

COMMUNITY AFFAIRS

NEW JERSEY HOUSING AND MORTGAGE FINANCE AGENCY

New Jersey Housing and Mortgage Finance Agency Rules

Proposed Repeals and New Rules: N.J.A.C. 5:80-6.2, 6.3, 22.1, 32.2, and 32.3

Proposed Repeals: N.J.A.C. 5:80-6.4, 6.9, 9.13, 10, 22.2 through 22.24, 24, 32.4 through 32.6, and 5:80-32 Appendix

Proposed Amendments: N.J.A.C. 5:80-5.1, 5.9, 6.1, 6.5, 6.6, 6.7, 6.8, 6.10, 6.11, 9.14, 22.25, 32.1, 32.7

Authorized By: New Jersey Housing and Mortgage Finance Agency, Anthony Marchetta, Executive Director.

Authority: N.J.S.A. 55:14K-5.g.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2017-093.

Submit comments by August 18, 2017, to:

Jim Peasco

Senior Legal Research Analyst

New Jersey Housing and Mortgage Finance Agency

637 South Clinton Avenue

PO Box 18550

Trenton, New Jersey 08650-2085

jpeasco@njhmf.gov

The agency proposal follows:

Summary

The New Jersey Housing and Mortgage Finance Agency (“NJHMFA” or “Agency”), pursuant to its statutory authority, serves as an advocate for increasing the supply of adequate, safe, and affordable housing in the State of New Jersey. To fulfill its statutory mandate, the Agency acts as a mortgage lender by providing financing to housing sponsors who wish to construct, rehabilitate, or improve housing for low- and moderate-income residents of the State. The Agency also provides mortgage loans for home buyers and serves as the low-income housing tax credit agency for the State.

The rules of the Agency, N.J.A.C. 5:80, were adopted and have been amended from time to time pursuant to the authority of the New Jersey Housing and Mortgage Finance Agency Law of 1983 (Act), N.J.S.A. 55:14K-1 et seq., to establish the procedures for and the terms and conditions of mortgage loans made by the Agency and the means of administering the program of Federal low-income housing tax credits pursuant to Section 42 of the Internal Revenue Code (IRC), 26 U.S.C. § 42.

The Agency proposes repeals of and amendments to its rules to promote de-regulation, clarity, and accuracy.

The Agency has identified certain programs that are obsolete and no longer a part of its portfolio of products; the Agency, therefore, proposes to repeal the rules regulating those programs. Specifically, the Agency proposes to repeal N.J.A.C. 5:80-9.13, which provides an alternate procedure for implementing rent increases at low- and/or moderate-income housing projects without Federal project-based rent subsidies; 10, the Loans to Lenders for Single Family Mortgage Loans program; and 24, the Lease-Purchase Program. Additionally, the Agency proposes to delete the Portfolio Reserve Account sum at N.J.A.C. 5:80-5.9(a)1 and to make certain related amendments at N.J.A.C. 5:80-5.1 and 5.9(b).

The Agency also proposes to substantially amend the Affirmative Fair Housing Marketing Plan (AFHMP) rules codified at N.J.A.C. 5:80-22 and replace it with a much more abbreviated version that

incorporates the U.S. Department of Housing and Urban Development (HUD) form of AFHMP. The Agency further proposes to amend its rules at N.J.A.C. 5:80-6, Sale of Projects Owned by Nonprofit Corporations to Limited Partnerships, to reduce the content and scope of the subchapter in recognition of the essentially historical nature of sales contemplated thereunder. Additionally, the Agency proposes to amend N.J.A.C. 5:80-9.14(a) and (b), regarding resident monthly fee increases for low- and/or moderate-income restricted units in assisted living residences (ALRs) in light of the proposed repeal of N.J.A.C. 5:80-9.13 and to correct a longstanding error. Finally, the Agency proposes to amend its Housing Investment Sales program rules at N.J.A.C. 5:80-32 to eliminate that program as to any future transactions while maintaining existing restrictions and requirements for housing projects for which housing investment sales transactions have already taken place.

The proposed repeals and amendments are summarized as follows:

N.J.A.C. 5:80-5.9(a) sets forth the payments and repayments required upon the transfer of an applicable ownership interest in Agency-financed housing projects. The Agency proposes to delete N.J.A.C. 5:80-5.9(a)1, which imposes a payment of 3.25 percent of the purchase price of such a transfer to the Portfolio Reserve Account (PRA). Concomitantly, the Agency proposes to delete the definition of “Portfolio Reserve Account” at N.J.A.C. 5:80-5.1; and to amend N.J.A.C. 5:80-5.9(b) to reflect the essentially historical nature of the PRA.

N.J.A.C. 5:80-6, Sale of Projects Owned by Nonprofit Corporations to Limited Partnerships, sets forth the procedures to be followed by nonprofit sponsors desiring to sell housing projects to certain for-profit entities and the terms and conditions of such sales. Subchapter 6 also sets forth the requirements for the funding and use of certain escrow accounts (Development Cost Escrow or DCE; Community Development Escrow or CDE; PRA; and Project Subsidy Reserve or PSR) established in connection with the sales of certain projects. Prior to the 1991 repeal of the Limited Dividend Law (LD Law), a number of Agency-financed housing projects were sold by their nonprofit sponsors to limited partnerships formed pursuant to the LD Law. As a result of those transactions, designated funds were

deposited into certain accounts for the primary purpose of financing project and community activities and services. Because the provisions of Subchapter 6 that set forth the procedures for such sales and the resulting funding apparatuses for the relevant accounts were rendered largely historical by the repeal of the LD Law, as well as by the introduction of low-income housing tax credit syndications, the Agency proposes amendments to delete those provisions and to amend the subchapter heading to “Use of Funds from Sale of Projects Owned by Nonprofit Corporations to Limited Partnerships”; the remaining provisions of the subchapter, as proposed to be amended and recodified, are intended primarily to set forth the permissible uses of, and the procedure for accessing, the funds remaining in and accruing to those accounts. Specific amendments are proposed as follows:

