

Annex E

AMERICAN PLANNING ASSOCIATION MODEL HOUSING ACT

CHAPTER 4

4-208 State Planning for Affordable Housing (Two Alternatives)

*Alternative 1 – A Model Balanced and Affordable Housing Act*¹¹⁴

4-208.1 Findings and Purposes

The [legislature] finds and declares as follows:

- (1) The primary goal of this Act is to assure the availability of a wide variety of housing types that will cover all income strata and accommodate a diverse population, including growing families, senior citizens, persons and households with special needs, single householders, and families whose children are of adult age and have left the household, with special emphasis and high priority on the provision of low- and moderate-income housing on a regional fair-share basis.
- (2) The attainment of this goal of providing a regional fair share of the need for balanced and low- and moderate-income housing is of vital statewide importance and should be given highest priority by local governments. It requires the participation of state, regional, and local governments as well as the private sector, and the coordinated effort of all levels of government in an attempt to expand the variety of affordable housing opportunities at appropriate locations.
- (3) Balance in employment and residential land use patterns should reduce traffic congestion, contribute to an improved environment through the reduction in vehicle-related emissions, and ensure that workers in this state will have available to them the opportunity to reside close to their jobsites, making the state more competitive and attractive as a location for new or expanded businesses.
- (4) Balanced housing and employment opportunities at appropriate locations should result in reducing the isolation of lower income groups in a community or region, improving the safety and livability of neighborhoods, and increasing access to quality public and private facilities and services.
- (5) State, regional, and local governments have a responsibility to use the powers vested in them to facilitate the improvement and development of a balanced housing stock that will be

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CHAPTER 4

affordable to all income levels, especially middle-, moderate-, and low-income households, and meet the needs of a diverse population.

- (6) The [legislature] recognizes that in carrying out this responsibility, each local government must also consider economic, environmental, and fiscal factors and community goals set forth in its local comprehensive plan and must cooperate with other local governments and state and regional agencies in addressing the regional housing needs for middle-, moderate-, and low-income households.

4-208.2 Intent

It is the [legislature's] intent to:

- (1) ensure that local governments recognize their responsibilities in contributing to the attainment of the state's fair-share housing goal identified in Section [4-208.1] of this Act and that they endeavor to create a realistic opportunity to achieve this goal;
- (2) ensure that local governments prepare and affirmatively implement housing elements in their comprehensive plans, which, along with federal and state programs, will realize the attainment of the state's fair-share housing goal identified in Section [4-208.1] of this Act;
- (3) recognize that local governments may be best capable of determining which specific efforts will most likely contribute to the attainment of the state's fair-share housing goal identified in Section [4-208.1] of this Act;
- (4) ensure that each local government cooperates with other local and regional governments in order to address the regional housing needs of middle-, moderate-, and low-income persons;
- (5) assist local governments in developing suitable mechanisms and programs to promote and develop a variety of middle-, moderate-, and low-income housing types;
- (6) provide a mechanism whereby low- and moderate-income housing needs may be equitably determined on a regional basis and a fair share of such regional needs may be allocated to local governments by a state administrative agency [and by regional planning agencies];
- (7) encourage state agencies to reward performance by creating linkages between grant-in-aid programs and the provision of opportunities for low- and moderate-income housing by local governments;
- (8) implement programs that will encourage home ownership over a wide range of income levels, especially by middle-, moderate-, and low-income persons;
- (9) provide for a state administrative agency to review and approve local housing elements and provide state funding, when available, on a priority basis to those local governments with approved elements; and

CHAPTER 4

[or]

- (9) provide for [regional planning agencies] to review and approve local housing elements under the general supervision of a state administrative agency which will provide state funding, when available, on a priority basis to those local governments with approved elements; and
- (10) provide for a state administrative agency to prepare substantive and procedural rules to assist and guide [regional planning agencies and] local governments in carrying out this Act.

4-208.3 Definitions

As used in this Act:

- (1) “**Act**” means the Balanced and Affordable Housing Act of _____.
 - (2) “**Affordable Housing**” means housing that has a sales price or rental amount that is within the means of a household that may occupy middle-, moderate-, low-, or very low-income housing, as defined by paragraphs (13), (14), (15), and (21), below. In the case of dwelling units for sale, housing that is affordable means housing in which mortgage, amortization, taxes, insurance, and condominium or association fees, if any, constitute no more than [28] percent of such gross annual household income for a household of the size which may occupy the unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the rent and utilities constitute no more than [30] percent of such gross annual household income for a household of the size which may occupy the unit in question.
- ◆ Percentages of gross annual household income, shown in brackets, are for 1995 and were derived from the New Jersey Administrative Code, §5:93-7.4 (1995), for the New Jersey Council on Affordable Housing. These percentages may vary by region of the country or may be influenced by current requirements of various mortgage financing programs, such as those administered by the Federal Housing Administration (FHA), the Federal National Mortgage Association (FNMA), or the Federal Home Loan Mortgage Corporation (FHLMC). Consequently, it may be necessary to modify or update these percentages.
 - ◆ It is the intention that the term “affordable housing” be construed throughout this Act to be synonymous with the term “middle-, moderate-, and low-income housing” and they are used interchangeably throughout this model. By contrast, when the term “low- and moderate-income housing” is used, the intent is to specifically exclude middle-income housing.
- (3) “**Authority**” means the entity designated by the local government for the purpose of monitoring the occupancy, resale, and rental restrictions of low- and moderate-income dwelling units.

CHAPTER 4

- (4) “**Balanced**” means a recognition of, as well as an obligation to address, the need to provide a variety and choice of housing throughout the region, including middle-, moderate-, and low-income housing.
- (5) “**Council**” means the Balanced and Affordable Housing Council established by this Act which shall have primary jurisdiction for the administration and implementation of this Act.
- (6) “**Density**” means the result of:
- (a) dividing the total number of dwelling units existing on a housing site by the net area in acres; or
 - (b) multiplying the net area in acres times 43,560 square feet per acre and then dividing the product by the required minimum number of square feet per dwelling unit.

The result is expressed as dwelling units per net acre.

- (7) “**Development**” means any building, construction, renovation, mining, extraction, dredging, filling, excavation, or drilling activity or operation; any material change in the use or appearance of any structure or in the land itself; the division of land into parcels; any change in the intensity or use of land, such as an increase in the number of dwelling units in a structure or a change to a commercial or industrial use from a less intensive use; any activity which alters a shore, beach, seacoast, river, stream, lake, pond, canal, marsh, dune area, woodland, wetland, endangered species habitat, aquifer, or other resource area, including coastal construction or other activity.
- (8) “**Household**” means the person or persons occupying a dwelling unit.
- (9) “**Housing Element**” means that portion of a local government's comprehensive plan, as identified in Section [4-208.9] of this Act, designed to meet the local government's fair share of a region's low- and moderate-income housing needs and analyze the local government's overall needs for affordable housing.
- (10) “**Housing Region**” means that geographic area determined by the Council that exhibits significant social, economic, and income similarities, and which constitutes to the greatest extent practicable, the applicable primary metropolitan statistical area as last defined and delineated by the United States Census Bureau.

[or]

- (10) “**Housing Region**” means a substate district that was previously designated by the governor pursuant to [Sections 6-601 to 6-602, *or cite to other section of state statutes providing for substate districting delineation*].

