH has included a definition of market to affordable program in NJAC 5:99-1.2 which states "market to affordable program means a program to pay down the cost of market-rate units and offer them in sound condition, for sale or rent, at affordable prices to low- and moderate-income households to address all or a portion of the affordable housing obligation." COAH should honor affordable rental credits created through a rental market to affordable program and COAH should permit a municipality to continue to administer and/or propose a rental market to affordable program to address Prior Obligation.

"5:99-2.3. Comment: COAH should confirm that it will honor all existing, certified or planned affordable housing credits in programs permitted in prior COAH regulations and included in previously adopted housing elements and fair share plans and either submitted as a petition to COAH or to the Superior Court to address Prior Obligation."

"5:99-4.3(a)2. Comment: COAH should require a minimum percentage of very low income affordable units to be provided as affordable rental units." Although AHPNJ believes that virtually all very low income affordable housing should be provided as rental housing, there may be a specific municipal circumstance or program (i.e., Habitat for Humanity) that may be able to provide for-sale very low-income housing.

"5:99-6.1(b)2. Comment: Why has COAH eliminated the requirement for at least one major system to be repaired or replaced for each eligible rehabilitation unit in a housing rehabilitation program?" The definition of 'major system' was also removed from COAH's rules.

"5:99-6.1(b)2. Comment: Please explain the meaning of the phrase '...and include improvements necessary for the provision of low- and moderate-income housing' and give an example of what this may include."

"5:99-7. Comment: COAH must re-establish a minimum rental requirement for Prospective Need." AHPNJ understands the need for COAH to implement new standards and requirements but by deleting the long-standing minimum requirement for affordable rental housing, COAH will harm the most vulnerable segment of low and moderate income households. There is a tremendous demand for affordable rental housing as has been determined by countless studies and as is seen by AHPNJ members who serve as administrative agents and municipal housing liaisons to over 100 municipalities.

"5:99-7.1(a). Comment: To address Prospective Need, COAH permits 'such other techniques as proposed by the municipality'. COAH should confirm that such other techniques proposed by the municipality may include market to affordable programs (both for-sale and rental)."

Municipalities should continue to be permitted to satisfy their affordable housing obligation pursuant to the Fair Housing Act, at NJSA 52:27D-311.a, which clearly states that a municipality may address its affordable housing obligation 'by means of any technique or combination of techniques which provide a realistic opportunity for the provision of the fair share.' Please confirm that this successful and efficient affordable housing delivery technique and other creative means of adding affordable units may address Prospective Need.

"5:99-7.1(a). Comment: COAH defines extensions of expiring controls at NJAC 5:99-1.2 but only lists it as a compliance technique for a vacant land adjustment community to address Prospective Need. COAH must recognize that expiring controls on units that were part of Prior Round COAH or Court plans represent a major threat to the affordability of homes for low- and moderate-income households. COAH must ensure that the rules contain incentives for municipalities to extend such controls especially given that in many cases, absent actions by municipalities, such controls will expire in the next few years."

"5:99-7.1(a)3. Comment: COAH should confirm that COAH's definition of 'individuals with special needs' in NJAC 5:99-1.2 takes precedence over the definition of 'developmentally disabled' per section 2 of P.L. 1977, c. 448 (N.J.S.A. 30:11B-2) for community residences to be eligible to address Prospective Need." To do otherwise would limit special needs housing to just community residences for the developmentally disabled as defined in section 2 of P.L. 1977, c. 448 (NJSA 30:11B-2). In this referenced statute, developmentally disabled is defined as 'a severe, chronic disability of a person which: a. is attributable to a mental or physical impairment or combination of mental or physical impairments; b. is manifest before age 22; c. is likely to continue indefinitely; d. results in substantial functional limitations in three or more of the following areas of major life activity, that is, self-care, receptive and expressive language, learning, mobility, self-direction and capacity for independent living, or economic self-sufficiency; and e. reflects the need for a combination and sequence of special interdisciplinary or generic care, treatment or other services which are of lifelong or extended duration and are individually planned and coordinated. Developmental disability includes, but is not limited to, severe disabilities attributable to an intellectual disability, autism, cerebral palsy, epilepsy, spina bifida, and other neurological impairments where the above criteria are met.'