N.J.A.C. 5:80-6.1 contains definitions of certain words and terms used in Subchapter 6. The Agency proposes to delete the following definitions as unnecessary because the proposed amendment of the subchapter will eliminate all references to the terms: “cash proceeds,” “closing,” “commitment letter,” “gross syndication proceeds,” “Multi-Family Rental Investment Program,” “net proceeds,” “original mortgage amount,” “portfolio reserve account,” “purchase price,” “stated equity,” “syndication,” and “transaction costs.” Also, the Agency proposes to amend the following definitions: “Community Development Escrow” to substitute the generic term “a conversion” for references to N.J.A.C. 5:80-6.5(a)2 and 5:80-6.6(b)4, to add the term “intended” and the phrase “or activities,” and to substitute the phrase “a project” for “the development,” the latter amendments for consistency with certain other definitions and to more accurately reflect the permitted uses of funds in a CDE account; “conversion” to more accurately state the nature of and assign historical perspective to transactions encompassed by Subchapter 6; “Development Cost Escrow” to substitute the generic term “a conversion” for references to N.J.A.C. 5:80-6.2(e)2 and 6.5(a)1 and to make a stylistic change; “nonprofit” to assign historical perspective to the term as used in Subchapter 6 and to make a stylistic change; “partnership” to assign historical perspective to the term as used in Subchapter 6 and to make

certain stylistic changes; and “Project Subsidy Reserve Fund” to substitute the generic term “a conversion” for references to N.J.A.C. 5:80-6.2(e) and 6.6(b).

The Agency proposes to repeal N.J.A.C. 5:80-6.2, 6.3, 6.4, and 6.9 inasmuch as these sections set forth procedural rules governing sales; since such sales will not occur in the future, these rules are deemed to be obsolete. New N.J.A.C. 5:80-6.2 is proposed to describe the scope of Subchapter 6, as amended. New N.J.A.C. 5:80-6.3 is proposed to restate existing N.J.A.C. 5:80-6.4(a)5, which mandates payment of an annual \$3,500 administrative fee to the Agency; because the current provision requiring that the fee “be assessed proportionately against the respective accounts for the project to the extent available” is awkward and has not been followed in practice, the Agency proposes the more practical approach that such fee be payable, unless otherwise provided for by agreement, from the principal and/or interest income on the escrow accounts in such manner as determined by the Agency.

The Agency proposes to recodify N.J.A.C. 5:80-6.5, which is concerned with funds obtained from the sales and syndications of projects subsidized under the Federal Section 8 program, as N.J.A.C. 5:80-6.4 and to amend the section. Because existing N.J.A.C. 5:80-6.5(a) and the first sentences of paragraphs (a)1 and 2 are historical, in that they deal with housing project sales and syndications and the assignment to DCE and CDE accounts of certain of the proceeds therefrom, these provisions are proposed to be deleted. As a result, at recodified subsection (a), the Agency proposes to insert the phrase “principal of the Development Cost Escrow” to eliminate a possible ambiguity and to clarify that it is only the use of DCE account principal that is being addressed in the subsection; also, the Agency proposes to amend the phrase “increase tenant safety and comfort” in that subsection to state “increase tenant safety and/or comfort” to provide, by insertion of the disjunctive option, greater leeway for permitted uses of such principal. The Agency also proposes to recodify the second sentence of existing N.J.A.C. 5:80-6.5(a)2 as subsection (b) and to make the following amendments thereto: substitute the phrase “the principal of the Community Development Escrow (CDE) shall be used” for the phrase “these funds may be utilized by the nonprofit” to eliminate another possible ambiguity and clarify that it is only

the use of CDE account principal that is being addressed in the subsection; update a cross-reference; and insert the phrase “in the community in which the project is located” at the end of the sentence to provide a geographic restriction to the preceding phrase “community development activities.”

The Agency proposes to recodify existing N.J.A.C. 5:80-6.6, which is concerned with funds obtained from the sales and syndications of projects subsidized under the Federal Section 236 interest reduction program, as N.J.A.C. 5:80-6.5. Amendments are proposed to existing N.J.A.C. 5:80-6.6(a), to account for the proposed repeal of N.J.A.C. 5:80-6.4 and the essentially historical nature of the subsection. As the first sentence of existing N.J.A.C. 5:80-6.6(b) is solely historical, in that it deals with prior sales of Section 236 projects and the assignment to PSR accounts of certain of the proceeds therefrom, that sentence is proposed to be deleted. The Agency proposes to amend existing N.J.A.C. 5:80-6.6(b)4, which provides the procedure for a portion of the funds in a PSR account and the interest thereon to be transferred to a CDE account under certain circumstances, to reflect the proposed deletion of existing N.J.A.C. 5:80-6.4(a)6 and recodification of N.J.A.C. 5:80-6.5; to clarify that the project housing sponsor must demonstrate to the satisfaction of the Agency that PSR funds are not and will not be required for certain purposes set forth at existing N.J.A.C. 5:80-6.6(b)1, 2, and 3; to mandate that funding be provided for payment of the annual administrative fee to the Agency; and, by way of the proposed last sentence, to require the housing sponsor to submit, and the Agency to consider, the criteria enumerated at existing N.J.A.C. 5:80-6.4(a)6 (which is proposed for repeal) in the transfer process.

The Agency proposes to recodify existing N.J.A.C. 5:80-6.7, which concerns the use of investment income on the PSR, DCE, and CDE accounts, as N.J.A.C. 5:80-6.6. The Agency proposes amendments for stylistic purposes and to reflect the proposed repeal of N.J.A.C. 5:80-6.4 and proposed relocation of the content thereof as new N.J.A.C. 5:80-6.3. The Agency also proposes stylistic changes at existing N.J.A.C. 5:80-6.7(a)1, 2 and 3.

The Agency proposes to recodify existing N.J.A.C. 5:80-6.8, which provides for the use of DCE and CDE account funds for the development of housing, as N.J.A.C. 5:80-6.7. The Agency proposes

amendments at existing N.J.A.C. 5:80-6.8(a) for stylistic purposes and to replace the phrase “community or in other communities” with the defined term “State,” as the former phrase is so vague as to be virtually meaningless. The Agency also proposes stylistic amendments at existing N.J.A.C. 5:80-6.8(b).