CHAPTER 4

- (11) “**Inclusionary Development**” means a development containing [at least 20 percent] low- and moderate-income dwelling units. This term includes, but is not necessarily limited to, the creation of new low- and moderate-income dwelling units through new construction, the conversion of a nonresidential structure to a residential structure, and/or the gut rehabilitation of a vacant residential structure.
- (12) “**Local Government**” means a county, municipality, village, town, township, borough, city, or other general purpose political subdivision [*other than a council of governments, regional planning commission, or other regional political subdivision*].
- (13) “**Low-Income Housing**” means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that does not exceed 50 percent of the median gross household income for households of the same size within the housing region in which the housing is located. For purposes of this Act, the term “low-income housing” shall include “very low-income housing.”¹¹⁵
- (14) “**Middle-Income Housing**” means housing that is affordable for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than [80] percent but does not exceed [*specify a number within a range of 95 to 120*] percent of the median gross household income for households of the same size within the housing region in which the housing is located.
- ◆ While the definitions of low-income and moderate-income housing are specific legal terms based on federal legislation and regulations, this term is intended to signify in a more general manner housing that is affordable to the great mass of working Americans. Therefore, the percentage may be amended by adopting legislatures to fit the state’s circumstances.
- (15) “**Moderate-Income Housing**” means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than 50 percent but does not exceed 80 percent of the median gross household income for households of the same size within the housing region in which the housing is located.
- (16) “**Net Area**” means the total area of a site for residential or nonresidential development, excluding street rights of way and other publicly dedicated improvements such as parks, open space, and stormwater detention and retention facilities. “Net area” is expressed in either acres or square feet.

¹¹⁵For sources of definitions for low-, moderate- and very low-income households, see 24 CFR §91.5 (Definitions) and 5 N.J.A.C. §5:93-1.3.

CHAPTER 4

- (17) “**Petition For Approval**” means that petition which a local government files which engages the [Balanced and Affordable Housing Council *or* regional planning agency] approval process for a housing element.
- (18) “**Regional Planning Agency**” means a [*council of governments, regional planning commission, or other regional political subdivision*] with the authority to prepare and adopt a regional comprehensive plan.
- (19) “**Regional Fair Share**” means that part of a region's low- and moderate-income housing units that is allocated to a local government by [the Balanced and Affordable Housing Council *or* a regional planning agency].
- [(20) “**Regional Fair-Share Allocation Plan**” means the plan for allocating the present and prospective need for low- and moderate-income housing to local governments in a housing region that is prepared by a [regional planning agency] using regional need figures provided by the Balanced and Affordable Housing Council.¹¹⁶]
- (21) “**Unnecessary Cost Generating Requirements**” mean those development standards that may be eliminated or reduced that are not essential to protect the public health, safety, or welfare or that are not critical to the protection or preservation of the environment, and that may otherwise make a project economically infeasible. An unnecessary cost generating requirement may include, but shall not be limited to, excessive standards or requirements for: minimum lot size, building size, building setbacks, spacing between buildings, impervious surfaces, open space, landscaping, buffering, reforestation, road width, pavements, parking, sidewalks, paved paths, culverts and stormwater drainage, oversized water and sewer lines to accommodate future development without reimbursement, and such other requirements as the Balanced and Affordable Housing Council may identify by rule.
- (22) “**Very Low-Income Housing**” means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income equal to 30 percent or less of the median gross household income for households of the same size within the housing region in which the housing is located.
- ◆ Additional definitions may be needed as the Council develops procedures and programs to implement this statute. Some definitions may be incorporated into the Council’s rules, thereby avoiding the need to amend the statute.

4-208.4 Creation and Composition of Balanced and Affordable Housing Council

¹¹⁶See Section 6-201(5)(e), Alternative 2, of the *Legislative Guidebook*, which describes the components of a regional comprehensive plan, including a regional fair-share housing allocation plan. The definition of a regional fair-share allocation plan would only need to be included if the approach selected gives the responsibility of preparing the regional fair-share allocations to a regional planning agency.

CHAPTER 4

- (1) There is hereby established a Balanced and Affordable Housing Council.
 - (2) The Council shall consist of [15] members to be appointed by the governor. The members shall consist of the following:
 - [(a) The commissioner or director of the Department of Housing and Community Development [*or similar state agency*];]
 - [(b) The director of the State Housing Finance Agency;]
 - [(c) [3] members of a municipal legislative body [*or other elected chief officials of local governments, other than counties*];]
 - [(d) [3] elected chief county executives or legislators;]
 - [(e) [1] resident of low- or moderate-income housing or citizen designated as an advocate for low- or moderate-income persons;]
 - [(f) [4] citizens representing the various geographic areas of the state; and]
 - [(g) [2] representatives of professional and service organizations who are active in providing balanced and affordable housing, including, but not limited to, home building, nonresidential development, banking, construction, labor, and real estate.]
- ◆ A key to a successful balanced and affordable housing council is broad representation by both local officials and persons knowledgeable about building and managing middle-, moderate-, and low-income housing. While this model has the governor making all of the appointments to the Council, in some states, appointments could instead be made by the senate president and speaker of the house. Other designated appointments could include representatives of the state home builders association and/or a state chapter of the American Planning Association. While language has not been provided here, the Act may also indicate whether members should have term limits and how they may be removed.

4-208.5 Organization of the Council

- (1) The Council shall elect its own chair and may create and fill such offices as it determines to be necessary. The Council may create and appoint advisory committees whose membership may consist of individuals whose experience, training, and/or interest in a program, activity, or plan may qualify them to lend valuable assistance to the Council. Members of such advisory bodies shall receive no compensation for their services but may be reimbursed for actual expenses expended in the performance of their duties.
- (2) The Council shall meet at least [4] times each year.

CHAPTER 4

- (3) All actions of such advisory committees shall be reported in writing to the Council no later than the next meeting or within [30] days from the date of the action, whichever is earlier. The Council may provide a procedure to ratify committee actions by a vote of the members of the Council.

Alternative 1A – Strong Council with No Regional Planning Agency Involvement

4-208.6 Functions and Duties of the Council.

- (1) The Council shall have the authority and duty to:
- (a) determine, in consultation with affected agencies, and revise as necessary, housing regions for the state;
 - (b) estimate and revise at least once every [5] years the present and prospective need for low- and moderate-income housing for each housing region in the state;
 - (c) determine the regional fair share of the present and prospective need for low- and moderate-income housing for each local government in each housing region and revise the allocation of the need for each housing region in the state at least once every [5] years;
 - (d) review and approve housing elements submitted by local governments;
 - (e) establish a mediation process by which objectors to a local government's housing element may seek redress;
 - (f) hear and decide appeals on denials or conditional approvals from applicants seeking approval from a local government to construct an inclusionary housing project;
 - (g) adopt rules and issue orders concerning any matter within its jurisdiction to carry out the purposes of this Act pursuant to [*the state administrative procedures act*]; and
 - (h) prepare a biennial report to the governor and state legislature that describes progress in promoting affordable housing in the housing regions of the state.
- (2) The Council may advise state agencies on criteria and procedures by which to reward local governments through the discretionary distribution of grants of state aid when their housing elements are approved pursuant to this Act.¹¹⁷

¹¹⁷For an example of a state-level policy that links the award of discretionary state funds with local government housing policies, see Commonwealth of Massachusetts, Executive Order No. 215, “Disbursement of State Development Assistance” (March 15, 1982).