This is a very narrow definition of special needs housing and would preclude all other types of special needs housing such as for the physically disabled, mentally ill, victims of domestic violence, persons with HIV or AIDS, etc. where these individuals do not also meet the definition of 'developmentally disabled'. This reliance on the definition of developmentally disabled in NJSA 30:11B-2 contradicts the definition of 'individuals with special needs' in NJAC 5:99-1.2. COAH's definition of 'individuals with special needs' clearly expands the categories of individuals to be served to mean "individuals with mental illness, individuals with physical or developmental disabilities, and individuals in other emerging special needs groups identified by State agencies that are at least 18 years of age if not part of a household. Special needs populations also include victims of domestic violence; ex-offenders; youth aging out of foster care; individuals and households who are homeless; and individuals with AIDS/HIV." All

permanent special needs and supportive housing should continue to qualify for COAH credit towards Prospective Need.

"5:99-7.2(d)1.iv. Comment: COAH should confirm that a municipality may factor in necessary administrative program or project costs in determining in-lieu payment amounts."

"5:99-7.4(b)1. Comment: COAH's reliance on the definition of developmentally disabled in NJSA 30:11B-2 contradicts with the definition of 'individuals with special needs' in NJAC 5:99-1.2 and referenced in this subsection. COAH should encourage a broader spectrum of permanent supportive and special needs housing."

"5:99-10. Comment: COAH should add back the provision permitting municipalities to condition the cost of administering and/or affirmatively marketing affordable units to be a developer's responsibility as long as the requirement was a condition of planning board approval as established in the municipal fair share ordinance."

"5:99-10.1. Comment: COAH should recognize the requirement at NJSA 45:22A-46.16 that requires full COAH crediting for any affordable housing development that receives Low Income Housing Tax Credits per 26U.S.C. s.42."

"5:99-10.1(a). Comment: COAH should add a sentence that recognizes that certain properties are exempt from UHAC at NJAC 5:80-26.1." This section of COAH's proposed rules details the applicability of UHAC. There is much confusion as to when and whether UHAC applies to properties, particularly if they fall into the exempt properties listed in UHAC at NJAC 5:80-26.1.

"5:99-10.1(a)1. Comment: A judgment of foreclosure or deed in lieu of foreclosure should never extinguish controls on affordable housing units."

"5:99-10.1(a)1. Comment: If the regulation will continue to provide that a judgment of foreclosure or deed in lieu of foreclosure will extinguish controls on affordable housing units, then COAH should add a sunset provision or a review provision to this subsection to require that an annual determination be made by COAH as to whether this new requirement that extinguishes controls on affordability in a foreclosure action is still needed."

"5:99-10.1(a)1. Comment: As this subsection in COAH's proposed new rules provides for a Notice of Foreclosure to allow the administrative entity, the municipality, the DCA, the Agency or a nonprofit entity to purchase the affordable housing unit, COAH should state the exact method by which the notice must be given, the time line and the department/agency/municipality specific recipient of the notice." COAH's proposed new rules extinguish the affordability controls in the event of foreclosure, thus causing the unit to no longer be a part of the municipality's affordable housing stock. The only chance to redeem this property is once such notice is received. COAH's rules should state the exact method by which notice must be given, the time line and the department/ agency/ municipality specific recipients. Currently, notice of foreclosure must be sent to municipal clerks for the purpose of code enforcement. This does not insure that the administrative entity, municipal housing liaison, the DCA or Agency or nonprofit entity will be notified of the opportunity to purchase the unit or intervene to save the unit from

foreclosure.

The Foreclosure Fairness Act requires the following regarding proper notice. COAH's rules should, at a minimum, mirror these rules, especially the underlined sentence regarding affordable housing:

NJSA 46:10B-51. Procedure for serving summons and complaint in an action to foreclose on a mortgage.

17. a. (1) A creditor serving a summons and complaint in an action to foreclose on a mortgage on residential property in this State shall, within 10 days of serving the summons and complaint, notify the municipal clerk of the municipality in which the property is located that a summons and complaint in an action to foreclose on a mortgage has been filed against the subject property. The notice shall contain the name and contact information for the representative of the creditor who is responsible for receiving complaints of property maintenance and code violations, may contain information about more than one property, and shall be provided by mail or electronic communication, at the discretion of the municipal clerk. If the municipality has appointed a public officer pursuant to P.L.1942, c.112 (C.40:48-2.3 et seq.), the municipal clerk shall forward a copy of the notice to the public officer or shall otherwise provide it to any other local official responsible for administration of any property maintenance or public nuisance code.