The Agency proposes to recodify existing N.J.A.C. 5:80-6.10, which concerns tax matters arising from sales, as N.J.A.C. 5:80-6.8, and to delete subsection (b) thereof, because its content is exclusively historical.

The Agency proposes to recodify existing N.J.A.C. 5:80-6.11, which deals with approval and disclosure requirements relating to parties involved in sales, as N.J.A.C. 5:80-6.9 and to insert the phrase “or members” to recognize that entities other than partnerships and corporations may be, or have been, involved in sales and syndication transactions.

N.J.A.C. 5:80-6.12 is proposed for recodification as N.J.A.C. 5:80-6.10 without change.

N.J.A.C. 5:80-9 sets forth the procedures for making annual rent determinations and for submitting and determining rent increase applications at Agency-financed housing projects. While the rules at N.J.A.C. 5:80-9.1 through 9.12 establish the general procedure for the determination, submission, and review of rent increase requests, N.J.A.C. 5:80-9.13 provides an alternative means by which sponsors of housing projects without Federal project-based rent subsidies may implement rent increases. However, because the procedure set forth therein is applicable to no more than seven projects, has been used by only one housing sponsor, and it is unlikely that the procedure will be used in the future by any other housing sponsors, the Agency proposes to repeal N.J.A.C. 5:80-9.13. The proposed repeal of N.J.A.C. 5:80-9.13 necessitates the proposed amendment of N.J.A.C. 5:80-9.14(b), which relies upon and cross-references N.J.A.C. 5:80-9.13(a)1 as providing the procedure for implementing monthly fee increases for income-restricted assisted living residences (ALRs). To preserve that procedure’s applicability to income-restricted ALRs, it is proposed to incorporate the procedure currently set forth at N.J.A.C. 5:80-9.13(a)1 (which is proposed for repeal) directly into N.J.A.C. 5:80-9.14(b).

Additionally, the Agency discovered an error in the text of the third sentence of N.J.A.C. 5:80-9.14(a), which error it proposes to correct. The third sentence currently states: “Monthly fees for income-restricted ALR units may not exceed 80 percent of the percentage of HUD median income applicable to that ALR as set forth in the Financing, Deed Restriction and Regulatory Agreement executed by the housing sponsor and the Agency (“applicable HUD median income level”).” The recitation of “80 percent of the percentage of HUD median income” is incorrect; “monthly fees,” which are expressed in dollar amounts, must be limited by similarly expressed dollar amounts, not by a “percentage,” as results from a literal reading of the current text of N.J.A.C. 5:80-9.14(b) (in effect, resulting in a comparison of apples and oranges). Accordingly, the Agency proposes to amend the third sentence to read as follows: “Monthly fees for income-restricted ALR units may not exceed 80 percent of the HUD median income level applicable to that ALR as set forth in the Financing, Deed Restriction and Regulatory Agreement executed by the housing sponsor and the Agency (“applicable HUD median income level”); this proposed amendment will result in the rule stating that monthly fees for income-restricted ALR units must be limited to 80 percent of the applicable HUD median income level (a dollar-to-dollar comparison), which is the intention of the rule and accords with how it has been applied in practice.

Subchapter 10, Loans to Lenders for Single Family Mortgage Loans, sets forth the terms and procedures pursuant to which the Agency may make loans to institutional lenders in order for such lenders to make single family mortgage loans. This program is no longer used by the Agency and is, thus, obsolete. Accordingly, the Agency proposes to repeal N.J.A.C. 5:80-10.

N.J.A.C. 5:80-22 extensively sets forth the purpose, the requirement for submittal, and the content of an AFHMP. Because the Office of Fair Housing and Equal Opportunity in HUD has an AFHMP form that is similar, although not identical, to that required by the Agency, the Agency proposes to repeal most of existing Subchapter 22 and replace it with a much simplified version that would require sponsors of Agency-financed housing projects and continuing care retirement communities to complete the HUD AFHMP and, as is presently the case, to register their projects on the New Jersey Housing

Resource Center (HRC) website, which is a freely accessible website administered and funded by the Agency to provide a central location for users to search for and list affordable and accessible housing units throughout the State. The Agency believes the proposed repeals and amendments will reduce the administrative burden on sponsors of some housing projects and continuing care retirement communities who will have to complete and comply with only the HUD AFHMP and not similar, but basically duplicative, AFHMPs for both HUD and the Agency.

Subchapter 24, Lease-Purchase Program, sets forth the terms of a program under which eligible buyers may execute lease-purchase agreements enabling them to lease residential units with an option to purchase such units following the expiration of the lease terms. As with the Loans to Lenders for Single Family Mortgage Loans program codified at Subchapter 10, this program is no longer used by the Agency and is, thus, obsolete. Accordingly, the Agency proposes to repeal N.J.A.C. 5:80-24.

N.J.A.C. 5:80-32, Housing Investment Sales (Program), was promulgated in 1994, to set forth the terms of a program whereby for-profit housing sponsors that were formed pursuant to the LD Law, N.J.S.A. 55:16-1 et seq. (repealed by P.L. 1991, c. 431, § 20), can realize an enhanced return (to be shared with the Agency) upon the sale of an Agency-financed housing project to a housing sponsor who agrees to preserve the low- or moderate-income status of the project for an additional 35 years beyond the original mortgage term. The Program was targeted primarily toward older Agency-financed projects that had built up substantial cash surpluses known as “residual receipts,” which were largely unrealizable by the housing sponsors due to Agency investment-return restrictions that were in place at the time. Sixteen housing projects availed themselves of the Program from 1994 through and including 1998. With the exception of a supplemental housing investment sale by one of those 16 projects that occurred in 2001, no additional housing investment sale transactions have occurred since 1998. The Agency believes it is unlikely that any future applications will be made for such sales given certain regulatory changes that have provided projects financed prior to, as well as after, January 17, 1984 with the ability to include project appreciation as part of the housing sponsor’s investment, thereby allowing a

greater return upon the operation and sale of a project than at the time the Program was established. The Agency, therefore, proposes amendments to eliminate the Program as to any new transactions and maintain the existing restrictions and requirements as to housing projects for which housing investment sales transactions have already taken place. The following specific amendments are proposed:

At N.J.A.C. 5:80-32.1, Definitions, the Agency proposes to delete the definition of “available cash” because that term is no longer used in Subchapter 32 as proposed to be amended; amend the definition of “eligible LD sponsor” to cite the repeal of the LD Law and to reflect the historical nature of housing investment sales; amend the definition of “housing investment sale” to reflect the historical nature of such sales and to provide a citation for the Fair Housing Act; amend the definition of “maximum additional return” to reflect the historical nature of the additional return payable under the LD Law; and delete the definition of “purchase price” because that term is no longer used in Subchapter 32 as proposed to be amended.