CHAPTER 4

- (3) The Council shall also take such other actions as may be necessary to carry out the purposes of this Act, including coordination with other federal, state, and local agencies.
- ◆ Alternative 1A is appropriate in those states with either a weak (or nonexistent) county government and/or a weak (or nonexistent) regional planning organization. By contrast, in states that have strong county governments or strong regional councils of government, a regional planning agency can work in tandem with the Council in preparing the regional fair-share allocations and in reviewing and certifying local housing elements. These are discussed below.

Alternative 1B – Council and Regional Planning Agency Work in Tandem

4-208.6 Functions and Duties of the Council and [Regional Planning Agencies]

- (1) The Council shall have the authority and duty to:
- (a) determine, in consultation with [regional planning agencies and other affected agencies], housing regions for the state, and revise such regions as necessary;
 - (b) estimate the present and prospective need for low- and moderate-income housing for each housing region in the state at least once every [5] years;
 - (c) review and approve regional fair-share allocation plans prepared by [regional planning agencies];
 - (d) hear and decide appeals on denials or conditional approvals from applicants seeking approval from a local government to construct an inclusionary housing project;
 - (e) hear and decide appeals of determinations by [regional planning agencies] pursuant to this Act and the Council’s rules;
 - (f) adopt rules and issue orders concerning any matter within its jurisdiction to carry out the purposes of this Act pursuant to [*the state administrative procedures act*],¹¹⁸
 - (g) administer grants-in-aid to [regional planning agencies] to carry out their duties under this Act;
 - (h) prepare a biennial report to the governor and state legislature that describes progress in promoting affordable housing in the housing regions of the state;

¹¹⁸For an example of language granting authority to a state planning agency to issue rules and orders, see Section 4-103 of the *Legislative Guidebook*.

CHAPTER 4

- (i) advise state agencies on criteria and procedures by which to reward local governments through the discretionary distribution of grants of state aid when their housing elements are approved pursuant to this Act; and
 - (j) take such other actions as may be necessary to carry out the purposes of this Act, including coordination with other federal, state, and local agencies.
- (2) [Regional planning agencies] shall have the authority to:
- (a) prepare and submit to the Council at least once every [5] years a regional fair-share allocation plan in accordance with Section [4-208.8] of this Act;
 - (b) review and approve all local government housing elements that meet the requirements of this Act and the rules of the Council;
 - (c) provide for a mediation process by which objectors to a local government's housing element may seek redress, subject to the rules of the Council;
 - (d) provide technical assistance to local governments in the region in the development and implementation of local housing elements;
 - (e) administer federal and state grant-in-aid programs to carry out the purposes of this Act; and
 - (f) take such other actions as may be necessary to carry out the purposes of this Act.

4-208.7 Appointment of Council Executive Director; Hire by Contracts; Purchases and Leases; Maintenance of Public Records

- (1) The Council shall appoint an executive director who shall select, hire, evaluate, discipline, and terminate employees pursuant to rules adopted by the Council. The executive director shall also be responsible for the day-to-day work of the Council, and shall manage and supervise employees and consultants hired by contract, except for attorneys retained to provide independent legal counsel and certified public accountants retained to conduct independent audits. The executive director shall serve at the pleasure of the Council.
- (2) The Council may hire by contract mediators and consultants for part-time or full-time service as may be necessary to fulfill its responsibilities.
- (3) The Council may purchase, lease, or otherwise provide for supplies, materials, equipment, and facilities as it deems necessary and appropriate in the manner provided for in rules adopted by the Council.

CHAPTER 4

- (4) The Council shall keep a record of its resolutions, minutes of meetings, transactions, findings, and determinations, which record shall be public record.
- ◆ As an alternative, a Council may use the rule-making and contract authority provided for by the state's administrative procedures act or procurement laws.

Alternative 1A – Action by Council

4-208.8 Council Designation of Housing Regions; Determination of Present and Prospective Housing Need; Regional Fair-Share Allocations; Adoption of Need Estimates and Allocations

- (1) The Council shall, within [18] months of the effective date of this Act, designate housing regions for the state, prepare estimates of present and prospective housing needs for low- and moderate-income dwelling units for each region for the next [5] years, and prepare regional fair-share allocations of those dwelling units to local governments in each region. The Council may, from time to time, revise the boundaries of the housing regions and shall revise the estimates and allocations at least once every [5] years hereafter. Revisions to the boundaries, estimates, and allocations shall be effected in the same manner as the original adoption.
- (2) In developing the regional estimates, the Council shall consider the availability of public and private financing for housing and the relevant housing market conditions, shall use the most recent data and population statistics published by the United States Bureau of the Census, and shall give appropriate weight to pertinent research studies and reports by government agencies. The Council may utilize the assistance of the [state planning agency or similar state agency] in obtaining demographic, economic, housing, and such other data and in developing population, employment, and other relevant estimates and projections.¹¹⁹
- (3) In calculating each local government's regional fair share, the Council shall consider, but shall not be limited to, the following factors:¹²⁰
- [(a) the number of vacant, overcrowded, or substandard housing units;

¹¹⁹For an example of housing need projections, see 5 N.J.A.C., Ch. 93, App. A (Methodology); see also David Listokin, *Fair Share Housing Allocation* (New Brunswick, N.J.: Center for Urban Policy Research, 1976), 48-51.

¹²⁰These factors are only intended to be illustrative. Compare Cal. Gov't. Code, §65584(a) (Regional housing needs), where the factors are included in the statute, with N.J.S.A. §52:27D-307(c)(2) (discussion of adjustment of present and prospective regional fair share). The allocation formulas must be tailored to each state. For an example of an allocation formula that is the result of rule making by a state agency, see N.J.A.C. §5:93-2.1 *et seq.* (Municipal determination of present and prospective Need) and Appendix A. See also David Listokin, *Fair Share Housing Allocation* (New Brunswick, N.J.: Center for Urban Policy Research, 1976) for an early survey of allocation formulas.

CHAPTER 4

- (b) the number of acres of:
 - 1. vacant residential land;
 - 2. residential land suitable for redevelopment or increased density of development; and
 - 3. nonresidential land suitable, with respect to surrounding or neighboring uses, for residential use;in each local government presently sewerred or expected to be sewerred in the next [5] years;
- (c) commuting patterns within each housing region;
- (d) employment opportunities within each housing region, including the growth and location of moderate- and low-wage jobs;¹²¹
- (e) the current per capita fiscal resources of each local government, defined by the total [nonresidential] real estate valuation of the local government, plus the total of all personal income, divided by current population;
- (f) the relationship of each local government's median household income to the median household income of the region;
- (g) the existing concentrations of low- and moderate-income households in each housing region;¹²²
- (h) the location of urban growth area(s) in an adopted regional comprehensive plan; and¹²³
- (i) the existence of an area of critical state concern¹²⁴ and any restrictions on development placed on it.]

¹²¹Projecting the growth and location of moderate- and low-wage jobs is an important factor in assessing the need and approximate location for low- and moderate-income housing.

¹²²It is important that an allocation strategy and a local housing element seek spatial dispersion of low- and moderate-income housing opportunities since they should not add to the concentration of the poor.

¹²³See Section 6-201, Preparation of Regional Comprehensive Plan, Alternative 2, of the *Legislative Guidebook* for a treatment of urban growth area designation.

¹²⁴See Section 5-201 *et seq.* of the *Legislative Guidebook*, which addresses areas of critical state concern.

