COMMUNITY AFFAIRS

(a)

NEW JERSEY HOUSING AND MORTGAGE FINANCE AGENCY

New Jersey Housing and Mortgage Finance Agency Rules

Adopted Amendments: N.J.A.C. 5:80-1.3, 26.16, and 33.2

Proposed: May 6, 2019, at 51 N.J.R. 527(a).
Adopted: August 30, 2019, by the New Jersey Housing and Mortgage Finance Agency, Charles A. Richman, Executive Director.
Filed: August 30, 2019, as R.2019 d.104, **without change**.
Authority: N.J.S.A. 55:14K-5.g.
Effective Date: October 7, 2019.
Expiration Date: September 14, 2024.

Summary of Public Comment and Agency Responses:

The Agency received one comment from Jean Public as follows:

1. COMMENT: The commenter states that "[the] proposal needs to include more informa[t]ion on how to help autistic kids who have grown up who need housing. [T]heir parents cannot take care of them anymore and have exhaus[t]ed all their money on those kids and when they pass 21 or so they will need housing in some cases."

2. COMMENT: The commenter further states that "we need to provide for those kids injured by vaccines."

3. COMMENT: The commenter also states that she "think[s] [A]merican citizens deserve the only help that is given. think illegal immigrants should be deported and not get any housing from [A]merican citizens taxpayers[*sic*]. [W]e need to take care of our own, not those who sneak into this country illegally. [N]o housing help for illegal immigrants."

RESPONSE TO COMMENTS 1, 2, AND 3: The comments do not relate to any proposed amendment included in the notice of proposal; the comments, therefore, are beyond the scope of this rulemaking.

Federal Standards Statement

The adopted amendments do not contain any standards or requirements that exceed the standards or requirements imposed by applicable Federal law.

Full text of the adoption follows:

SUBCHAPTER 1. GENERAL PROVISIONS

5:80-1.3 General definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

…

"Special needs project" means a project serving special needs populations under the developmental disability housing programs, transitional housing revolving loan programs, shelter plus care programs, HIV/AIDS programs, and similar special needs housing programs, the primary purpose of which is to provide certain types of homes and/or community-based supportive services to individuals and families who are in need of such homes and/or services. Supportive services range across a wide continuum of care and will vary from person to person depending on their particular physical, psychosocial, and/or mental limitations, and may vary for one person over time. Examples of targeted populations that fall within a special needs project are:

1.-9. (No change.)

10. Orphans, children placed in resource family care, children who are wards of the Division of Child Protection and Permanency (CP&P), and children for whom CP&P has care and custody.

…

SUBCHAPTER 26. HOUSING AFFORDABILITY CONTROLS

5:80-26.16 Household certification and referral; related project information

(a) (No change.)

(b) The administrative agent shall prepare a standard form of certification and shall sign and date one for each household when certified. An initial certification shall be valid for no more than 180 days unless a valid contract for sale or lease has been executed within that time period. In this event, certifications shall be valid until such time as the contract for sale or lease is ruled invalid and no occupancy has occurred. Certifications may be renewed in writing at the request of a certified household for an additional period of 180 days at the discretion of the administrative agent.

1.-4. (No change.)

5. Income does not include benefits, payments, rebates, or credits received under any of the following: Federal or State low-income energy assistance programs, food stamps, payments received for children placed in resource family care, relocation assistance benefits, income of live-in attendants, scholarships, student loans, personal property such as automobiles, lump-sum additions to assets such as inheritances, lottery winnings, gifts, insurance settlements, and part-time income of persons enrolled as full-time students. Income, however, does include interest and other earnings from the investment of any of the foregoing benefits, payments, rebates, or credits.

(c)-(l) (No change.)

SUBCHAPTER 33. LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN

5:80-33.2 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

…

"Individuals with special needs" means:

1.-5. (No change.)

6. Youth aging out of resource family care;

7.-12. (No change.)

…

(b)

NEW JERSEY HOUSING AND MORTGAGE FINANCE AGENCY

Low Income Housing Tax Credit Qualified Allocation Plan

Adopted Amendments: N.J.A.C. 5:80-33.9 and 33.12

Proposed: May 6, 2019, at 51 N.J.R. 528(a).
Adopted: September 6, 2019, by the New Jersey Housing and Mortgage Finance Agency, Charles A. Richman, Executive Director.
Filed: September 9, 2019, as R.2019 d.106, **without change**.
Authority: N.J.S.A. 55:14K-5.g and 26 U.S.C. § 42.
Effective Date: October 7, 2019.
Expiration Date: September 14, 2024.

Summary of Public Comments and Agency Responses:

Anne Hamlin, New Jersey Housing and Mortgage Finance Agency ("NJHMFA" or "Agency") Director of Tax Credit Services, conducted a public hearing in the boardroom of NJHMFA at 637 South Clinton Avenue, Trenton, New Jersey at 10:00 A.M. on Wednesday, June 5, 2019, at which time and place no persons appeared to testify. Subsequent to the hearing, the hearing officer recommended that no changes be made to the rulemaking based on the hearing; the hearing officer's recommendations were accepted by the Agency. Copies of the transcript of the public hearing are available at the following address: New Jersey Housing and Mortgage Finance Agency, Division of Tax Credit Services, Attn:

Johanna Peña, 637 South Clinton Avenue, PO Box 18550, Trenton, New Jersey 08650-2085.