The Agency proposes to repeal N.J.A.C. 5:80-32.2, relating to the realization of maximum additional return, as it is no longer applicable. Proposed new N.J.A.C. 5:80-32.2, Scope, states that the provisions of Subchapter 32 “are intended to set forth the continuing requirements and restrictions applicable to housing projects that participated in housing investment sales” in recognition that such sales are historical and will not occur in the future.

At N.J.A.C. 5:80-32.3, the Agency proposes to delete subsections (a) through (f), relating to the application procedure for housing investment sales, and to update the section heading to “prepayment.”

The Agency proposes to repeal N.J.A.C. 5:80-32.4, 32.5, and 32.6, relating to, respectively, the required documents, fee, and closing procedure for housing investment sales in recognition that such sales are historical and will not occur in the future. The Agency also proposes to recodify existing N.J.A.C. 5:80-32.7 as 32.4; amend the section heading to “return on equity”; delete existing subsection (a), which relates to the crediting of a developer’s fee at the time of closing of a housing investment sale;

and to amend existing subsection (b) and paragraph (c)⁴ for stylistic purposes and to reflect the historical nature of housing investment sales.

Finally, the Agency proposes to repeal the subchapter appendix, which provides an example of the application of the subchapter rules, as being unnecessary as the result of the proposed amendments and repeals to Subchapter 32.

This notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)⁵ as a 60-day comment period is provided.

Social Impact

Because of the limited nature of the proposed repeals and amendments, due in part to the obsolescence of the programs proposed for repeal and as more fully set forth in the Economic Impact statement below, the proposed rules are not anticipated to have any social impact.

Economic Impact

The proposed deletion of N.J.A.C. 5:80-5.9(a)¹ is anticipated to stimulate investment in existing affordable housing projects in the State. The Agency believes that elimination of the requirement of paying the PRA sum will provide an incentive for potential investors who might currently be dissuaded from making an investment. However, inasmuch as the PRA was established to assist Agency-financed housing projects that are experiencing financial difficulties, it is anticipated that such projects will be negatively impacted by the proposed deletion since the result will be to eliminate a source of financial assistance. The Agency expects that it will be able to partially mitigate this result by making other loans, where feasible, to those projects. On the other hand, both financially troubled and financially

healthy projects are expected to benefit economically from an increased flow of funds into the projects resulting from the elimination of a financial barrier to the transfer of interests therein.

The proposed amendments, repeals, and new rules at N.J.A.C. 5:80-6 effectuate the reality that no sales contemplated by Subchapter 6 have been undertaken since repeal of the LD Law in 1991 and none will be undertaken in the future; the changes are to basically reflect the historical nature of such sales and will limit Subchapter 6 to governing the use of and access to funds remaining in the accounts that were established pursuant to such sales, with no substantive change to current practice. The Agency does not anticipate any economic impact from the proposed amendments.

The proposed repeal of N.J.A.C. 5:80-9.13 will affect only the means by which housing sponsors of projects without Federal project-based rent subsidies apply to the Agency for rent increases; it will not affect the Agency's review and consideration of those applications. Since only one project has elected to use the procedure provided by N.J.A.C. 5:80-9.13 and that project will be allowed to continue to do so until its regulatory agreement with the Agency expires in October 2020, the Agency does not anticipate any economic impact from the proposed repeal.

Nor does the Agency anticipate that there will be any economic impact as a result of the proposed repeals of the loans-to-lenders and lease-purchase program rules at N.J.A.C. 5:80-10 and 24, respectively; neither of those programs proposed for repeal are or have been recently used by the Agency and it is not anticipated that either program will be resorted to in the future.

The Agency anticipates that there may be a minor administrative cost savings to some project sponsors as a result of the proposed substantial repeal and one new rule and amendment of the AFHMP rules at N.J.A.C. 5:80-22; sponsors will have to complete and comply with only the HUD AFHMP and not similar, but basically duplicative, AFHMPs for both HUD and the Agency.

The Agency does not anticipate any economic impact from the proposed amendments, repeals, and new rules of the Housing Investment Sales rule at N.J.A.C. 5:80-32. The impetus for the 1994 promulgation of the rules – the then-difficulty of older Agency-financed projects in accessing residual

receipts due to Agency investment-return restrictions – has been obviated by subsequent regulatory changes and the rule has basically fallen into disuse since 1998.

Federal Standards Statement

The proposed new rules, repeals, and amendments do not exceed any standards or requirements imposed by any known Federal laws or regulations. The proposed substantial repeal and new rule and amendment of the AFHMP rules at N.J.A.C. 5:80-22 are specifically intended to comply with the express State policy of reducing “confusion and costs” by eliminating an unnecessary State standard where it has been determined that an analogous Federal counterpart adequately protects the welfare of New Jersey citizens. See N.J.S.A. 52:14B-22.

Jobs Impact

The proposed new rules, repeals, and amendments are not expected to create or eliminate any jobs.

Agriculture Industry Impact

The proposed new rules, repeals, and amendments are not expected to have any impact on the agriculture industry in the State.