CHAPTER 4

- (4) The Council shall adopt by rule, either individually or joined in one or more proceedings, designations for housing regions in the state, the estimates of present and prospective housing needs for low- and moderate-income dwelling units for each region for the next [5] years, and the regional fair-share allocations of those units to local governments in each region. At least [30] days prior to adoption, the Council shall transmit a copy of the proposed housing regions, as well as the estimates and allocations, to the legislative body of each local government in the state. Any interested party may submit written comments or may present oral testimony to the Council on the proposed rule. Such comments and testimony shall be incorporated into the hearing record. A copy of the adopted rule shall be transmitted by the Council to each local government's legislative body, to persons requesting a copy, and to the [state planning agency *or similar state agency*].

Alternative 1B – Action by Council and Regional Planning Agency

4-208.8 Council Designation of Housing Regions; Preparation of Estimates of Present and Prospective Housing Need; Preparation of Regional Fair-Share Allocation Plan by [Regional Planning Agency]; Adoption of Plan; Review and Approval of Plan by Council

- (1) The Council shall, within [12] months of the effective date of this Act, designate housing regions for the state and prepare estimates of present and prospective housing needs for low- and moderate-income dwelling units for each housing region for the next [5] years. The Council may, from time to time, revise the boundaries of the housing regions and shall revise the estimates at least once every [5] years hereafter. Revisions to the boundaries and the estimates shall be effected in the same manner as the original adoption.
- (2) In developing the regional estimates, the Council shall consider the availability of public and private financing for housing and the relevant housing market conditions, shall use the most recent data and population statistics published by the United States Bureau of the Census, and shall give appropriate weight to pertinent research studies and reports by government agencies. The Council may utilize the assistance of the [state planning agency *or similar state agency*] in obtaining demographic, economic, housing, and such other data and in developing population, employment, and other relevant estimates and projections.
- (3) The Council shall adopt by rule, either individually or joined in one or more proceedings, the designations for housing regions for the state and the estimates of present and prospective housing needs for low- and moderate-income dwelling units for each region for the next [5] years. At least [30] days prior to adoption, the Council shall transmit a copy of the proposed housing regions and the estimates to each [regional planning agency] and the legislative body of each local government in the state. Any interested party may submit written comments or may present oral testimony to the Council on the proposed rule. Such comments and testimony shall be incorporated into the hearing record. The Council shall transmit a copy of the adopted rule to each local government's legislative body, to persons requesting a copy, and to the [state planning agency *or similar state agency*].

CHAPTER 4

- (4) The Council shall, within [12] months of the effective date of this Act, provide guidelines, data, and suggested methodologies to each [regional planning agency] in the state in order that each agency may prepare a regional fair-share allocation plan. In developing the guidelines, data, and suggested methodologies, the Council shall consider, but shall not be limited to, the following factors:
- [(a) the number of vacant, overcrowded, or substandard housing units;
 - (b) the number of acres of:
 - 1. vacant residential land;
 - 2. residential land suitable for redevelopment or increased density of development; and
 - 3. nonresidential land suitable, with respect to surrounding or neighboring uses, for residential use;in each local government presently sewerred or expected to be sewerred in the next [5] years;
 - (c) commuting patterns within each housing region;
 - (d) employment opportunities within each housing region, including the growth and location of moderate- and low-wage jobs;
 - (e) the current per capita fiscal resources of each local government, defined by the total [nonresidential] real estate valuation of the local government, plus the total of all personal income, divided by current population;
 - (f) the relationship of each local government's median household income to the median household income of the region;
 - (g) the existing concentrations of low-and moderate-income households in each housing region;
 - (h) the location of urban growth area(s) in an adopted regional comprehensive plan,¹²⁵ and

¹²⁵See Section 6-201, Preparation of Regional Comprehensive Plan, Alternative 2, of the *Legislative Guidebook* for a treatment of urban growth area designation.

CHAPTER 4

- (i) the existence of an area of critical state concern¹²⁶ and any restrictions on development placed on it.]
- (5) The Council shall adopt criteria for the review and approval of regional fair-share allocation plans prepared and adopted by [regional planning agencies] under this Act.
- (6) Each [regional planning agency] in the state created pursuant to [*citation to statute creating or authorizing regional planning agencies*] shall prepare a regional fair-share allocation plan within [18] months of the effective date hereafter, and shall update and amend the plan at least every [5] years. In preparing the plan, each agency shall use the estimates of present and prospective need adopted by the Council for the region, and may use guidelines, data, and methodologies developed by the Council, or such other data and methodologies, provided that such data and methodologies are supported by adequate documentation, represent accepted planning techniques, and achieve an equitable allocation of need for low- and moderate-income housing to the region's local governments.
- (7)¹²⁷ Each [regional planning agency] shall adopt by rule the regional fair-share allocation plan. At least [30] days prior to adoption, the [regional planning agency] shall transmit a copy of the proposed plan to each local government in the region, to the [state planning agency *or similar state agency*], and to the Council. Any interested person may present oral testimony to the [regional planning agency] on the proposed rule. Such comments and testimony shall be incorporated into the public hearing record, in accordance with the provisions of Section [6-105].¹²⁸ A copy of the adopted rule shall be transmitted by the [regional planning agency] to each local government's legislative body, to persons requesting a copy, to the [state planning agency *or similar state agency*], and to the Council. In transmitting the rule to the Council, the [regional planning agency] shall petition the Council for review and approval of the plan.
- (8) Upon the receipt of a [regional planning agency's] petition for review and approval of a regional fair-share allocation plan, the Council shall undertake and complete a review of the plan within [90] days of submission of a complete plan. The Council shall approve the plan in writing if it finds that it is consistent with the requirements of this Act and with any rules of the Council. In the event that the Council does not approve the plan, it shall indicate in writing to the [regional planning agency] what changes should be made in the plan in order that the Council may consider it for approval upon resubmission.

¹²⁶See Section 5-201 *et seq.* of the *Legislative Guidebook*, which addresses areas of critical state concern.

¹²⁷Alternatively, the regional fair-share allocation plan may be publicly reviewed in the manner proposed in Section 6-301, Public Workshops and Hearings, and adopted in the manner proposed in Section 6-303, Adoption of Regional Plans.

¹²⁸Section 6-105 pertains to rule-making authority by the regional planning agency.

CHAPTER 4

- (9) In the event that a [regional planning agency] does not submit a petition for review and approval of a regional fair-share allocation plan within the period specified in this Act, fails to update the plan at least every [5] years, or fails to make changes as indicated by the Council within [90] days of the Council's decision on its petition and resubmits the plan for review and approval, the Council shall prepare a fair-share allocation plan for the region and shall adopt it in the manner provided for by paragraph (3), above. Upon adoption of the plan for a housing region, the Council may then also assume any duties of a [regional planning agency] as provided by Section [4-208.6(2)] of this Act for that housing region.