The Agency received comments from the following persons:

1. Barbara K. Schoor, Vice President, Community Investment Strategies, Inc., Lawrenceville, New Jersey; and
2. Carol Ann Short, Esq., Chief Executive Officer, New Jersey Builders Association, Robbinsville, New Jersey.

A summary of the comments received and the Agency responses follows (commenters are identified in parentheses by the numbers appearing before their names above):

1. COMMENT: The proposed amendments violate the New Jersey Fair Housing Act (FHA), N.J.S.A. 52:27D-301 et seq., and exceed the scope of the Agency's rulemaking authority. The first sentence of the A500 legislation (codified in the FHA at N.J.S.A. 52:27D-321.1) provides that the Agency "shall" not abbreviate the full extent of low income housing tax credits permitted to be allocated under Federal law. (1 and 2)

RESPONSE: The proposed amendments do not in any way "abbreviate" the limited amount of tax credits to be allocated; the Agency will, as it has always done, continue to allocate the full amount of credits available. Rather, the amendments implement the standards for the Agency to determine an applicant's eligibility for those tax credits. Those standards were designed not only to meet the statutory requirements of N.J.S.A. 52:27D-321.1, but also Section 42(m)(2)(a) of the Internal Revenue Code, which requires that the Agency allocate only the tax credits needed for financial feasibility. The proposed amendments should not be misinterpreted as a limitation on, or a way to unduly curtail, tax credits, but instead as a means to efficiently and responsibly allocate Federal tax credits only to projects that demonstrate a financial need.

2. COMMENT: The Agency's Developer Bulletin 2018-3: Inclusionary Policy dated October 23, 2018 (Inclusionary Policy Bulletin) and the proposed amendments violate the second sentence of N.J.S.A. 52:27D-321.1. The Inclusionary Policy Bulletin quotes that portion of the A500 legislation codified at N.J.S.A. 52:27D-321.1, then states that in order for an applicant to "conclusively demonstrate" a need for Low Income Housing Tax Credits (LIHTC), an "initial presumption" will be made that the municipally approved inclusionary zoning alone creates a realistic opportunity for construction of the affordable units in a development.

The Inclusionary Policy Bulletin and proposed regulations exceed the statutory authority since the A500 legislation does not establish any premise or presumption that must be disproved. Rather, A500 provides that an inclusionary development that is part of a Housing Element and Fair Share Plan (HEFSP) and zoned as such "shall be permitted to receive allocations of low income tax credits," which negates the application of the proposed "initial presumption." Instead, the opposite presumption would hold true because N.J.S.A. 52:27D-321.1 starts with the premise that an inclusionary development ("including, but not limited to, a development that has received a density bonus") shall be permitted to receive allocations of low-income tax credits. (1)

RESPONSE: The comment addresses only part of the second sentence of N.J.S.A. 52:27D-321.1 and, as a result, misconstrues the statute and the proposed amendments. Pursuant to N.J.S.A. 52:27D-321.1, a development included in a Council on Affordable Housing ("COAH-" or "Council-") or court-approved fair share plan "shall be permitted to receive allocations of low income tax credits, provided that the applicant can conclusively demonstrate that the market rate residential or commercial units are unable to internally subsidize the affordable units, and the affordable units are developed contemporaneously with the commercial or market rate residential units." The statute places the burden on the applicant to "conclusively demonstrate" that the internal subsidy is insufficient. The Agency, therefore, proposed these amendments to set forth the criteria and the means by which an applicant can comply with the statutory requirement to "conclusively demonstrate" an insufficiency, so that all applicants know the standards the Agency uses to evaluate applications. The proposed amendments codify the Inclusionary Policy Bulletin.

Additionally, the Agency notes that a fair share plan can only be approved if the plan makes "the achievement of the municipality's fair share of low and moderate income housing realistically possible[.]" N.J.S.A. 52:27D-314.b. Where the court or the Council has approved a plan involving an inclusionary zoning component, the court or Council has determined under N.J.S.A. 52:27D-314.b that the inclusionary zoning in the plan provides a realistic opportunity for the provision of affordable housing through that mechanism. Thus, it is entirely consistent with the FHA for the Agency to make an initial presumption that the inclusionary zoning in an approved fair share plan provides a realistic opportunity for the provision of the affordable units without the need for further subsidization.