Regulatory Flexibility Statement

The proposed new rules, repeals, and amendments will apply to the approximately 400 sponsors of housing projects financed with Agency mortgages, each of which is believed to be a small business as defined at N.J.S.A. 52:14B-17. The proposed new rules, repeals, and amendments comport with the statutory objective of minimizing any adverse economic impact on small businesses. See N.J.S.A. 52:14B-18. No reporting, recordkeeping, or other compliance requirements are being proposed for adoption. (In fact, the proposed substantial repeal and new rule and amendment of the AFHMP rule at N.J.A.C. 5:80-22 are expected to reduce such requirements for some housing sponsors.) Therefore, the requirement of a regulatory flexibility analysis does not apply to this proposed rulemaking. N.J.S.A. 52:14B-19.

Housing Affordability Impact Analysis

In accordance with N.J.S.A. 52:14B-4.1b.a, the Agency has evaluated the proposed new rules, repeals, and amendments to determine if they will evoke a change in the cost of housing. The proposed new rules, repeals, and amendments do not impact any current or recently used housing production program nor are they likely to affect the amount of rent imposed at any housing project; therefore, the Agency finds that there is an extreme unlikelihood that the rulemaking would evoke a change in the average costs associated with housing nor would it have any impact on the affordability of housing.

Smart Growth Development Impact Analysis

In accordance with N.J.S.A. 52:14B-4.1b.b, the Agency has evaluated the proposed new rules, repeals, and amendments to determine if they will have any impact on housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment

Plan. The proposed new rules, repeals, and amendments do not impact any current or recently used housing production program; therefore, the Agency finds that there is an extreme unlikelihood that the rulemaking would evoke a change in housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan.

Full text of the rules proposed for repeal may be found in the New Jersey Administrative Code at N.J.A.C. 5:80-6.2, 6.3, 6.4, 6.9, 9.13, 10, 22.1 through 22.24, 24, 32.2 through 32.6, and 5:80-32 Appendix.

Full text of the proposed new rules and amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 5. TRANSFER OF OWNERSHIP INTERESTS

5:80-5.1 Definitions

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

...

["Portfolio Reserve Account" means that fund established pursuant to N.J.A.C. 5:80-5.9(b) intended primarily for financial support for any housing project financed by the agency.]

...

5:80-5.9 Required payment and repayments

(a) At closing, the following payments and repayments are required:

[1. The buyer shall pay to the Portfolio Reserve Account a sum amounting to 3.25 percent of the purchase price.]

Recodify existing 2.–4.as **1.–3.** (No change in text.)

(b) The Portfolio Reserve Account is a fund **previously** established by the Agency to provide support for any project financed by the Agency that is in need of financial assistance. **The source of such fund was previously codified at (a)1 above, which was deleted effective (effective date of this amendment).** The Portfolio Reserve Account, and any interest or investment income earned thereon, may be used, at the Agency’s discretion, to fund debt service arrears and other operating deficits, capital improvements, and repairs of any project that cannot fund these items from normal project income. The Portfolio Reserve Account [will] enables the Agency to assist projects in maintaining physical and fiscal viability, so as to preserve the housing units at rents that are affordable to low- and moderate-income families. Eligibility for assistance from the Portfolio Reserve Account shall be subject to the terms and conditions as determined by the Agency.

SUBCHAPTER 6. **USE OF FUNDS FROM SALE OF PROJECTS OWNED BY NONPROFIT CORPORATIONS TO LIMITED PARTNERSHIPS**

5:80-6.1 Definitions

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

["Cash proceeds" means that portion of the purchase price paid by the partnership to the nonprofit in cash at closing or in successive years following the closing.

"Closing" means the final steps of the procedure by which title to a project is transferred from the nonprofit to the partnership.

"Commitment Letter" means the initial proposal or letter of intention submitted by the prospective purchaser of a project, which outlines the parameters of the transaction and the offer.]

"Community Development Escrow" [(CDE)] **or "CDE"** means that fund established pursuant to [N.J.A.C. 5:80-6.5(a)2 or 5:80-6.6(b)4] **a conversion, intended** primarily for use in assisting community improvements **or activities** or services related to [the development] **a project.**

“Conversion” means the overall transaction [in] **by** which ownership **of a project** [is] **was** transferred from [the] **a nonprofit entity** to a **profit-motivated** partnership.

“Development Cost Escrow” [(DCE)] **or “DCE”** means that fund established pursuant to [N.J.A.C. 5:80-6.2(e) or 6.5(a)1] **a conversion**, intended primarily for use in improving or supporting [the] **a** project itself.

[“Gross syndication proceeds” means the sum of all capital contributions.

“Multi-Family Rental Investment Program” means the program funded through the use of Agency administrative funds and through payments as provided by N.J.A.C. 5:80-6.4 for the purpose of providing loans to rental projects meeting low- and moderate-income housing needs

“Net proceeds” means the gross syndication proceeds less the costs of the syndication. The net proceeds include all payments made to or on behalf of the nonprofit and may include interest due on deferred payments. The net proceeds may not be used for any purpose other than to pay transaction costs or to fund the DCE or CDE unless otherwise expressly authorized by the Agency. Net proceeds does not include secondary financing granted on the sale from the nonprofit to the partnership.]

“Nonprofit” means the nonprofit owner of a project that [is conveying] **conveyed** its interest in the project and [assigning] **assigned** its Agency mortgage on the premises to [the] **a profit-motivated** partnership.

...

[“Original Mortgage Amount” means the amount of the loan which was made to the nonprofit or its predecessors by the Agency for development costs and was financed by bonds issued by the Agency.]

“Partnership” means [the] **a profit-motivated** limited partnership[, which qualifies] **that has qualified** as a limited dividend housing association pursuant to **the New Jersey Limited-Dividend and Nonprofit Housing Corporations and Associations Law**, N.J.S.A. 55:16-1 et seq (**Limited Dividend Law**), repealed by [P.L.1991, c.431, §20, which takes] **P.L. 1991, c. 431, § 20, and that has taken** title to [the] **a** project from [the] **a nonprofit entity**.

["Portfolio Reserve Account" (PRA) means that fund established by the Agency for the primary purpose of funding debt service arrearages and other operating deficits or capital improvements of any project financed by the Agency that cannot fund these items from normal project income. Funds deposited in the PRA and the investment income earned thereon will be available for use by the Agency for the aforesaid purposes.]