4-208.9 Contents of a Housing Element

- (1) The housing element of the local government's comprehensive plan is intended to provide an analysis and identification of existing and prospective housing needs, especially for middle-, moderate-, and low-income housing, in its housing region and to set forth implementing measures for the preservation, improvement and development of housing. The housing element shall include all of the following, none of which may serve as a basis for excusing a local government from fulfilling its regional fair-share obligation:
- (a) an inventory of the local government's housing stock by age, condition, purchase or rental value, occupancy characteristics, and type, including the number of units affordable to middle-, moderate-, and low-income households and the number of substandard housing units capable of being rehabilitated;
 - (b) a projection of the local government's housing stock, including the probable future construction of middle-, moderate-, and low-income housing for the next [5] years, taking into account, but not necessarily limited to, construction permits issued, preliminary as well as final approvals of applications for development, and all lands identified by the local government for probable residential development;
 - (c) an analysis of the local government's demographic characteristics, including but not necessarily limited to, household size, income level, and age of residents;
 - (d) an analysis of the existing and probable future employment characteristics and opportunities within the boundaries of the local government, especially those jobs that will pay moderate or low wages;
 - (e) an analysis of the existing and planned infrastructure capacity, including, but not limited to sewage and water treatment, sewer and water lines, and roads;
 - (f) a statement of the local government's own assessment of its present and prospective housing needs for all income levels, including its regional fair share for low- and moderate-income housing, and its capacity to accommodate those needs. The regional fair share as determined by the [Council *or* regional planning agency] shall form the minimum basis for the local government's determination of its own fair share;

CHAPTER 4

- (g) an identification of lands within the local government that are most appropriate for the construction of low- and moderate-income housing and of existing structures most appropriate for conversion to, or rehabilitation for, low- and moderate-income housing, including a consideration of lands and structures of developers who have expressed a commitment to provide low- and moderate-income housing and lands and structures that are publicly or semi-publicly owned;
 - (h) a statement of the local government's housing goals and policies;
- ◆ As part of the housing element, the local government can provide for its fair share by any technique or combination of techniques which provides a realistic opportunity for the provision of its fair share. The housing element should contain an analysis demonstrating that it will provide such a realistic opportunity. The local government should review its land-use and other relevant ordinances to incorporate provisions for low- and moderate-income housing and remove any unnecessary cost generating features that would affect whether housing is affordable. The model legislation provides, in (i) below, for the elimination or reduction of unnecessary cost generating features for all housing or affordable housing (on the theory that such action would reduce housing costs overall) or for only inclusionary developments (on the theory that it would ensure project feasibility).
- (i) the text of adopted or proposed ordinances or regulations of the local government that are intended to eliminate or reduce unnecessary cost generating requirements for [all housing *or* affordable housing *or* inclusionary developments]; and
 - (j) the text of adopted or proposed ordinances or regulations of the local government that are intended to provide a realistic opportunity for the development of low- and moderate-income housing. Such ordinances or regulations shall consider the following techniques, as well as others that may be proposed by the local government or recommended by the Council as a means of assuring the achievement of the local government's regional fair share, removing barriers to and providing incentives for the construction of low- and moderate-income housing and generally removing constraints that unnecessarily contribute to housing costs or unreasonably restrict land supply:¹²⁹
 - 1. expanding or rehabilitating public infrastructure;
 - 2. reserving infrastructure capacity for low- and moderate-income housing;

¹²⁹For an interesting and creative statute providing financial incentives to local governments for removing barriers to low- and moderate-income housing (as well as middle-income housing), see Fla. Stat. §420.907 *et seq.* (1995) (State housing incentives partnership), esp. §420.9076 (Adoption of affordable housing incentive plans; committees).

CHAPTER 4

3. establishing a process by which the local government may consider, before adoption, policies, procedures, ordinances, regulations, or plan provisions that may have a significant impact on the cost of housing;
4. designating a sufficient supply of sites in the housing element that will be zoned at densities that may accommodate low- and moderate-income housing, rezoning lands for densities necessary to assure the economic viability of any inclusionary developments, and giving density bonuses for mandatory set-asides of low- and moderate-income dwelling units as a condition of development approval;¹³⁰
5. establishing controls to ensure that once low- and moderate-income housing is built or rehabilitated through subsidies or other means, its availability will be maintained through measures such as, but not limited to, those that establish income qualifications for low- and moderate-income housing residents, promote affirmative marketing measures, and regulate the price and rents of such housing, including the resale price, pursuant to Section [4-208.22] below;
6. establishing development or linkage fees, where appropriate, authorizing such other land dedications or cash contributions by a nonresidential developer in lieu of constructing or rehabilitating low- and moderate-income housing, the need for which arises from the nonresidential development, generating other dedicated revenue sources, or committing other financial resources to provide funding for low- and moderate-income housing. Such development or linkage fees, land dedications, cash contributions, and dedicated revenue sources may be used for the following activities or other activities approved by the Council: rehabilitation; new construction; purchase of land for low- and moderate- income housing; improvement of land for low- and moderate-income housing; and assistance designed to render units to be more affordable;
7. modifying procedures to expedite the processing of permits for inclusionary developments and modifying development fee requirements, including reduction or waiver of fees and alternative methods of fee payment;
8. using funds obtained from any state or federal subsidy toward the construction of low- and moderate- income housing; and

¹³⁰While a local government may not want to designate specific sites for low- and moderate-income housing, it is nonetheless important to designate a sufficient supply of sites zoned at appropriate densities to assure an open, competitive land market.

CHAPTER 4

9. providing tax abatements or other incentives, as appropriate, for the purposes of providing low- and moderate-income housing.

4-208.10 Submission of Housing Element to [Council *or* Regional Planning Agency]

- (1) No later than *[date]*, each local government shall prepare and submit to the [Council *or* regional planning agency] a housing element and a petition for approval in a form prescribed by the Council.
 - (2) The [Council *or* regional planning agency] shall complete the review of the housing element and determine whether to approve the element within [90] days after submission of a complete document. This [90] day period may be extended for an additional [60] days by the written consent of the local government and any objectors involved, or for good reason as determined by the [Council *or* regional planning agency].
- ◆ If a regional planning agency (such as a regional planning commission or council of governments) is in place, then approval of the local government's housing element would be undertaken by the regional planning agency.
 - ◆ The initial years of the fair share program's operation will require closer scrutiny by the reviewing agency. However, as local governments gain experience with the program and demonstrate substantial achievement of goals, as an alternative, the reviewing procedures may be simplified and perhaps replaced by some type of self-certification by the local government. The self-certification process would have to be well-developed to allow for challenges by neighboring or affected jurisdictions and other third parties. In addition, the process would have to incorporate appropriate conflict resolution procedures.

4-208.11 Notice of Submission

- (1) At the time of submission to the [Council *or* regional planning agency], the local government shall provide notice of the submission to all owners of land whose properties are included in the housing element for the development of proposed low- and moderate-income housing.
- (2) In addition, notice shall be provided within [1] week of the date of submission to a newspaper of general circulation in the area in which the local government is located and to all other persons who requested it in writing.
- (3) The notice shall specify that the housing element has been submitted to the [Council *or* regional planning agency] for approval and that all persons receiving a notice shall have the right to participate in the agency's mediation and review process if they object to the plan. The notice shall also specify that copies of the housing element are available for purchase at cost, and shall indicate where they may be reviewed or copied.

CHAPTER 4

- (4) The notice shall also state that objections to the housing element, or requests to participate in the mediation, must be filed within [30] days of the date of the mailing of the notices.
- (5) If the housing element is a revision of an earlier submission, notice shall also be given to any owners of land whose properties were included in the prior submission but whose properties were omitted from the one currently being proposed.