3. COMMENT: The zoning of an inclusionary project is not a valid indicator of whether the zoning is able to internally subsidize the affordable portion of the development. A municipality that has an approved fair share plan is required to proceed to zone for inclusionary development in accordance with the HEFSP. It is an invalid assumption on the Agency's part that when a municipality applies a set-aside that it performs, or is even capable of performing, a feasibility analysis. At times, the zoning occurs prior to the involvement of a developer and/or before the design of the development. (1)

RESPONSE: Consistent with the FHA, the Agency has reasonably presumed that the approved inclusionary zoning provides sufficient incentive, or economic benefit, for a developer to undertake a development because there has been a finding, either by the Council or court, that the fair share plan provides the requisite realistic opportunity for provision of the affordable housing. The bottom line is that the statute places the burden on the applicant to demonstrate that the market rate residential or commercial units cannot internally subsidize the affordable units. The proposed amendments set forth three means to demonstrate that the presumption is not applicable to a specific case.

4. COMMENT: The Inclusionary Policy Bulletin does not account for or acknowledge well-established presumptive densities and elimination of cost-burdensome requirements for inclusionary development. In 2008, the Legislature expressly recognized the need for a municipality to provide incentives to residential developers for the construction of affordable housing by enacting N.J.S.A. 52:27D-311, which requires a municipality to utilize any technique or combination of techniques to provide a realistic opportunity for the provision of its fair share of affordable housing. Section 311 requires the consideration of mechanisms that can be employed by municipalities to ensure the feasibility and viability of an inclusionary development, including increased densities, as well as the utilization of funds obtained from any State or Federal subsidy toward the construction (as provided in N.J.S.A. 52:27D-321.1). (1)

RESPONSE: While the comment addresses the Inclusionary Policy Bulletin, the Agency assumes the commenter meant to address those portions of the proposed amendments that would codify the Bulletin.

In preparing its housing element, a municipality must evaluate the criteria set forth in N.J.S.A. 52:27D-311. And, as the commenter notes, N.J.S.A. 52:27D-311.h requires a municipality, when utilizing inclusionary zoning as a compliance method, to provide "incentives to the developer, which shall include increased densities and reduced costs[.]" Thus, the municipality in fashioning its fair share plan must provide appropriate incentives and reduced costs. The court or Council is statutorily directed to approve a plan only upon a finding that the housing element and fair share plan provide a realistic opportunity for the provision of the municipality's fair share obligation, which includes consideration of the combination of all techniques, including increased densities and elimination of unnecessary cost-generating features. Given the statutory directive to both the municipality and the approving entity, it is entirely reasonable for the Agency to presume that the Council or a court has followed the statutory directive of N.J.S.A. 52:27D-314 and has approved the plan upon a finding that it provides the requisite realistic opportunity.

5. COMMENT: A project approval or inclusion in a settlement agreement may require, among other things, significant off-site improvements, contributions, dedication of additional lands to the municipality, land for recreation, and on-site or off-site recreational amenities, all adding to the cost burden and affecting the internal rate of return. An evaluation of density alone cannot measure true economic return or the cost of the affordable housing components. Moreover, the additional economic costs are costs that are allocated to the homebuyer as reflected in the cost of the housing or the land seller as reflected in the acquisition price, both having detrimental effects on the housing market,

land values, and general affordability across all income cohorts, not just the low- and moderate-income sector. (1)

RESPONSE: As stated in the Response to Comments 3 and 4, it is reasonable for the Agency to presume that the Council or court has discharged its statutory responsibility to approve a municipal fair share plan only upon a finding that the fair share plan provides a realistic opportunity for the provision of the municipality's fair share obligation. Pursuant to N.J.S.A. 52:27D-314.b, this includes a finding that "[t]he combination of the elimination of unnecessary housing cost-generating features from the municipal land use ordinances and regulations, and the affirmative measures in the housing element and implementation plan make the achievement of the municipality's fair share of low and moderate income housing realistically possible[.]" A settlement agreement or project approval is part of an approved plan and the Agency is reasonable in making the presumption set forth in the proposed amendments. Nevertheless, under the amendments, plan approval is not the sole criterion; the amendments provide three means by which an applicant can demonstrate that the market rate units are unable to internally subsidize the affordable units so as to warrant the award of tax credits despite the plan approval.

6. COMMENT: The Economic Impact statement in the notice of proposal indicates that the Agency does not anticipate a fiscal impact to the State. This is false as the statement only assesses the impact to the allocation of tax credits and does not assess or comment upon the fiscal impact that allocating or withholding four-percent tax credits (not a fixed annual amount) would have on the State. Specifically, additional credits flowing into inclusionary developments could incentivize development further, create economic development, reduce development costs, reduce market pricing of homes making them more affordable to all income strata, and support land values. Alternatively, withholding the allocation of four-percent credits to inclusionary projects (which demonstrate the need as intended by the statute) would thwart all residential and potentially commercial development in the State and, in addition, would increase market prices of homes and decrease land values substantially. The decrease in land value has far-reaching impacts and could drive the economy away from residential development while the demand for housing remains high. (1 and 2)

RESPONSE: First, the Agency disputes the proposition that tax credits would be withheld from a project that demonstrates a need. The inclusionary policy outlines a pathway to the receipt of an award of tax credits. Second, the Agency does not agree that these negative outcomes will result from implementation of the inclusionary policy. Since 2008, the Agency has denied tax credits to two inclusionary projects that could not conclusively demonstrate the need for tax credits and it did not appear to discourage affordable or inclusionary development. In both cases, the market rate developer agreed to provide affordable housing without the need for tax credits and could not demonstrate a change in circumstances that evidenced a need for additional sources. Finally, the Agency notes that it is not the purpose of the tax credit program to reduce market pricing of homes or to make market rate housing more affordable; rather, it is to help finance affordable rental housing for low income households.