In the event that the property being foreclosed on is an affordable unit pursuant to the "Fair Housing Act," P.L.1985, c.222 (C.52:27D-301 et al.), then the creditor shall identify that the property is subject to the "Fair Housing Act."

The notice shall also include the street address, lot and block number of the property, and the full name and contact information of an individual located within the State who is authorized to accept service on behalf of the creditor. The notice shall be provided to the municipal clerk within 10 days of service of a summons and complaint in an action to foreclose on a mortgage against the subject property.

"5:99-10.1(a)4. Comment: COAH should clarify that the condo or association fee of the affordable units must be proportionate to the square footage and/or lower 'maintenance' cost of the affordable unit relative to the market units."

"5:99-10.1(a)6. Comment: COAH should revise this subsection to state that a municipality must give upfront approval to an Administrative Agent ("AA") to enable the AA to grant a waiver of the income qualification requirement."

"5:99-11.1(d). Comment: As COAH has delayed approving affordable housing trust fund spending plans for over six (6) years in some instances, COAH should provide flexibility in the requirement that a commitment of trust funds cannot be made without first obtaining COAH's spending plan approval." To prepare a housing plan and spending plan, a municipality is required to provide a commitment of trust funds, typically through a developer's agreement or an executed contract. Thus, since COAH's rules require a municipality to commit funds as part of the preparation of a housing plan and spending plan, how can a municipality first receive COAH's approval of that same spending plan to show a commitment of funds? This requirement puts a municipality in a Catch-22 situation.

"5:99-11.6. Comment: COAH must develop a process for a municipality to pay for the administration of an affordable housing program or an affordable housing compliance technique when municipalities receive payments in lieu of constructing affordable units on-site."

"5:99-11.9(a). Comment: COAH should clarify whether municipalities should use COAH's second round rules at NJAC 5:93 for determining the use of trust funds on compliance mechanisms addressing Unanswered Prior Obligation."

"5:99-11.9(a). Comment: If COAH determines that municipalities must address these proposed rules for eligible use of trust funds on compliance mechanisms addressing Unanswered Prior Obligation, then COAH should revise the list in this subsection to clearly denote the eligible compliance mechanisms in the second round rules."

"5:99-11.9(a). Comment: COAH should add back 'market to affordable program' and 'extensions of control' programs to the list of eligible uses of trust funds as vacant land adjustment municipalities may still use these programs to address Prospective Need."

"5:99-11.9(a). Comment: COAH should add back to the list of eligible uses of trust funds 'the purchase of existing market rate or affordable housing for the purpose of maintaining or implementing affordability controls, such as in the event of a foreclosure. To do otherwise would harm a municipality as subsection 10.1(a)1 requires a municipality to purchase an affordable unit under foreclosure or risk having the municipal affordable housing obligation increased."

"5:99-11.10(b). Comment: COAH should revise this subsection to allow for the in-house administration of an affordability assistance program where contracts are not required." Municipalities such as South Brunswick Township have a long history of administering its affordable housing programs in-house. COAH's proposed rules must be revised to acknowledge and permit the continuation of municipal employees to administer in-house affordability assistance programs.

"5:99-11.11(b). Comment: COAH should permit a portion of payments in lieu of constructing affordable units on-site to be used for administration of the programs/projects these funds create."

"5:99-11.11(c). Comment: COAH should clarify that a permitted use of administrative expenses still includes 'salaries and benefits for municipal employees or consultant fees."

"5:99-11.16. Comment: COAH should revise the first sentence of this subsection to add that a municipality may petition COAH 'or may submit its fair share plan to the Superior Court' to address its succeeding affordable housing obligation so as to continue the ongoing ability to impose and collect development fees and maintain a trust fund."