4-208.12 Objection to Housing Element; Mediation

- (1) If any person or entity to whom notice is required to be given, or who requests notice, files an objection, the [Council *or* regional planning agency] shall initiate a mediation process in which it shall attempt to resolve the objections to the housing element voluntarily. Any such objection must be filed within [30] days of the date of service of notice of the filing of the petition for approval.
- (2) Objections shall be filed with the [Council *or* regional planning agency] and the local government with as many copies as the Council shall by rule require. The objections shall state with specificity the provisions of the element objected to, and the grounds for the objection to each, and shall contain such expert reports or affidavits as may be needed for an understanding of the objection. In the case of objectors whose lands have not been selected in the element for consideration for low- and moderate-income housing, the objection may also set forth why the lands of the objector are more likely to produce low- and moderate-income housing and either why one or more of the sites proposed by the local government are not realistically likely to produce such housing during the period in which the housing element is in effect or why such sites are not suitable for same.
- (3) The mediation and review shall be conducted by a mediator who is either selected by the parties and approved by the [Council *or* regional planning agency] or appointed by the [Council *or* regional planning agency] from its own staff or from a list of outside mediators maintained by the [Council *or* regional planning agency]. The mediator shall possess qualifications not only with respect to dispute resolution, but also with respect to planning and other issues relating to the siting and development of low- and moderate-income housing. The mediation process shall be confidential so that no statements made in or information exchanged during mediation may be used in any judicial or administrative proceeding, except that agreements reached during the mediation process shall be reduced to writing and shall become part of the public record considered by the [Council *or* regional planning agency] in its review of the housing element.

4-208.13 [Council *or* Regional Planning Agency] Review and Approval of Housing Element

- (1) The [Council *or* regional planning agency] shall grant its approval of a housing element if it finds in writing that:
 - (a) the element is consistent with the provisions of this Act and rules adopted by the Council;

CHAPTER 4

- (b) the element provides a realistic opportunity for the development of affordable housing through the elimination or reduction of unnecessary cost generating requirements by existing or proposed local government ordinances or regulations; and
 - (c) the element provides a realistic opportunity for the development of low- and moderate-income housing through the adoption of affirmative measures in the housing element that can lead to the achievement of the local government's regional fair share of low- and moderate-income housing.
- (2) In conducting its review, the [Council *or* regional planning agency] may meet with the local government and may deny the petition or condition its approval upon changes in the housing element, including changes in existing or proposed ordinances or regulations. Any approval, denial, or conditions for approval shall be in writing and shall set forth the reasons for denial or conditions. If, within [60] days of the [Council's *or* regional planning agency's] denial or conditional approval, the local government refiles its petition with changes satisfactory to the [Council *or* regional planning agency], the [Council *or* regional planning agency] shall grant approval or grant approval subject to conditions.
- [(3) Upon denying, conditionally approving, or approving a local housing element, the [regional planning agency] shall provide a notice of its actions to the Council within [10] days. Where the [regional planning agency] has approved or conditionally approved a housing element, it shall transmit a copy of the approved element with the notice to the Council.]

4-208.14 Adoption of Changes to Development Regulations After Approval

- (1) Approval of any housing element by the [Council *or* regional planning agency] shall be subject to and conditioned upon the adoption by the local government of all amendments to ordinances or regulations proposed in the housing element by the local government within [90] days of such approval.
- (2) Failure to adopt such changes in the housing element as approved by the [Council *or* regional planning agency] shall render approval of the element null and void and shall subject the local government to the provisions of Section [4-208.16] of this Act.

[4-208.15 Quasi-legislative Review]

- [(1) Review by the [Council *or* regional planning agency] of a local government's housing element shall be considered a quasi-legislative decision of general application, and not a decision in a contested case requiring an adjudicatory hearing with the calling of witnesses, cross-examination, or the use of sworn testimony.
- (2) The [Council *or* regional planning agency] may appoint hearing officers to conduct such fact finding proceedings as may be appropriate in the event that the [Council *or* regional planning

CHAPTER 4

agency] in its discretion deems it appropriate to undertake more detailed fact finding prior to deciding whether to approve, disapprove, or approve a housing element with conditions.]

- ◆ The purpose of this Section is to avoid lengthy trial type administrative hearings with respect to the approval or disapproval of a housing element. This Section may be omitted if a more formal administrative hearing process is desired.

4-208.16 Appeal to Council of Decision Made by a Local Government Regarding an Inclusionary Development When a Housing Element is not Approved or is not Submitted

- (1) In the event that the [Council *or* regional planning agency] denies approval of a housing element and the local government does not refile a petition for approval of a housing element, or the [Council *or* regional planning agency], upon reviewing a refiled petition, does not grant approval of the element, or a local government fails to submit a housing element for approval by [date], or a local government fails to update a housing element, an applicant seeking approval to build an inclusionary development shall have the right to appeal any denial or approval with conditions by the local government to the Council.
- ◆ The procedures in this Section could also be the responsibility of a separate appeals board or could be handled by a court. For an example of this, see Alternative 2 in Section 4-208, Application for affordable housing development; affordable housing appeals.
- (2) Such an appeal may be taken to the Council within [30] days following receipt of a local government's decision of denial or approval with conditions of a proposed inclusionary development by filing with the Council a petition stating the reasons for the appeal. The petition for appeal shall be considered presumptively valid by the Council and the burden of proof shall be with the local government. Within [10] days following receipt of a petition, the Council shall notify the local government that issued the denial or approval with conditions that an appeal has been filed. The local government shall transmit to the Council within [10] days a certified copy of its decision, the application, and the hearing record for the application, if any.
 - (3) A hearing on the appeal shall be held by the Council within [45] days following receipt of the decision, application, and hearing record. The hearing shall be held on the record, consistent with the [state administrative procedures act]. The Council shall render a written decision on the appeal, stating findings of fact and conclusions of law within [30] days following the hearing, unless such time is extended by mutual consent of the petitioner and the local government that issued the decision. The Council may allow interested parties to intervene in the appeal upon timely motion and showing of good cause.
 - (4) In the case of a denial by the local government, the Council shall consider at the hearing on appeal, but shall not be limited to, the following issues:

CHAPTER 4

- (a) has the local government previously authorized or permitted the construction of low- and/or moderate-income dwelling units at least equal in number to its regional fair share; and
 - (b) the extent to which the project would cause significant adverse effects on the environment.
- ◆ Whoever promulgates rules for handling these appeals (i.e., the Council or a separate appeals board) should develop a list of evaluation parameters, perhaps in consultation with appropriate state environmental agencies and public health authorities, to determine whether a proposed project will cause “significant adverse effects” on the environment.
- (5) In the case of approval with conditions by the local government, the Council shall consider at the hearing on appeal, but shall not be limited to, the following issues:
 - (a) whether the conditions are necessary to prevent the project from causing significant adverse effects on the environment; and
 - (b) whether these conditions render the project infeasible. For purposes of this Act, a requirement, condition, ordinance, or regulation shall be considered to render an inclusionary development proposed by a developer that is a nonprofit entity, limited equity cooperative, or public agency infeasible when it renders the development unable to proceed in accordance with the program requirements of any public program for the production of low- and moderate-income housing in view of the amount of subsidy realistically available. For an inclusionary development proposed by a developer that is a private for-profit individual firm, corporation, or other entity, the imposition of unnecessary cost generating requirements, either alone or in combination with other requirements, shall be considered to render an inclusionary development infeasible when it reduces the likely return on the development to a point where a reasonably prudent developer would not proceed.
 - (6) In the case of a denial by the local government, if the Council finds that the local government has not authorized or permitted the construction of low- and/or moderate-income dwelling units at least equal in number to its regional fair share and that the project as proposed would not cause significant adverse effects to the environment, it shall by order vacate the local government's decision and approve the application with or without conditions.
 - (7) In the case of approval with conditions by the local government, if the Council determines that the conditions, if removed or modified, would not result in the project causing significant adverse affect to the environment and that such conditions would otherwise render the construction or operation of the project infeasible, it shall by order modify or remove such conditions so that the project would no longer be infeasible and otherwise affirm the approval of the application.