7. COMMENT: The Agency should retain the regulatory flexibility permitted under a policy (though not one which exceeds the statutory authority) and not codify a process and procedure that has been in effect for more than a decade. The process, until the recent policy issuance, was not transparent, but it did not systemically burden or reduce the ability for inclusionary projects to obtain tax credits. "A regulatory regime that relies on developers to incur the uncompensated expense of providing affordable housing is unlikely to ... make it realistically probable that the statewide need for affordable housing can be met." (citing *In re Adoption of N.J.A.C. 5:96 and 5:97*, 416 *N.J.Super.* 462, 489 (App. Div. 2010) (quoting *In re Adoption of N.J.A.C. 5:94 & 5:95*, 390 *N.J. Super.* 1, 73-74 (App. Div. 2007))). The Agency should provide information as to the number and "thresholds" that have been met for inclusionary projects that have previously received an award of tax credits. Since the statute has not changed, there is no reason the Agency should create a rule that curtails the allocation of credits to inclusionary projects or create presumptions beyond those which have previously been applied. (1)

RESPONSE: Substantively, the proposed amendments set forth criteria for the award of low-income tax credits that will apply to all applicants and codify the existing process set forth in the Inclusionary Policy Bulletin. It is, therefore, appropriate to adopt the proposed amendments, so that all applicants will know the standards the Agency will apply in evaluating applications. The commenter appears to favor a less transparent process.

Contrary to the comment, the amendments do not curtail the allocation of tax credits nor do they create a new presumption. Likewise, they do not impose an improper uncompensated expense on a developer; the costs associated with this process have not materially changed since the inception of the inclusionary policy and will likely be passed through as a development cost. The proposed amendments simply implement the statutory requirement regarding an applicant's burden to "conclusively demonstrate" that low-income tax credits are needed for an approved inclusionary development. The project-specific information the commenter seeks is not relevant to and is beyond the scope of the proposed amendments.

8. COMMENT: There is a concern that the proposed amendments cannot be applied evenly or consistently. Many affordable projects actually receive benefits from market rate projects through contributions of municipal Affordable Housing Trust Funds. It is not clear how the Agency can make the distinction that a project that receives Affordable Housing Trust Funds generated by a residential or non-residential development fee is different than units built within an inclusionary development. In one, there is a contribution in lieu of building units; in the other, units are built. Why then would units actually built be penalized from receiving subsidy and the units built with contributed funds be eligible for not only four-percent, but also nine-percent tax credits? (1)

RESPONSE: There is a clear distinction between inclusionary developments and projects that receive municipal Affordable Housing Trust Funds. Contributions to the municipal Affordable Housing Trust Fund are not always associated with an affordable housing obligation and the receipt of those funds by an affordable housing project would not necessarily establish an inclusionary tie or contingent relationship to another development. Municipalities are responsible for the collection and distribution of those funds; those functions are outside the scope of this rulemaking and exceed the authority and oversight of the Agency. However, where there is clear evidence that a contribution to the Affordable Housing Trust Fund was made in lieu of an inclusionary obligation, the Agency will evaluate the delta between the contribution and the cost to build in the project's need for tax credits.

9. COMMENT: As defined by COAH regulations, any project with affordable housing is an inclusionary project, even those that are 100-percent affordable. It is the commenter's understanding, supported by the information submission requirements in the notice of proposal, that redevelopment projects are being reviewed as inclusionary. There are many circumstances where a redeveloper is unrelated to other redevelopers of parcels in a redevelopment plan, but would be considered inclusionary. In those cases, there is no reason to assume a connection or require information that is not publicly obtainable. It is commonplace to have a designated master redeveloper and then parcels developed by a host of developers whose economics are not related to or contingent upon each other. The assumption that redevelopment creates an inclusionary condition by its nature is not fact. (1 and 2)

RESPONSE: The proposed amendments do not specify that projects with a master redeveloper are automatically assumed to be inclusionary; the policy broadly covers all projects applying for tax credits. The Agency is aware that redevelopment projects can have multiple types of land uses and, therefore, may have multiple developers, but contends that affordable housing developers should perform the due diligence necessary to fully understand how their portion fits in the total redevelopment plan, including financial linkages, if any, to other parts of the overall development.

Where a redevelopment plan duly adopted pursuant to N.J.S.A. 40A:12A-1 et seq., serves as zoning that is designed to create a realistic opportunity for the construction of affordable housing, all sites in the redevelopment plan will be reviewed to determine whether there is a relationship or contingent connection between projects or separate phases of redevelopment.