"5:99-11.17. Comment: COAH must not apply this rule on 'trust fund commitments' retroactively." COAH says in its procedural rules at NJAC 5:98-5.4(a) that "Pursuant to NJSA 52:27D-329.2, a municipality may not spend or commit to spend any affordable housing development fees, including Statewide non-residential fees collected and deposited into the

municipal affordable housing trust fund, without first obtaining the Council's approval of the expenditure." Given that COAH prohibits a commitment prior to the Council's approval - and the Council has not made any such approvals since NJSA 52:27D-329.2 was enacted in 2008 despite repeated requests from hundreds of municipalities - how can any municipality comply with the requirement that funds had to have been committed for expenditure within four years of collection? Given COAH's inaction, it must not apply this rule retroactively, but rather must first act on all pending requests for determining whether funds may be committed, and then give municipalities at least 12 months to address any shortcomings that COAH may identify before transferring any funds. Going forward, COAH should put in its rules that it will respond to any requests from municipalities for spending plan and/or commitment review within 90 days.

"5:99-11.17(d)1. Comment: COAH should revise this subsection to clearly state that funds spent on housing activities either previously certified by COAH or permitted under prior COAH regulations are deemed appropriately expended." The reference only to NJAC 5:99-11.9 is too limiting and does not reflect the many other eligible affordable housing methods in previous regulations (including the second round regulations) which are not now proposed in NJAC 5:99-11.9.

"5:99-11.17(d)2. Comment: If subsection 11.9 is to cover commitments for Unanswered Prior Obligation, then COAH should revise this subsection to clearly state that funds under a contract or legally enforceable agreement for housing activities either previously certified by COAH or permitted under prior COAH regulations are deemed appropriately committed." The reference only to NJAC 5:99-11.9 is too limiting and does not reflect the many other eligible affordable housing methods in previous regulations (including the second round regulations) which are not now proposed in NJAC 5:99-11.9.

"5:99-11.17(d)2. Comment: COAH should clarify that the requirement for trust fund or unit monitoring would be a future requirement once the units were completed."

"5:99-11.17(d)3. Comment: COAH should construe this subsection broadly to enable municipalities to spend trust fund monies to implement the programs in their plans."

"5:99-11.17(d)3. Comment: If subsection 11.9 is to cover 'firm and binding obligation' for Unanswered Prior Obligation, then COAH should revise this subsection to clearly state that funds with a firm and binding obligation for housing activities either previously certified by COAH or permitted under prior COAH regulations (including the second round regulations) are deemed appropriately committed." The reference only to NJAC 5:99-11.9 is too limiting and does not reflect the many other eligible affordable housing methods in previous regulations which are not now proposed in NJAC 5:99-11.9.

"5:99-11.17(d)4. Comment: COAH should revise this subsection to allow for the in-house administration of affordable housing programs where contracts/agreements are not required." Municipalities such as South Brunswick Township have a long history of administering affordable housing programs in-house. COAH's proposed rules must be revised to acknowledge and permit the continuation of municipal employees to administer in-house affordable housing programs.

"5:99-11.17(d)4. Comment: COAH should revise this subsection to provide a simple solution for a municipality to address COAH's rules on 'committing' administrative expenses by recognizing that municipalities may only commit trust funds for administrative expenses on a yearly basis to pay staff and outside administrative consultant fees, thus, COAH must accept the municipality's adopted spending plan as the necessary commitment for long-term in-house and consultant planned administrative expenses." COAH's requirement for a resolution or ordinance and an executed contract or agreement does not reflect that fact that municipalities are precluded from entering into contracts beyond one-year for administrative consultant fees and that, pursuant to legislative mandates, municipalities may pay municipal staff only on a year by year basis. The kind of one-time agreement committing up to 20% of a municipal affordable housing trust funds for administrative purposes that COAH envisions simply cannot be done consistent with applicable law. Instead, annual agreements and budget allocations are necessary. While an enforceable agreement may work in the case of an arrangement between a municipality and a non-profit builder of affordable units, for example, it simply cannot work in the context of municipal budgeting for the salaries of staff performing affordable housing responsibilities or the one-year limit on the term of professional service agreements.

