



Council on Affordable Housing (COAH) Proposes New Growth Share Rules

COAH's "growth share rules" adopted December 20, 2004 replace the fair share methodology implemented by the agency upon start-up in 1986. On January 25, 2007, the Appellate Division invalidated the growth share rules in a comprehensive 127 page decision.

COAH's proposed rules responding to the Appellate Division decision were published on January 22, 2008. March 22, 2008 is the deadline for comments. The Appellate Division has granted COAH's request for an extension to June 2, 2008 for adoption.

The proposed rules result in a 63% increase in statewide fair share, from 155,000 under the 2004 rules to 253,000 affordable units under the proposed rules. The proportion of new housing which will have to be affordable, and the rate at which non-residential development will have to produce affordable housing has also increased. For every four market-rate units produced via certificate of occupancy issued from 1999 to 2018 in a municipality, one affordable housing unit must be provided. For every 16 new jobs created, one affordable housing unit will be required. The cost of in-lieu payments, developers fees, regional contribution agreements and other options to developer-constructed affordable housing have increased dramatically.

Statewide Affordable Housing Needs

As per the rules adopted in 2004, a municipality's fair share consists of three components: the rehabilitation share, the prior round obligation and the growth share (1999 through 2018). The agency-calculated Statewide affordable housing need as per the 2004 rules and the proposed rules is:

Comparison of Affordable Housing Needs Calculated Pursuant to Original (2004) Methodology and Proposed (2007) Methodology

	2004	2007
Rehab. Share	24,847	51,891
Prior Round	77,527	85,710
Growth Share	52,747	115,666
Total	155,121	253,267 (63% increase)

The rehabilitation share component increased due to the inclusion of over-crowded units built before 1949 (rather than 1939) and the exclusion of credits for "spontaneous rehabilitation". The prior round component increased due to reduction in the credit for "filtering" and the use of updated data. The growth share component increased due to higher growth share ratios, the extension of the planning horizon to 2018 and the use of historic growth data to project future housing and employment.

Each municipality's fair share is required to be calculated by using the charts included with the proposed rules. The rehabilitation share for each municipality is shown in Appendix B to the proposed rules. The prior round need component by municipality is found in Appendix C to

the proposed rules. The growth share component may be calculated from the charts in the Task 1 report attached as part of Appendix F to the proposed rules.

Each municipality must provide rental housing. A portion of the prior round component must be rentals and 25% of the growth share component must also be rentals. The percentage of municipal fair share which may be age-restricted has been reduced from 50% to 25%. The prior round fair share may be reduced via vacant land and durational adjustments, as well as the "20% cap". The growth share projection may also be reduced upon proof of insufficient vacant land.

Growth Share Ratios

The residential growth share requirement has been changed from the ratio under the 2004 rules, one lower income unit per eight market units (11%), to one lower income unit per four market units (20%) under the proposed rules. The nonresidential growth share requirement has been changed from one lower income unit per 25 new jobs to 1 lower income unit per 16 jobs. COAH has also proposed to increase the ratios which must be used to project the number of jobs per thousand square feet for many non-residential use groups. For example, retail uses have increased from one job to 1.7 jobs per thousand square feet; storage uses have increased from .2 to 1.5 jobs per thousand square feet; and hotels and motels have increased from .8 to 1.7 jobs per thousand square feet. Thus, there is a double impact on many nonresidential uses: the number of jobs per thousand square feet has increased and the number of jobs generating the requirement for one affordable housing unit has decreased. The impact can be illustrated by considering a 100,000 square foot shopping center. This use would have generated a requirement for 4 affordable housing units under the 2004 methodology. Under the proposed rules, it will generate a requirement for 11 affordable housing units. If the housing units are not constructed on-site, the in-lieu fee (under the proposed rules) would increase from \$583,612.00 to \$1,604,933.00.

Municipal Compliance Options

The costs associated with a number of options have increased dramatically:

The payment in lieu option which allows a developer to pay rather than construct lower income housing on site was not previously set in the COAH rules. The price set in the proposed rules varies between \$145,903.00 per lower income unit in COAH Region 3 and \$182,859.00 in COAH Region 6.

The developer's fee option for residential development has been increased from 1 % to 1.5% and has been increased for nonresidential development from 2 % to 3%.

Minimum RCA contributions have been increased from \$35,000.00 per unit to between \$67,000.00 and \$80,000.00 per unit.