CHAPTER 4

- (8) The decision of the Council in paragraph (3) above shall constitute an order directed to the local government and shall be binding on the local government, which shall forthwith issue any and all necessary permits and approvals consistent with the determination of the Council.

4-208.17 Review of Decisions of the Council [and Regional Planning Agency]

- (1) A review of a final determination by a [regional planning agency] shall be taken to the Council within [30] days of the determination and the Council shall conduct a *de novo* review of the matter.
- (2) A review of a final determination of the Council shall be filed with the [*appellate court of competent jurisdiction*] within [30] days of the determination.
- ◆ The appeal should go to the state's intermediate appellate court. It would thereafter be subject to normal review by the state's appellate court of last resort.

4-208.18 Enforcement of Housing Element Requirements

- (1) Subsequent to the approval of the housing element by the [Council *or* regional planning agency], any person with an interest in land or property that has been identified in a housing element pursuant to Section [4-208.9(1)(f)] of this Act may apply to the Council for such order as may be appropriate in connection with the implementation of the element, or the approval of any application for development of the property for low- and moderate-income housing.
- (2) Such enforcement action may be taken where it is alleged that the local government has failed to implement the element or has conducted the process of reviewing or approving an inclusionary development on the land in such fashion as to unreasonably delay, add cost to, or otherwise interfere with the development of low- and moderate-income housing proposed in the element.
- ◆ Practical experience in New Jersey has shown that low- and moderate-income housing developments, even when included in a duly approved housing element that has dealt with the zoning of a development, become the subject of intense controversy at the time of site plan or subdivision review. To ensure that an approved element is carried out, the Council should have the power to order compliance with the element.

4-208.19 Assistance of Court in Enforcing Orders

- (1) The Council may obtain the assistance of the [*trial court*] in enforcing any order issued by the Council pursuant to this Act. In acting on any such application for enforcement, the court shall have all powers it otherwise has in addressing the contempt of a court order.

CHAPTER 4

(2) In a proceeding for enforcement, the court shall not consider the validity of the Council's order, which may only be challenged by a direct appeal to the [*intermediate appellate court of competent jurisdiction*], in accordance with the provisions of Section [4-208.17(2)] of this Act.

- ◆ An agency's power to enforce its order is important. The agency should therefore have the authority to ensure that its mandates are carried out.

4-208.20 Council as Advocate

The Council may act as an advocate for affordable housing developments in the obtaining of federal, state, regional, or local government development approvals or any other permits, approvals, licenses or clearances of any kind which are necessary for the construction of an affordable housing development.

- ◆ The development may need additional state permits for wetlands, sewers, etc. The agency ought to alert other permitting entities that the affordable housing project is in the public interest so that other permits and approvals may be expedited.

4-208.21 Designation of Authority; Controls on Affordability of Low- and Moderate-Income Dwelling Units

- (1) Each local government whose housing element has been approved by the [Council *or* regional planning agency] shall designate a local authority ("Authority") with the responsibility of ensuring the continued affordability of low- and moderate-income sales and rental dwelling units over time.
- (2) The Authority shall also be responsible for: affirmative marketing; income qualification of low- and moderate-income households; placing income eligible households in low- and moderate-income dwelling units upon initial occupancy; placing income eligible households in low- and moderate-income dwelling units as they become available during the period of affordability controls; and enforcing the terms of any deed restriction and mortgage loan.
- (3) Local governments shall establish a local authority or may contract with a state, regional, or nonprofit agency approved by the Council to perform the functions of the Authority.

Commentary: Controls on Resales and Re-Rentals

Affordability controls on resales and re-rentals are needed for several reasons. Affordable housing is often in short supply, so conserving the stock of new and rehabilitated affordable housing through controls serves an important public purpose. When government offers subsidies or other

CHAPTER 4

incentives to encourage the development of additional affordable housing, unless there are controls on subsequent future sales prices or rent levels, there could be profiteering in the short term on the difference between the below-market subsidized price or rent and the higher prevailing market value or rent of the unit. The controls assure that when the government gives a subsidy, the public in return will receive a benefit in the form of a lasting supply of affordable housing.

The need for affordability controls on resales and re-rentals will obviously vary by community and region of the state.¹³¹ While some housing markets may call for minimal controls, other markets may require controls that are more stringent in terms of length of time and scope. In addition, it is important to re-evaluate the controls as they apply to individual developments on a regular basis to ensure that they remain relevant to market conditions. The imposition of controls could serve as a disincentive to the production of affordable housing because they may limit future flexibility, marketability, and return on investment. Consequently, it may be necessary to link controls on resales and re-rentals with incentives that might include: density bonuses, public contributions or subsidies of infrastructure or land, and expedited permit processing. Subsidies, as used in this model, are specific to the project and do not include such devices as federal home mortgage interest tax deductions. By contrast, a subsidy could include the public assumption of the cost of installing water and sewer lines to the site for a low- and moderate-income housing project or the write-down of land costs.

In imposing controls on rentals and for-sale housing, it is important to recognize the differences between the two types of housing. Rental housing is typically the best alternative for housing people in the very-low-income groups and operators of subsidized housing are accustomed to accepting rent limits. However, rents should periodically be adjusted to reflect changing costs to assure economic and physical viability. In the rental case, the principal public policy objective is assuring an adequate supply of affordable units.

The for-sale case is complicated by a second public policy objective: helping families maintain their status as homeowners. Because homeownership entails many more elements of risk and expense than renting, it involves somewhat different public policy concerns. First, homeownership may not be the best choice for very-low income households. Second, there is a down payment and closing costs that are invested and put at risk. There is a longer lasting risk to good credit and a profound sense of personal failure for the foreclosed owners. There are also the financial burden and risk associated with maintaining a home, especially in facing large, unexpected maintenance items. In addition, locking into homeownership with long-term resale price controls constrains the homeowner's flexibility to respond to job or other life situations. These concerns, together with the public purposes served by homeownership, mean that resale price control terms should be more lenient in order to reward low-income homeowners with some measure of equity appreciation, if only to protect them from returning to renter status.

¹³¹ Affordability controls may also be supplemented with other direct subsidies such as low interest loans to assist a homebuyer in making a down payment on a dwelling unit. Such a loan would be short term, such as five years, and would be recaptured in order to assist other future homebuyers of low- and moderate-income units.

CHAPTER 4

One way to temper the effect of resale price controls on the subsidized homeowner is to offer him/her the option of paying the subsidy back (either fully or partially). The purpose of such a payback of subsidy or “recapture” is three-fold: (1) to guarantee that housing remains affordable for a reasonable period; (2) to ensure that the stock of low- and moderate-income housing is not later depleted if the unit is sold at a higher price; and (3) to create a pool of monies that may be used to construct or rehabilitate affordable units. Once the subsidy has been recaptured by the public to be recycled into other assisted housing, the homeowner would be free to sell at market prices and to use the equity toward the next home purchase. Because of the complexity of recapture systems, their design is probably best done as part of an administrative rule-making process as opposed to a state statute.

An example of how recapture might operate: A homeowner buys a subsidized unit and signs a right of first refusal agreement with the local government that gives the government the right to buy back the unit for the subsidized price with adjustments for inflation, broker fees, etc. If the homeowner pays back the full subsidy, the government would not exercise its option and the house could be sold at market value. Alternately, the government could resell the house as an affordable unit to a qualifying low- or moderate-income homebuyer.