Comments on NJAC 5:98 (procedural rules) -

"5:98-5.4(a). Comment: Comment: COAH must not apply this rule retroactively." COAH states here that "Pursuant to NJSA 52:27D-329.2, a municipality may not spend or commit to spend any affordable housing development fees, including Statewide non-residential fees collected and deposited into the municipal affordable housing trust fund, without first obtaining the Council's approval of the expenditure." Given that COAH prohibits a commitment prior to the Council's approval - and the Council has not made any such approvals since NJSA 52:27D-329.2 was enacted in 2008 despite repeated requests from hundreds of municipalities - how can any municipality comply with the requirement that funds had to have been committed for expenditure within four years of collection? Given COAH's inaction, it must not apply this rule retroactively, but rather must first act on all pending requests for determining whether funds may be committed, and then give municipalities at least 12 months to address any shortcomings that COAH may identify before transferring any funds. Going forward, COAH should put in its rules that it will respond to any requests from municipalities for spending plan and/or commitment review within 90 days.

"5:98-5.5(a). Comment: As COAH has delayed approving affordable housing trust fund spending plans for over six (6) years in some instances, COAH should provide flexibility to the requirement that a commitment of trust funds cannot be made without first obtaining COAH's approval of an amendment to a spending plan." A requirement to get COAH's spending plan amendment approval first before a municipality even crafts its housing plan and spending plan amendment (which requires a municipality to commit funds!) is non-workable.

"5:98-6.2(a). Comment: COAH should add back the 'report requesting additional information.' By eliminating the requirement for COAH to prepare a report requesting additional information,

COAH will eliminate what was typically the first notice to a municipality that there may be a few missing items in a municipal petition. This report also triggered a 60-day time period to submit such information and possibly a repetition to COAH. Only if this initial 60-day deadline was not met by a municipality would COAH then issue a report recommending denial of certification.

"5:98-6.2(b). Comment: For all of the instances in the proposed rules where COAH has set a 60-day time period for a municipality to amend its housing element and fair share plan and repetition, COAH should extend the period of time from 60 days to 120 days for a municipality to amend the housing element and fair share plan and a repetition." Sixty days is not enough time to develop a revised plan and then formally amend the plan at a planning board hearing and endorse the plan at a governing body meeting. In the alternative, COAH should add that the COAH Executive Director shall have authority to grant a 60-day extension if requested by the municipality.

"5:98-6.2(c). Comment: COAH should confirm that a denial of substantive certification as set forth in this subsection is actually a denial of substantive certification with conditions and the municipality has 60 days to perfect the conditions. COAH should also confirm that such a municipality is still under COAH's jurisdiction and not vulnerable to a builder's remedy lawsuit at such time as the COAH Board initially takes action to deny substantive certification." By eliminating the requirement for COAH to prepare a 'report requesting additional information' that has been a staple of COAH's procedural rules for decades, there is a possibility that COAH could simply issue a 'report recommending denial of substantive certification' without any correspondence whatsoever from COAH staff with the municipality before this one report is sent to the municipality. As the rule is now proposed, a town would be only given 14 days notice of such COAH staff recommendation to deny substantive certification.

"5:98-6.3(b). Comment: COAH should extend the period of substantive certification at least an extra year to December 31, 2025 to ensure that at least some municipalities that are certified in 2015 (the earliest year that COAH could certify a municipality based on these proposed new rules) would at least have a chance at a 10-year period of certification."

"5:98-17.3(d). Comment: COAH should clarify that the phrase "may revoke its approval" refers solely to COAH's approval of a governing body's appointment of a municipal housing liaison in 17.3(a)."

"5:98-17.3(d). Comment: In a situation where COAH "may revoke its approval" of a municipal governing body's appointment of a municipal housing liaison, COAH should provide standards and/or procedures for an appeal process by the municipal housing liaison and/or governing body of a municipality."

"5:98-18.2. Comment: COAH should make available to the public, upon request, a list of administrative agents that have been approved by COAH."

"5:98-18.2. Comment: COAH should add this new provision to this section 'For properties exempt from UHAC pursuant to NJAC 5:80-26.1, the owner or approved managing agent shall

be the Administrative Agent for the property, provided that they are approved by the overseeing authority to perform such duties (i.e. HMFA, HUD). Such owner or approved managing agent shall report to the municipal Administrative Agent or Municipal Housing Liaison." This section details the requirements for the approval of an administrative agent. There is a substantial level of confusion by municipalities, developers, and property owners as to who is qualified to be an Administrative Agent, who has previously been approved by COAH, and whether a property owner/managing agent can serve as the Administrative Agent for their own property particularly if that property is governed by federal requirements (i.e. LIHTC or HUD programs). This new provision for this section requested above will clarify this issue.