The following options, none of which are new, are offered to municipalities to meet the third round fair share:

Municipal Options For Providing Affordable Housing

1. Rehabilitation at \$10,000.00 per dwelling unit (N.J.A.C. 5:94-6.2);
2. ECHO units, up to a maximum of 10 towards the rehabilitation share (N.J.A.C. 5:94-6.3);
3. Inclusionary zoning, including the use of previously zoned affordable housing site (N.J.A.C. 5:94-6.4, -6.5);
4. Payments in lieu of on-site construction (N.J.A.C. 5:94-6.4(c));
5. Redevelopment (N.J.A.C. 5:94-6.6);
6. Municipally sponsored affordable housing (N.J.A.C. 5:94-6.7);
7. Accessory apartments at a cost of \$25,000.00 per low income unit and \$20,000.00 per moderate income unit, with a maximum of 10 accessory apartments or 10% of the fair share (N.J.A.C. 5:94-6.8);
8. A market to affordable program, utilizing a subsidy of \$30,000.00 per low income unit and \$25,000.00 per moderate income unit to convert market rate housing to affordable housing (N.J.A.C. 5:94-6.9);
9. Provision of supportive and special needs housing (N.J.A.C. 5:94-6.10);
10. Assisted living units (N.J.A.C. 5:94-6.11);
11. Regional contribution agreements at \$67,000.00 to \$80,000.00 to unit (N.J.A.C. 5:94-6.12 and Subchapter 7);
12. Affordable housing partnerships between municipalities (N.J.A.C. 5:94-6.13);
13. Extension of expiring controls (N.J.A.C. 5:94-6.14);
14. Developer's fees (N.J.A.C. 5:94-8.3).

The option of providing "supportive and special needs housing" as per proposed N.J.A.C. 5:94-6.10 is virtually the same as the alternative living arrangements authorized in current N.J.A.C. 5:94-4.8. Although redevelopment is listed as an option for the first time, it is not a new option.

Sites zoned for affordable housing will now have to meet the pre-growth share criteria (available, approvable, developable and suitable) and conform with the State Plan as per the current rules.

Bonus credits can be applied to prior round fair share numbers for rental units (2 per family rental, 1.33 for age-restricted rentals). Only "supportive housing" and very low income units (affordable to 30% of regional median income) can receive bonus credits which may be applied toward growth share numbers.

Compensating Benefits

In response to the Appellate Division's holding that developers must be provided a "compensating benefit" in return for mandatory construction of affordable housing or payments in lieu thereof, COAH has proposed a two-part compensatory benefit. First, one additional market-rate unit would be permitted for each affordable housing unit required on site. Where a payment in-lieu is made, an additional .5 market rate unit would have to be allowed. Second, modifications would be granted to permitted structure types and/or site plan standards and/or fee reductions.

The proposed density increase cannot be considered a "density bonus". As per the example in the proposed rule, if development of 50 single-family homes on half acre lots was previously permitted, 10 affordable housing units (i.e. 20%) could be required provided that the developer was still able to construct 50 market-rate units. The developer would not be penalized by losing market units, but he would not have the right to build any additional market-rate units to compensate for the cost of the 10 lower income units. Clearly this approach either mistakes COAH's intent or misunderstands the Appellate Division direction. Using the fifty market-rate unit example, assuming the project is located in COAH region 3, COAH has determined the cost to produce the newly-required ten affordable housing units to be \$1,459,030.00 (\$145,903.00 x 10). How will this additional cost of \$29,180.00 per market unit be turned into a "financial incentive to produce affordable housing"? Only if profit is increased by allowing more market rate units and/or additional incentives result in a cost savings greater than the total subsidy, will a compensatory benefit be provided. The proposed rule should be modified to assure that compensating benefits are provided.

Conclusion

The proposed COAH rules represent a legitimate attempt to conform with the Appellate Division's direction in its decision striking down the existing third round rules. Legislative initiatives, such as the proposal to eliminate regional contribution agreements and a separate proposal to impose a statewide nonresidential development fee to generate revenue for affordable housing construction, need to be carefully monitored.

If the new rules are adopted substantially as proposed, municipalities will have to work much harder to provide affordable housing within their borders. Zoning will have to be changed to allow onsite construction at reasonable densities. Legitimate plans will have to be developed to spend funds quickly to produce affordable housing. And developers will have to be enlisted as partners rather than adversaries.

If you have questions about the new growth share rules, please contact Guliet Hirsch, Esquire, of Archer & Greiner's Land Use Department at 908-788-9700.

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