4-208.22 Controls on Resales and Re-rentals of Low- and Moderate-Income Dwelling Units

- (1) The provisions of paragraphs (2) through (7) below, and the provisions of Section [4-208.23] below, shall apply to newly constructed, rehabilitated, and converted low- and moderate-income sales and rental dwelling units that are intended to fulfill a local government’s regional fair share obligations, provided that one or more of the following conditions are met:¹³²
 - (a) The dwelling unit was constructed, rehabilitated, or converted with assistance from the federal, state, or local government in the form of monetary subsidies, donations of land or infrastructure, financing assistance or guarantees, development fee exemptions, tax credits, or other financial or in-kind assistance; and/or
 - (b) The dwelling unit is located in a development that was granted a density bonus or other form of regulatory incentive in order to provide low- and moderate-income housing; and/or

- ◆ Note that the various devices listed in subparagraphs (a) and (b) correspond to tools that are considered to be “subsidies,” as defined in Chapter 3.

¹³²If none of these conditions is present, then presumably the developer is operating outside of the local government’s affordable housing program provided for under the Act. The developer would therefore not need any of the incentives or subsidies offered by the local government or other agencies.

CHAPTER 4

- (c) The dwelling unit was built subject to the terms of a local ordinance which requires the construction of low- and moderate-income housing as a condition of development approval.
- (2) In developing housing elements, local governments shall determine and adopt measures to ensure that newly constructed low- and moderate-income sales and rental dwelling units that are intended to fulfill regional fair share obligations remain affordable to low- and moderate-income households for a period of not less than [15] years, which period may be renewed. The Authority shall require all conveyances of those newly constructed low- and moderate-income sales dwelling units subject to this Act to contain the deed restriction and mortgage lien adopted by the Council.¹³³ Any restrictions on future resale or rentals shall be included in the deed restriction as a condition of approval enforceable through legal and equitable remedies, as provided for in Section [4-208.23] of this Act.
- (3) Rehabilitated owner-occupied single-family dwelling units that are improved to code standard shall be subject to affordability controls for at least [5] years.
- (4) Rehabilitated renter-occupied dwelling units that are improved to code standard shall be subject to affordability controls on re-rental for at least [10] years.
- (5) Dwelling units created through the conversion of a nonresidential structure shall be considered a new dwelling unit and shall be subject to controls on affordability as delineated in paragraphs (2), (3), and (4) above.
- (6) Affordability controls on owner- or renter-occupied accessory apartments shall be for a period of at least [5] years.
- (7) Alternatives not otherwise described in this Section shall be controlled in a manner deemed suitable to the Council and shall provide assurances that such arrangements will house low- and moderate-income households for at least [10] years.

4-208.23 Enforcement of Deed Restriction

- (1) No local government shall issue a certificate of occupancy for the initial occupancy of a low- or moderate-income sales dwelling unit unless there is a written determination by the Authority that the unit is to be controlled by a deed restriction and mortgage lien as adopted by the Council. The Authority shall make such determination within [10] days of receipt of a proposed deed restriction and mortgage lien. Amendments to the deed restriction and lien shall be permitted only if they have been approved by the Council. A request for an

¹³³A model deed restriction and lien for low- and moderate-income housing appears in 5 N.J.A.C., Ch. 93, App. I.

CHAPTER 4

amendment to the deed restriction and lien may be made by the Authority, the local government, or a developer.

- (2) No local government shall permit the initial occupancy of a low- or moderate-income sales dwelling unit prior to the issuance of a certificate of occupancy in accordance with paragraph (1) above and with its zoning code and other land development regulations.
- (3) Local governments shall, by ordinance, require a certificate of reoccupancy for any occupancy of a low- or moderate-income sales dwelling unit resulting from a resale and shall not issue such certificate unless there is a written determination by the Authority that the unit is to be controlled by the deed restriction and mortgage lien prior to the issuance of a certificate of reoccupancy, regardless of whether the sellers had executed the deed restriction and mortgage lien adopted by the Council upon acquisition of the property. The Authority shall make such determination with [10] days of receipt of a proposed deed restriction and mortgage lien.
- (4) The mortgage lien and the deed restriction shall be filed with the recorder's office of the county in which the unit is located. The lien and deed restriction shall be in the form prescribed by the Council.
- (5) In the event of a threatened breach of any of the terms of a deed restriction by an owner, the Authority shall have all remedies provided at law or equity, including the right to seek injunctive relief or specific performance, it being recognized by parties to the deed restriction that a breach will cause irreparable harm to the Authority in light of the public policies set forth in this Act and the obligation for the provision of low- and moderate-income housing.
- (6) Upon the occurrence of a breach of any of the terms of the deed restriction by an owner, the Authority shall have all remedies provided at law or equity, including but not limited to, foreclosure, recoupment of any funds from a rental in violation of the deed restriction, injunctive relief to prevent further violation of the deed restriction, entry on the premises, and specific performance.

4-208.24 Local Government Right to Purchase, Lease, or Acquire Real Property for Low- and Moderate-Income Housing

- (1) Notwithstanding any other law to the contrary, a local government may purchase, lease, or acquire by gift, real property and any estate or interest therein, which the local government determines necessary or useful for the construction or rehabilitation of low- and moderate-income housing or the conversion to low- and moderate-income housing.
- (2) The local government may provide for the acquisition, construction, and maintenance of buildings, structures, or other improvements necessary or useful for the provision of low- and moderate-income housing, and may provide for the reconstruction, conversion, or

CHAPTER 4

rehabilitation of those improvements in such manner as may be necessary or useful for those purposes.

- (3) Notwithstanding the provisions of any other law regarding the conveyance, sale, or lease of real property by a local government to the contrary, a local government's legislative body may, by [ordinance *or* resolution], authorize the private sale and conveyance or lease of a housing unit or units acquired or constructed pursuant to this Section, where the sale, conveyance, or lease is to a low- or moderate-income household or nonprofit entity and contains a contractual guarantee that the dwelling unit will remain available to low- and moderate-income households for a period of at least [15] years.

4-208.25 Biennial Report of the Council to Governor and Legislature

- (1) By [*date*] of each even-numbered year, the Council shall prepare a report to the governor and legislature. The Council shall report on the effect of this Act on promoting the provision of affordable housing in the housing regions of the state. The report shall address, among other things: local governments with housing elements that have been approved, with or without conditions, or that have not been approved by [the Council *or* a regional planning agency]; the number of low- and moderate income dwelling units constructed, rehabilitated, purchased, or otherwise made available pursuant to this Act; the number and nature of appeals to the Council on decisions of local governments denying or conditionally approving inclusionary developments and the Council's disposition of such appeals; [regional planning agencies with regional fair-share housing allocation plans that have, or have not been approved;] actions that have been taken by local governments to reduce or eliminate unnecessary cost generating requirements that affect affordable housing; and such other actions that the Council has taken or matters that the Council deems appropriate upon which to report. The report may include recommendations for any revisions to this Act which the Council believes are necessary to more nearly effectuate the state's housing goal.
- (2) Every officer, agency, department, or instrumentality of state government, of [regional planning agencies,] and of local government shall comply with any reasonable request by the Council for advice, assistance, information, or other material in the preparation of this report.
- (3) The Council shall send the biennial report to the governor, members of the legislature, state agencies, departments, boards and commissions, appropriate federal agencies, [regional planning agencies], and to the chief executive officer of every local government in the state, and shall make the report available to the public. Copies shall be deposited in the state library and shall be sent to all public libraries in the state that serve as depositories for state documents.