10. COMMENT: The notice of proposal states that typically, the Agency receives applications for low-income housing tax credits

(LIHTC) from approximately two inclusionary projects, containing a total of approximately 150 rental units, per year. Based upon the nearly 300 recent settlement cases, which practically all include inclusionary zoning, this number should be expected to significantly increase until 2025. The development community has only just begun the focus on financial feasibility, contractual negotiations, and the assessment of inclusionary projects as it transitions from settlement to development stages. It has been mostly landowners seeking conclusion to settlements with no or limited real input from housing providers.

Other situations could arise that unknowingly or unintendedly cause a project to be deemed inclusionary. These could include, but are not limited to, the means, methods, and funding of the acquisition of land by a municipality that is ultimately used for affordable housing and the use of municipal Affordable Housing Trust Funds, which are derived from contributions, payments in lieu of construction, or Development Fees (residential or non-residential). (1)

RESPONSE: The Agency agrees that it is likely, given the number of court settlements and the increasing prevalence of inclusionary zoning ordinances, that applications from inclusionary projects will increase. This underscores why it is important to adopt the proposed amendments, which advise all interested applicants of the criteria for securing low-income tax credits and further serve to cause projects to be scrutinized to ensure that scarce tax credits are awarded only to projects that are without alternative means of funding.

11. COMMENT: The Housing Affordability Impact Analysis statement states that it would impose an insignificant impact on the affordability and average cost of housing. This is false, as the impacts of withholding tax credits from inclusionary projects, particularly those in redevelopment plans and those included in settlements, would have a devastating impact on land values and new home costs. Additionally, if demand continues and the supply is not created, then there are further impacts on all housing in the State.

New York City, one of the highest cost-burdened areas, has instituted a policy that has substantially increased the number of affordable housing units by creating incentive programs for developers to create inclusionary communities whereby those units are eligible for significant amounts of subsidy. It seems New Jersey is doing the opposite and penalizing developers creating inclusionary projects. (1)

RESPONSE: The Agency disagrees that the Housing Affordability Impact Analysis statement is false and that the Agency is withholding tax credits from inclusionary projects. Inclusionary developments may receive tax credits if the applicant can conclusively demonstrate that the market rate residential or commercial units cannot internally subsidize the affordable units. The proposed amendments simply ensure that the tax credits allocated do not exceed the amount necessary to ensure project feasibility and that the Agency's limited affordable housing resources reach as many projects and municipalities as possible.

12. COMMENT: Proposed N.J.A.C. 5:80-33.9(b)1 states that "the Agency shall make an initial presumption that the municipally approved inclusionary zoning, in and of itself, creates a realistic opportunity for the affordable units to be built and that such zoning is sufficient to support the internal subsidization of the affordable units required to be built under the fair share plan or the judgment of repose or compliance applicable to the municipality in which the project is situated." This presumption cannot be made unless, as a minimum measure, presumptive densities, as well established by the courts, are achieved on the site. Additionally, the initial presumption can only be valid if there are not off-site or extraordinary development costs. Additionally, the initial presumption cannot be true unless the entire development is afforded relief from cost-generative features and requirements. (1)

RESPONSE: The Agency disagrees with the commenter. Pursuant to the FHA, a municipal fair share plan can only be approved upon a finding that the plan creates a realistic opportunity for the provision of the municipality's fair share need. In this regard, in addition to finding that the plan is consistent with applicable rules and not inconsistent with the achievement of regional low-income housing needs, the approving entity must determine that the municipality has eliminated unnecessary housing cost-generating features from its ordinances and regulations and that the affirmative measures in the plan make achievement of the low- and moderate-income housing realistically possible (see N.J.S.A. 52:27D-314). The Council reviewed fair share plans to make these determinations and the courts have plans reviewed by court-appointed masters and hold compliance hearings before entering a judgment of repose. Given this thorough review process and the statutory requirements, it is entirely reasonable and appropriate for the Agency to make an initial presumption that the inclusionary zoning included in any approved plan provides the requisite realistic opportunity for the production of affordable housing and that cost-generating features have been eliminated. Additionally, the presumption is not absolute. N.J.A.C. 5:80-33.9(b)2 sets forth criteria by which to overcome the initial presumption.

13. COMMENT: Tax credit equity is often anticipated and necessary to subsidize any or all of the affordable units and especially any units built in excess of 15 percent for rental and 20 percent for for-sale.

Courts have upheld and endorsed COAH regulations that provide for a maximum set aside of 15 percent for rental affordable housing units and 20 percent for for-sale affordable units and have rejected COAH regulations that provide for greater set asides. As in *In re the Adoption of N.J.A.C. 5:96 and 5:97* by COAH, the court recognized that an inclusionary development with a 25-percent set aside was not economically feasible (invalidating COAH regulations for failure to provide sufficient incentives for developers to construct inclusionary development). The court further took "judicial notice of the fact that a 20% set aside requirement has been considered the norm in the administration of the Mount Laurel doctrine and that experts in the field have expressed skepticism whether developers will be motivated to construct residential developments with affordable housing set-aside requirements any higher than 20% ..." (citations omitted)

RESPONSE: The Agency agrees that historically tax credits were awarded for the affordable units in excess of the 15-percent or 20-percent set aside. At N.J.A.C. 5:80-33.9(b)2i, the proposed amendments provide for the continuation of this practice, as they allow for tax credit equity "to subsidize any affordable units to be built in excess of the municipal obligation." Similarly, N.J.A.C. 5:80-33.9(b)3 requires that "[a]ny analysis submitted by the applicant shall expressly take into consideration the possibility of a partial award of low-income housing tax credits (LIHTC), taking into account the internal subsidy provided by the market rate units." The Agency also observes that the court's recognition of a 15- or 20-percent set aside as the norm further supports the establishment of an initial presumption that the zoning is sufficient to internally subsidize the affordable units.