"Project Subsidy Reserve Fund" [(PSR)] or "**PSR**" means that fund established pursuant to [N.J.A.C. 5:80-6.2(e) or 6.6(b)] **a conversion**, intended primarily for maintaining the operative viability of Section 236 projects.

"Purchase price" means the total amount of capital pledged to the nonprofit sponsor including cash proceeds and secondary financing.

"Stated equity" means an amount equal to 10 percent of the revised total development cost determined by the Agency pursuant to N.J.A.C. 5:80-6.3.]

...

"Syndication" means the admission of limited partners to a partnership through the sale of partnership interests.

"Transaction costs" means those costs related directly to the sale of the project which are paid by or on behalf of the nonprofit. All transaction costs must be approved by the Agency and include, with limitation, required fees and payments specified in N.J.A.C. 5:80-6.4 as well as professional fees of the nonprofit and title insurance.]

5:80-6.2 Scope

Prior to the repeal of the Limited Dividend Law, a number of Agency-financed housing projects were sold by their nonprofit sponsors to limited partnerships formed pursuant to the Limited Dividend Law. As a result of those transactions, designated funds were deposited into certain accounts for the primary purpose of financing project and community activities and

services. The provisions of this subchapter are intended primarily to set forth the permissible uses of and the procedure for accessing the funds remaining in and accruing to those accounts.

5:80-6.3 Annual administrative fee

Unless otherwise provided for by agreement, each project that has been subject to a conversion shall pay to the Agency an annual administrative fee of \$3,500.00 from the principal and/or interest income on the escrow accounts in such manner as shall be determined by the Agency.

5:80-[6.5]6.4 Use of funds with regard to projects subsidized under Section 8

[(a) While the primary reason for permitting the sale and syndication of Section 8 projects is to insure financial viability of the project, a large portion of the proceeds will be available to the nonprofit to finance community activities. Accordingly, after payment of the amounts required under N.J.A.C. 5:80-6.4, the proceeds of the transaction shall be disbursed in the following manner:]

[1.] (a) [There shall be deposited into a Development Cost Escrow (DCE) for the project those funds remaining after transaction costs are deducted from 60 percent of the cash proceeds or the stated equity amount, whichever is greater.] With the approval of the Agency, the [DCE] **principal of the Development Cost Escrow** shall be used to fund debt service arrearages and other operating deficits at the project, including appropriate funding of required reserve accounts as determined by the Agency and for such other purposes as may be approved by the Agency [as] **that** will improve the financial viability or physical structure of the project or increase tenant safety [and] **and/or** comfort.

[2.] (b) [The balance of the cash proceeds shall be deposited into a Community Development Escrow (CDE) in the name of the nonprofit.] With the approval of the Agency [these funds may be utilized by the nonprofit], **the principal of the Community Development Escrow shall be used** for any use permitted under (a)[1] above or to increase amenities of the project; reduce maintenance and

replacement costs of the project; provide or assist desirable social services benefiting the residents of the project or the community in which it is located; and finance various community development activities **in the community in which the project is located.**

5:80-[6.6]6.5 Use of funds with regard to projects subsidized under Section 236 Interest Reduction Program

(a) [These regulations] **This section is promulgated to** recognize the essential difference between the Section 236 and Section 8 Programs. In projects subsidized through interest reductions, tenants must bear the full responsibility for all other operating costs. Accordingly, after **certain required** payments [required by N.J.A.C. 5:80-6.4], all proceeds of the sales of [the project will be] **Section 236 projects** were primarily pledged to easing the burden on the tenants by subsidizing repair and maintenance or operating costs. If, however, the [nonprofit] **housing sponsor of a Section 236 project** can demonstrate that the project is in sound physical and financial condition and will likely remain so for the foreseeable future, a portion of the proceeds or investment income on the proceeds may be deposited into a CDE.

(b) [All cash proceeds received on the sale of a project subsidized under Section 236 shall, after payment of the amounts required under N.J.A.C. 5:80-6.4, be deposited into a Project Subsidy Reserve (PSR).] The income and principal of [the PSR] **a Project Subsidy Reserve** may be utilized in the following manner:

1. First to pay any existing operating deficits, including debt service arrearages, of the project;
- 2.-3. (No change.)

4. After the [nonprofit] **project sponsor has demonstrated to the satisfaction of the Agency,** based on information required under [N.J.A.C. 5:80-6.4(a)6] **(b)4i through iv below,** that the funds in the PSR are not required for any of the purposes listed in [(b)1-3] **(b)1, 2, or 3** above and will not be **so** required for the foreseeable future **and after payment of the annual administrative fee to the Agency has been funded,** [it may request that] a portion of these funds or the investment

income [on these funds] **thereon may, at the request of the sponsor,** be deposited into a CDE [as described in N.J.A.C. 5:80-6.5]. **If such a request is made, the project sponsor shall submit, and the Agency shall consider, the following information:**

- i. Operating revenue and expense projections for the project for the next five years;**
- ii. The rents expected to be charged at the project assuming reasonable annual increases for five years;**
- iii. The rents charged and expected to be charged at comparable projects; and**
- iv. The effect of the requested action on (b)4i and ii above.**

5:80-[6.7]6.6 Investment income earned on the PSR, DCE, and CDE

(a) After [the] payment of the **annual administrative** fee specified in N.J.A.C. 5:80-[6.4(a)5]6.3 **has been funded,** the investment income earned on the DCE and CDE may be used:

- 1. To fund current operating deficits and/or arrearages, including debt service arrearages, of the project;
- 2. To pay the partners a return on equity to the extent allowed by law and to the extent not paid from operating revenues of the project, but only if there are no operating deficits or arrearages at the project; **and**
- 3. In accordance with the designated uses of the accounts or for other purposes requested by the [nonprofit] **project sponsor** and approved by the Agency.

(b) After funding the uses described in N.J.A.C. 5:80-[6.6(b)1-3]6.5(b)1, 2, and 3 and the [required] **annual administrative** fee specified [in] at N.J.A.C. 5:80-[6.4(a)5]6.3, the investment income on the PSR may be utilized in the manner set forth in (a) above.

