



*State of New Jersey*  
DEPARTMENT OF COMMUNITY AFFAIRS  
OFFICE OF SMART GROWTH  
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November 30, 2004

**MEMORANDUM TO:** Members, State Planning Commission

**FROM:** Adam Zellner, Executive Director

**RE:** Report on the Consistency of the Adopted COAH rules with the Memorandum of Understanding between the State Planning Commission and COAH

On October 20, 2004, the State Planning Commission approved the proposed Memorandum of Understanding (MOU) with COAH. However, I was not authorized to execute the MOU until I prepared a report to the State Planning Commission concerning the consistency of the adopted COAH rules with the MOU. The pending COAH rule proposal was consistent with the MOU. The concern expressed by the State Planning Commission was the possibility that COAH could make changes in the rule proposal on adoption that would not be consistent with the MOU. The following is the report required by the State Planning Commission concerning the changes made by COAH when it adopted its rules.

In addition to various grammatical changes and changes to how the rules are organized, COAH made the following changes to its proposed substantive and procedural rules when they were adopted on November 22, 2004:

1. N.J.A.C. 5:94-1.2(d)2 has been clarified to state that municipal minimum subsidy amounts for accessory apartments, buy-down units, and regional contribution agreements are governed by N.J.A.C. 5:94 if the municipality has not petitioned for second round (1993-1999) substantive certification or interim substantive certification from the Council or if the municipality is including one of these housing activities for the first time to address a 1987-1999 affordable housing obligation.
2. The definition of "age restricted housing" has been clarified to mirror the definition in the Federal Fair Housing Act.
3. The proposed rule provided that market rate units in an inclusionary development for which the municipality received credit in a First or second round COAH-certified or Court-approved plan will not count toward growth share even if they are constructed after January 1, 2004, provided that they are zoned without conditions to provide affordable housing and further provided that the number of market units generated



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- within the development is four times the number of affordable units, unless the municipality demonstrates to the Council a rational basis for a lower set-aside rate. The rule proposal was clarified upon adoption to provide guidance as to what would be considered a rational basis-the guidelines in N.J.A.C. 5:93-5.6 and 5.15 are to be utilized to evaluate the market rate units in inclusionary developments that would be excluded from the growth share obligation.
4. The proposed N.J.A.C. 5:94-3.2(c) has been modified on adoption to make clear that sites from the municipality's 1987-1999 fair share plan that have been zoned for affordable housing but remain undeveloped are required to comply with the review requirements of N.J.A.C. 5:94-3.3(a) to be included in a municipality's third round plan.
  5. The rule has been clarified to require those compliance mechanisms described in N.J.A.C. 5:94-4.4 to be in conformance with the bedroom distribution requirements set forth in the Uniform Housing Affordability Controls (N.J.A.C. 5:80-26) unless otherwise exempted. Comparable language was added to N.J.A.C. 5:94-4.6 concerning municipally sponsored and 100% affordable programs and to N.J.A.C. 5:94-4.14 concerning the affordable housing partnership program. In addition, N.J.A.C. 5:94-4.4 was amended to make clear that it is the Council's intent to allow zoning for affordable housing in non-residential zones, in essence creating mixed-use developments.
  6. The rule has been clarified to specify that buy-down units and municipally sponsored rental programs may be exempt from the low/moderate income split when used in conjunction with an accessory apartment program or other program targeted to only low-income households provided the municipality meets the provisions of N.J.A.C. 5:94-4.18.
  7. For affordable units within an assisted living facility, the rule has been modified to make clear that market and affordable units receive the same basic services in an assisted living facility.
  8. The rule proposal was modified to clarify that ten percent of all townhouses receiving COAH credit meet the accessibility requirements set forth at N.J.A.C. 5:23-7.5(b) and (c) in the Barrier Free Subcode even though townhouse units are not required to be accessible under the Barrier Free Subcode, N.J.A.C. 5:23-7.
  9. The rule proposal was clarified on adoption to state that payments in lieu of constructing affordable housing may only be used to fund eligible housing activities



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- within the municipality pursuant to a spending plan in accordance with N.J.A.C. 5:94-6.12. The intent of this provision was to distinguish payments in lieu from development fees. Development fees may still be used to fund an RCA.
10. Appendix A Table 5 has been revised to provide for a more detailed accounting of the derivation of the total figure that has not changed.
  11. Appendix E has been expanded to provide additional examples of uses that are within each use group category and has been updated to reflect the use of the International Building Code (IBC) which is now incorporated by reference into the Uniform Construction Code (UCC).
  12. The Council has clarified the rule proposal to eliminate the word "conditional" as a modifier of "denial" to conform with the statutory language and to delete dismissal as an alternative because a dismissal is the automatic result where the conditions have not been met within the specified time frame and therefore Council action is not required.
  13. The rule proposal was modified on adoption so it is clear that a planning board member is required to participate in mediation.
  14. The rule proposal was clarified in several places on adoption to refer to contested issues of material fact since that is the standard for referring contested cases to the Office of Administrative Law (OAL). It remains COAH's decision whether or not to transfer the matter to OAL.
  15. The rule proposal was amended to clarify that municipalities that have received second round substantive certification are permitted to petition for amendments to their certification. Those municipalities that have been certified have met the requirements of the Council's rules and may petition at any time for an amendment to their certification pursuant to the second round rules in accordance with N.J.A.C. 5:94-1.2(d).
  16. The Council amended N.J.A.C. 5:95-15.2 concerning extensions of second round certifications that have or are about to expire. The changes are so the adopted rule will be consistent with the previously adopted emergency rule, which was adopted to meet the requirements of an Appellate Division of Superior Court decision. COAH



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is in the process of readopting the emergency rule through the normal rulemaking process as is required by the Administrative Procedures Act.

None of these changes are inconsistent with the agreed upon MOU between the State Planning Commission and COAH. The rules, as adopted by COAH, remain consistent with the previously approved MOU. I recommend that the State Planning Commission approve the resolution authorizing that the Commission's secretary and principal executive officer execute the MOU on behalf of the Commission.

AZ:wh