14. COMMENT: A change in "[e]conomic conditions" since approval of the municipally approved inclusionary zoning could be the mere contract to sell the land and develop homes. Typically, it is the landowner, or seller, who agrees to the inclusionary zoning without regard or assumption as to the cost or impact of the set-aside. Additionally, there is no statutory reference to changing economic conditions. (1 and 2)

RESPONSE: The proposed amendments at N.J.A.C. 5:80-33.9(b)2ii provide an exception and allowance for changing economic conditions and, thus, are to the benefit of a landowner or seller. This could result in a greater need for tax credits if the market rate units no longer support sufficient internal subsidization of the affordable units. Such economic conditions are germane to an analysis of whether the need for tax credits has been conclusively demonstrated, as required by the statute.

15. COMMENT: A municipality would never concede that the approved zoning erroneously determined that the internal subsidy would be sufficient to sustain building the affordable units; it is the initial presumption that is erroneous. (1)

RESPONSE: The Agency assumes that the comment refers to proposed N.J.A.C. 5:80-33.9(b)2iii, which allows an applicant to overcome the presumption that municipally approved inclusionary zoning, in and of itself, creates a realistic opportunity for affordable housing to be built by demonstrating that the municipally approved zoning made such determinations erroneously. This amendment requires an applicant to demonstrate that the municipality erred; it does not require the municipality to concede any error.

16. COMMENT: The Agency's submission requirements are onerous and overextending. The State should accept a certification from the municipal attorney that the project is or is not inclusionary. If the municipal attorney states that the project is inclusionary, then further steps are warranted. Additionally, if an applicant affirmatively states that the

project is inclusionary, then the submission should be reduced to only the analysis. (1)

RESPONSE: The Agency is not requesting any information over and above that which was requested previously. Furthermore, delegating this task to a multitude of municipal attorneys would likely result in an inconsistent application of the rule by entities or individuals that are not ultimately responsible for its implementation. Therefore, the Agency is convinced that ensuring consistency requires that this determination be made by the Agency, as the administrator of the program.

17. COMMENT: For an inclusionary project, much of the information required to be submitted under the notice of proposal is not available at the time the tax credit eligibility determination is necessary. Since many projects are go, no-go based on tax credit eligibility, the requirement to submit a site plan, infrastructure costs, municipal approvals, or reports and appraisals may be premature. (1)

RESPONSE: A final determination cannot be made until all required documentation is submitted and evaluated. It is at the discretion of the developer whether or not to advance an application that may be deemed inclusionary after development work is completed.

18. COMMENT: Requiring applicants to submit spread sheets with "live" Excel sheets is excessive, and for some developers that information may be proprietary and not available for dissemination outside of the corporation. (1)

RESPONSE: In the interest of consistency, efficiency, and timely review, "live" Excel sheets were requested so formulas and calculations could be easily evaluated. Requiring reviewers to manually enter data would cause delays in the process and generate extensive questions regarding assumptions and inputs. It is at the discretion of the developer whether to submit the information in workbooks that they deem proprietary; however, in order to determine a need for tax credits, financial information for all affordable, market rate, and non-residential components (as applicable) of the development must be submitted with live calculations in Excel.

19. COMMENT: N.J.S.A. 52:27D-321.1 explicitly provides that any rules of the Agency "shall" not reduce the full extent of credits permitted to be allocated by Federal law. There are currently no standards by which to determine whether an inclusionary project can internally subsidize the affordable units. The notice of proposal requests feasibility analyses, financial analyses, information on market conditions, and any other pertinent information necessary to conduct the needs analysis; however, the Agency provides no guidance as to how it might interpret and assign weight to such diverse information presented in various forms and utilizing different assumptions. Because the proposed amendments do not have clearly defined standards, the rules would conflict with Federal law and, thus, also violate the FHA as amended by A500. (1 and 2)

RESPONSE: The Agency disagrees with the comment that there are no clearly defined standards. As part of the evaluation process, financial scenarios are assessed through pro-forma analyses of annual cash flows. The financial viability and attractiveness of these cash flows are evaluated using a net present value (NPV) and internal rate of return (IRR) framework. The attractiveness of the development projects and investment alternatives varies based on market conditions, risk profiles, and locations. Therefore, no single numeric standard can capture whether a modeled return is sufficiently attractive for development to proceed. Instead, expected returns must be evaluated in light of market and project conditions. Given the variability among projects and their defining attributes, this cannot be reduced to a single numeric "threshold," but that should not be mistaken for the absence of a standard. Pro forma analysis using NPV and IRR is a standard method for analyzing real estate projects and determining viability.