5:80-[6.8]6.7 Use of DCE and CDE for development of housing

(a) In addition to **the** uses permitted under N.J.A.C. 5:80-[6.5]**6.4, 6.5, and, 6.6, [and 6.7,]** housing sponsors, or the authorized entity within the housing sponsor's organizational structure with financial control over the [DCE/CDE] **DCE and/or CDE** accounts, may, with Agency approval, use DCE and CDE funds, and interest thereon, for the development, operation, maintenance, construction, rehabilitation, or improvement of or investment in additional housing within the [community or in other communities] **State**. DCE and CDE funds may only be used for such purposes if the Agency determines that DCE and CDE funds are not needed to [insure] **ensure** the financial viability or physical structure of the project. This includes, but is not limited to, a finding by the Agency that the project has surplus cash and that DCE and CDE funds are not needed for providing an additional source of operating revenue to assist in financing any other aspect of the current or future operations of the project.

(b) Housing sponsors, or the authorized entity within the housing sponsor's organizational structure with financial control over the [DCE/CDE] **DCE and/or CDE** accounts, may use DCE and CDE funds as specified in (a) above or may deposit DCE and CDE funds with the Agency to be used by the Agency **itself** or by the Agency in conjunction with other developers for the purposes and under the conditions outlined in (a) above.

5:80-[6.10]**6.8** Tax obligations

[(a)] The partnership shall be responsible for all tax consequences arising out of the sale of the project.

[(b)] All existing contractors shall be notified of the sale and of the fact that they shall be responsible for the payment of all New Jersey sales tax and other taxes arising out of the loss of nonprofit status by the owner from the date of closing forward.]

5:80-[6.11]**6.9** Approval and disclosure requirements

The Agency specifically reserves the right to investigate and approve any party involved in the transaction including, without limitation, all limited and general partners, attorneys, syndicators, brokers, or consultants, as well as any partners, [or] shareholders, **or members** thereof. Prior to its approval the Agency may require any party to disclose such information as may be reasonably related to the transaction and may require any party to sign such waivers, releases, or affidavits as may be necessary to authenticate or investigate the information requested.

5:80-[6.12]6.10 (No change in text.)

SUBCHAPTER 9. RENTS

5:80-9.13 (Reserved)

5:80-9.14 Resident monthly fee increases for low- and/or moderate income-restricted units in assisted living residences (ALRs)

(a) For the purposes of this section, the term "monthly fee" includes charges for rent, meals, and basic services. The Agency shall regulate the monthly fees for all low and moderate income-restricted ALR units. Monthly fees for income-restricted ALR units may not exceed 80 percent of the [percentage of] HUD median income **level** applicable to that ALR as set forth in the Financing, Deed Restriction, and Regulatory Agreement executed by the housing sponsor and the Agency ("applicable HUD median income level"). The foregoing shall not apply to units occupied by persons who have insurance and/or another contracted third-party payor.

(b) Sponsors of ALRs may implement increases of monthly fees **for the income-restricted ALR units** with Agency approval [as provided in N.J.A.C. 5:80-9.13(a)1 for the income-restricted ALR units, provided that the maximum monthly fee for the income-restricted ALR units may] **by submitting**

a written request to the Director of Property Management of the Agency, accompanied by the current tenant income certifications for the income-restricted ALR units, the most recent HUD area median income figures, and the maximum rents corresponding to the area median income figures. The Director of Property Management will review and verify the information contained therein and, if accurate, approve the requested monthly fee increase, up to a maximum of 10 percent for low-income units and 20 percent for moderate-income units, but not to exceed 80 percent of the applicable HUD median income level. Monthly fee increases for non-income restricted ALR units do not require Agency approval.

(c) – (e) (No change.)

SUBCHAPTER 10. (RESERVED)

SUBCHAPTER 22. AFFIRMATIVE FAIR HOUSING MARKETING PLAN REQUIREMENTS

5:80-22.1 Requirement to submit an Affirmative Fair Housing Marketing Plan

(a) The purpose of an Affirmative Fair Housing Marketing Plan (Plan) is to ensure that necessary steps are being taken to eliminate discriminatory rental practices and to overcome the effects of past discrimination involving rental housing by informing individuals or groups of persons who would not normally apply for the housing about the availability thereof and providing them a reasonable opportunity to rent the housing.

(b) Sponsors of housing projects and sponsors of continuing care retirement communities are required to submit a Plan prior to receiving a commitment or funding from the Agency.

(c) The contents of a Plan under (a) above are as follows:

1. The Plan shall consist of a fully completed U.S. Department of Housing and Urban Development (HUD), Office of Fair Housing and Equal Opportunity Affirmative Fair Housing Marketing Plan (AFHMP) – Multifamily Housing (Form HUD-935.2A (12/2011)) or such

updated or successor form as may be developed by HUD, available at <http://portal.hud.gov/hudportal/documents/huddoc?id=935-2a.pdf>.

2. In addition to (c)1 above, all sponsors of housing projects and continuing care retirement communities shall register their projects or cause their projects to be registered on the New Jersey Housing Resource Center website at <http://www.nj.gov/njhrc/>.

5:80-[22.25]22.2 Monitoring

(a) [Monitoring will be conducted] **The Agency will monitor projects** to assess the degree to which the activities undertaken pursuant to an approved Plan conform with the applicable Fair Housing Laws and Regulations. In conducting monitoring, the Agency will determine:

1. Whether the applicant **or sponsor** has made a good-faith effort to carry out the provisions of the approved Plan and related Affirmative Fair Housing Marketing requirements; and
2. Whether progress has been made toward [the] achievement of the objectives of the Plan.

(b) – (c) (No change.)

SUBCHAPTER 24. (RESERVED)

SUBCHAPTER 32. HOUSING INVESTMENT SALES

5:80-32.1 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings:

[“Available cash” means all the cash available to an eligible LD sponsor upon the closing of a housing investment sale (after payment of all transaction costs) including, but not limited to:

1. The cash portion of the purchase price paid by the buyer;
2. Any obligations or instruments of indebtedness of the buyer in favor of the seller constituting a portion of the purchase price as provided in these rules; and

3. Any accumulated residual receipts, that are not subject to recapture by the United States Department of Housing and Urban Development.]

“Eligible LD sponsor” means a for-profit corporation or partnership organized under, and remaining subject to, the Limited Dividend Law, P.L. 1949, [c.184] c. 184, § 1 et seq., as amended (N.J.S.A. 55:16-1 et seq.) (**repealed by P.L.1991, c. 431, § 20 (N.J.S.A. 40A:20.1 et seq.)**), that owns and operates an Agency-financed, multifamily, rental housing project that, in each of the three fiscal years preceding the housing investment sale, [has] **had**:

1. – 2. (No change.)

“Housing investment sale” means a **previously completed** transaction that promotes the provision or maintenance of low and moderate income housing, as defined pursuant to the Fair Housing Act, N.J.S.A. 52:27D-301 et seq., through the sale by an eligible LD sponsor of an Agency-financed, multifamily, rental housing project to a qualified housing sponsor upon the following terms:

1. The buyer [executes] **executed** a deed restriction (and such other instruments reasonably required by the Agency) at the closing of the housing investment sale to ensure that the project will remain affordable to low and/or moderate income tenants as provided in the original mortgages; and subject to Agency restrictions regarding tenant income eligibility, tenant selection, project reserves, return on equity, rent increases, and the provisions at N.J.S.A. 55:14K-7b for 35 years after the expiration of the term of the project mortgage. The foregoing documents shall also **have** provided for the payment of a servicing fee to the Agency through the end of the additional 35 years for monitoring the restrictions that apply to the project[.], [Such] **such** fee [shall] not [be] **being** less than the servicing fee being paid by the eligible LD sponsor seller at the time of the housing investment sale; and

2. The eligible LD sponsor [invests] **invested** an amount equal to 50 percent of the maximum additional return in the Housing Investment Sale.

...

“Maximum additional return” means the additional return **that was** payable to the owners of an eligible LD sponsor under the Limited Dividend Law but not under the Housing and Mortgage Finance Agency (HMFA) Law, N.J.S.A. 55:14K-1 et seq.[, consisting of:

1. Cash invested by the owners in the eligible LD sponsor that has not previously been recognized by the Agency as investment in a housing project (including, but not limited to, those amounts invested by the owners at the initial Agency mortgage closing; any DCE/CDE funds; and the reserve for repair and replacement account, the operating reserve account and the tax and insurance escrow accounts (being transferred to the buyer in conjunction with the housing investment sale);

2. A cumulative annual return of eight percent on the investment described in 1 above;

3. If project revenues representing the return described in 2 above have been invested in the project's residual receipts account or otherwise, any income earned on said annual return;

4. An amount equal to the total reduction or amortization of the original principal owing on the eligible LD sponsor's mortgage loan from the Agency; and

5. An amount equal to the increase in the market value of the eligible LD sponsor's realty and tangible personalty during the period such assets were owned by the eligible LD sponsor, such increase to be determined by subtracting the following from the purchase price for those assets:

i. The eligible LD sponsor's investment in the project as determined by the Agency under the HMFA Law; and

ii. The original principal amount of the eligible LD sponsor's mortgage indebtedness to the Agency.

“Purchase price” means, in a housing investment sale, a sum equal to the fair market value of the realty and tangible personalty transferred to the buyer in the sale said sum to be comprised of:

1. Assumption of the eligible LD sponsor's first mortgage loan from the Agency and any other indebtedness of the eligible LD sponsor secured by project assets;
2. Cash paid by the buyer at the closing of the housing investment sale; and
3. Such obligations or instruments of indebtedness of the buyer in favor of the seller as the Agency may approve pursuant to N.J.A.C. 5:80-32.3(c).]

...

5:80-32.2 Scope

The provisions of this subchapter are intended to set forth the continuing requirements and restrictions applicable to housing projects that participated in housing investment sales.

5:80-32.3 Prepayment

Any prepayment of the first mortgage subsequent to a housing investment sale as may be permitted by the Agency's rules on prepayment shall not operate to relieve the buyer of the continuing requirements of this subchapter. As a condition to prepayment, a new or amended deed restriction, as may be required by the Agency, shall be recorded upon prepayment and shall contain the same affordability restrictions as the project's deed restriction in effect at the time of prepayment. The affordability provisions shall continue from the date of prepayment through the end of the regulatory period, as required by this subchapter, and the project's deed restriction in effect at the time of prepayment.

5:80-[32.7]32.4 [Developer's fee and return] Return on equity

[(a) The Agency may credit buyers with a developer's fee of 10 percent of the purchase price at the time of closing. The developer's fee may only be pledged as equity in the project. No project funds or available cash may be used to pay a developer's fee to the buyer.]

[(b)] **(a)** Buyers [shall be] **are** eligible to earn a return on equity based upon any equity investment in the project, including the developer's fee [which] **that** is being pledged as equity. The rate of return shall be established pursuant to N.J.A.C. 5:80-3.3(e), unless the buyer elects to qualify for enhanced return on equity under [(c)] **(b)** below. During the regulatory period, after expiration of the term of the Agency mortgage, the return on equity restrictions shall continue as provided in this section until the owner funds an operating reserve account in the amount provided in N.J.A.C. 5:80-5.10(b)7. The operating reserve account shall be maintained until the expiration of the deed restriction and administered as provided in N.J.A.C. 5:80-5.10(b)7. If the operating reserve account is used, the return on equity restrictions hereunder shall be reinstated until the operating reserve account is again fully funded.

[(c)] **(b)** Buyers who agreed to fund a capital improvement account, and agree to preserve the low-income status of the project for an additional 15 years, as provided below, may receive enhanced return on equity during the term of the Agency's mortgage through a split of the project's residual receipts on a 50/50 basis with the Agency.

1. – 3. (No change.)

4. Buyers who elect to participate in this option must [make] **have made** such election at the time of closing. Buyers may elect to participate subsequent to closing, provided they fund the capital improvement account with an amount equivalent to the amount that would have been required since closing and distribute 50 percent of the accumulated residual receipts to the Agency for deposit into the Housing Investment Sales Account.

[(d)] **(c)** (No change in text.)