The Agency also disagrees with the comment that the proposed rules conflict with Federal law. Section 42(m)(2)(a) of the Code provides: "The housing credit dollar amount allocated to a project shall not exceed the amount the housing credit agency determines is necessary for the financial feasibility of the project and its viability as a qualified low-income housing project throughout the credit period." The Agency is responsible for ensuring that low-income housing projects are not over-subsidized; to that end, all sources and uses of funds are evaluated, including those financial benefits that are granted by a municipality as a means for producing inclusionary affordable housing.

20. COMMENT: Many municipalities and/or developers in settling declaratory judgment actions pursuant to the procedure under Mount Laurel IV could not have anticipated this change in policy. For example, settlement agreements have been executed providing for a 25-percent set aside with the assumption that the project would require tax credits. This initial presumption that the municipalities are obligated to follow is invalid on its face, both in its current and retroactive application. (2)

RESPONSE: The Agency disagrees with the comment. Given the statutory scheme for approving municipal fair share plans under the FHA, it is reasonable for the Agency to assume that the Council or the court has discharged its statutory duty and only approved a plan that provides a realistic opportunity for the provision of the municipal fair share obligation. Therefore, it is reasonable for the Agency to presume that any inclusionary zoning, regardless of the low- and moderate-income set aside percentages, included in an approved plan is sufficient to internally subsidize the affordable units. In the case of an approved set aside in excess of 15 or 20 percent, a settlement agreement may specifically identify that tax credits are needed; that scenario (where tax credits are needed for units in excess of the municipal obligation) is anticipated under the proposed amendments. In either case, if the internal subsidy is determined to be insufficient, the Agency has included provisions that allow an applicant to overcome the initial presumption and an applicant can avail itself of those provisions to demonstrate that tax credits are warranted.

21. COMMENT: Proposed N.J.A.C. 5:80-33.9(b)2iii states that the third circumstance an applicant may prove to overcome the initial presumption is "the municipally approved zoning erroneously determined that the internal subsidy would be sufficient to sustain building the affordable units." As stated previously, no sophisticated analysis was conducted to determine whether a municipality's inclusionary zoning is sufficient to sustain building inclusionary projects. (2)

RESPONSE: The developer may simply demonstrate that the set-aside built into the municipality's inclusionary zoning is not sufficient to sustain the project. See also the Response to Comment 15.

Federal Standards Statement

The adopted amendments do not contain any standards or requirements that exceed the standards or requirements imposed by applicable Federal law.

Full text of the adoption follows:

SUBCHAPTER 33. LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN

5:80-33.9 Volume cap credits

(a) (No change.)

(b) A mixed-income or mixed-use project that is part of a municipal fair share housing development plan or a court-approved judgment of repose or compliance, including, but not limited to, developments that have received a density bonus, may not receive volume cap credits unless the applicant can conclusively demonstrate that the market rate residential or commercial units are unable to internally subsidize the affordable units and the affordable units are developed contemporaneously with the commercial or market rate residential units. This subsection shall not be evaded by failing to apply all or any portion of the subsidy to the low- or moderate-income units, by diverting all or any portion of the subsidy to other uses, or by using any other device in which all or any portion of the subsidy is not used to benefit low- or moderate-income housing.

1. In determining whether an applicant has conclusively demonstrated that the market rate residential or commercial units are unable to internally subsidize the affordable units, the Agency shall make an initial presumption that the municipally approved inclusionary zoning, in and of itself, creates a realistic opportunity for the affordable units to be built and that such zoning is sufficient to support the internal subsidization of the affordable units required to be built under the fair share plan or the judgment of repose or compliance applicable to the municipality in which the project is situated.

2. The presumption set forth in (b)1 above may be overcome if the applicant demonstrates, to the satisfaction of the Agency, the existence of any one or more of the circumstances in (b)2i, ii, or iii below:

i. Tax credit equity is necessary to subsidize any affordable units to be built in excess of the municipal obligation;

ii. Economic conditions have changed since approval of the municipally approved inclusionary zoning to such an extent that the zoning, taking into account any density bonus awarded, no longer supports sufficient internal subsidization to sustain construction of the requisite affordable units; or

iii. The municipally approved zoning erroneously determined that the internal subsidy would be sufficient to sustain building the affordable units.

3. It is the responsibility of the applicant to provide sufficient documentation to support the existence of any of the circumstances in (b)2i, ii, or iii above. Any analysis submitted by the applicant shall expressly take into consideration the possibility of a partial award of low-income housing tax credits (LIHTC), taking into account the internal subsidy provided by the market-rate units.

4. The sponsors of all inclusionary developments seeking tax-credit financing shall submit the information in this paragraph to enable the Agency to determine the need, if any, for tax credits. The Agency shall determine the amount of tax credits, if any, to be awarded to a project as part of the needs analysis required pursuant to 26 U.S.C. § 42(m)(2).

i. Basic development information, including, but not limited to, the following:

(1) A site plan for both the affordable and market-rate components; and

(2) A timetable for the affordable and market-rate components, which shall include the timing of any phased development and the availability of units for rent or sale;

ii. A description and the documentation of any financial ties and/or subsidies, including, but not limited to, the sale or transfer of land, shared infrastructure improvements, and financing, between the affordable and market-rate components;

iii. A description and the documentation of any business arrangements regarding additional components of the market-rate development;

iv. Information on all market-rate components linked to the affordable component;

v. A description and the amount of all subsidy requests, including, but not limited to, the following:

(1) Any density bonus, payment in lieu of taxes (PILOT) agreement, affordable housing trust fund contribution, State or Federal grant, and low-income housing tax credit application; and

(2) Copies of any Form 10 submission(s) for the affordable component;

vi. Terms and conditions of the purchase of land and the current market value of land proposed to be utilized in the development, including, but not limited to, the following:

(1) Documentation of any prior land purchase and/or current land purchase agreement, including date(s) of sale, price, acreage, parcel boundaries, and any terms or conditions of sale; and

(2) An estimate of the current market value of the land, with justification as to how the estimate was derived (for example, appraisal, recent sale, sale of comparable parcels of land, alternative uses, etc.);

vii. Documentation of municipal approvals, including, but not limited to, the following:

(1) Fair Share Plan and/or judgment of repose or compliance applicable to the municipality in which the project is situated;

(2) Local planning board approvals for the affordable units and any associated market-rate or commercial units; and

(3) Land use approvals for the affordable units and any associated market-rate or commercial units;

viii. Information on market conditions in support of anticipated revenue levels, including, as applicable, comparable properties, market-level pricing information, and market studies;

ix. A pro forma for both the market-rate and the affordable components of the development, including, but not limited to, the information in (b)4x(1) through (4) below for both. All calculations are to be provided electronically, with live Excel sheets:

(1) Development costs;

(2) Development financing, including equity and/or loans, with amounts and anticipated interest rates;

(3) Operating/sales costs; and

(4) Anticipated revenue from rentals or sales, including ancillary sources and/or unit upgrades;

x. A feasibility analysis conducted by an independent third-party skilled in market and financial analysis, certified to the Agency, and including, but not limited to, the information in (b)4x(1) through (3) below. All calculations are to be provided electronically, with live Excel sheets:

(1) The calculated internal rate of return (IRR) for both the market-rate project and the combined project, with and without the requested LIHTC;

(2) A narrative explanation, signed by the applicant, of the reason(s) for the insufficiency of the combined project returns absent the requested LIHTC. The narrative shall explain the basis for the insufficiency and shall be tied to the financial analysis; and

(3) Any other financial analyses used to support the narrative explanation.

(4) The feasibility analysis must reflect and be consistent with the pro formas referenced at (b)4ix above.

xi. The Agency reserves the right to request any additional information from the applicant as deemed necessary to conduct the needs analysis.

(c) (No change.)

5:80-33.12 Application to a cycle/eligibility requirements

(a) A mixed-income or mixed-use project that is part of a municipal fair share housing development plan or a court-approved judgment of repose or compliance, including, but not limited to, developments that have received a density bonus, may not compete for tax credits (ceiling tax credits), unless the applicant can conclusively demonstrate that the market rate residential or commercial units are unable to internally subsidize the affordable units and the affordable units are developed contemporaneously with the commercial or market rate residential units. This subsection shall not be evaded by failing to apply all or any portion of the subsidy to the low- or moderate-income units, by diverting all or any portion of the subsidy to other uses, or by using any other device by which all or any portion of the subsidy is not used to benefit low- or moderate-income housing. For example, if a site was originally zoned at four units per acre and a rezoning resulted in six units per acre with a 20 percent set-aside for low- and/or moderate-income units, then the site would be the recipient of a density bonus. If the developer built at six market units per acre, subdivided a portion of the acreage and donated that land to a for-profit or nonprofit developer, then the new owner may not compete for ceiling tax credits if the market rate residential units were able to subsidize the affordable units. Alternatively, if on the same site the number of low- and moderate-income units is increased without a corresponding increase in density, then the additional affordable units would be eligible to compete for ceiling tax credits. In determining whether an applicant has conclusively demonstrated that the market rate residential or commercial units are unable to internally subsidize the affordable units, the Agency shall apply the standards set forth at N.J.A.C. 5:80-33.9(b)1 through 4.

(b)-(c) (No change.)

ENVIRONMENTAL PROTECTION

(a)

WATER RESOURCES MANAGEMENT DIVISION OF WATER SUPPLY AND GEOSCIENCE

Notice of Administrative Change
Fee Schedule for Water Supply Allocation Permits
N.J.A.C. 7:19-3.6

Take notice that the Department of Environmental Protection (Department) is adjusting fees for water supply allocation permits, temporary dewatering permits, and water use registrations set forth in the Water Supply Allocation rules at N.J.A.C. 7:19-3.6. In accordance with N.J.A.C. 7:19-3.4, the Department is adjusting the fees for inflation based on the previous 12-month United States Department of Labor Consumer Price Index (CPI), U.S. city average, all items, all urban consumers. As