

**RESOLUTION GRANTING METUCHEN BOROUGH,
MIDDLESEX COUNTY
A WAIVER OF N.J.A.C. 5:97-6.9
COAH DOCKET NO. 10-2237**

WHEREAS, Metuchen Borough, Middlesex County received substantive certification of its first round Housing Element and Fair Share Plan from the Council on Affordable Housing (COAH) on May 6, 1992; and

WHEREAS, the Borough received certification of its second round Housing Element and Fair Share Plan from COAH on August 2, 200; and

WHEREAS, Metuchen petitioned COAH under the revised third round rules for substantive certification on December 30, 2008; and

WHEREAS, Metuchen Borough's third round obligation consists of a 42-unit rehabilitation share, a prior round obligation of 99 units consisting of a 20-unit Realistic Development Potential (RDP) and a 70-unit unmet need and a growth share obligation of 117 units: and

WHEREAS, the Borough is addressing its third round obligation as follows: the Borough is addressing its rehabilitation share with two rehabilitation credits and by participating in the Middlesex County Rehabilitation Program to address its remaining 40-unit rehabilitation share; the Borough proposes to address its 20-unit RDP with a group home and three inclusionary zoning projects; the Borough proposes to address its 117-unit growth share obligation with 28 credits, 26 inclusionary units and 24 compliance bonuses, eight supportive and special needs units and two rental bonuses, and 29 units from the Lincoln Avenue Senior site; and the Borough proposes an Affordable Housing Ordinance to address unmet need; and

WHEREAS, an objection was filed to Metuchen's Housing Element Fair Share Plan (HEFSP), by Fair Share Housing Center (FSHC) concerning the inclusion of the Lincoln Avenue Senior site in the HEFSP; and

WHEREAS, mediation has not yet been scheduled; and

WHEREAS, the Lincoln Avenue Senior site is a senior affordable housing project in Metuchen which was built in 1979 and was financed by HMFA, and the financing was retired in 1999, and ownership of the project passed from a local non-profit to a Sponsor, Metuchen Associates, LL; and

WHEREAS, affordability controls in the lending documents and in a Deed Restriction and Regulatory Agreement were set to expire in 2009; however, new lending documents were executed in 2006 and as a result, new controls in the form of mortgage conditions were put in place; and

WHEREAS, these affordability controls as mortgage conditions may be removed at any time if the owner pays off the mortgage and the only controls presently in effect which are independent of the financing are those found in the 1999 Deed Restriction, which require that, “At least 20 percent of the units in the project shall be reserved at all times for occupancy by persons of low or moderate income as defined in rules adopted by the Department of Community Affairs at N.J.A.C. 5:43-1.5...”; and the controls on the remaining 80 percent of the units expired in 1999 ; and

WHEREAS, in 1979, as part of the financing, the Borough granted the project a tax abatement, and an agreement to make and accept a payment in lieu of taxes (PILOT) was executed but did not have a specified term; and

WHEREAS, when the project was refinanced in 2006, a similar agreement was executed; and

WHEREAS, the owner of the project is again seeking to refinance and has applied to continue the PILOT agreement until 2042, as required by the lender, USHUD; and

WHEREAS, in return, the Borough will require that at least 29 of the units (in addition to the 20 percent in the restriction) be subject to affordability controls until 2042, regardless of whether the owner pays off the mortgage, and the agreement would increase the number of deed restricted affordable units in the project to 54 units (29 + 25); and

WHEREAS, the Borough states that currently, as a practical matter, all 122 units at the project will be made affordable by the tax exemption, because the terms of the financing will require that they be affordable, however, the owner could refinance at any time and release all but 20 percent of the units from the restrictions; and

WHEREAS, without placing deed restrictions on the remaining 80 percent of the units, they would not be encumbered and could be rented out at market levels if the owner chooses to refinance or pays off the mortgage, therefore the new tax abatement agreement would make 54 units (25 plus 29) affordable units 2042, notwithstanding any re-financing; and

WHEREAS, Metuchen requests 29 credits for the 29 “newly restricted” units as part of a market to affordable program, N.J.A.C. 5:97-6.9, acknowledging that the proposed market to affordable program is not conventional because Metuchen is subsidizing the project with tax exemptions and not cash; and

WHEREAS, Metuchen argues that in this case the units to be converted from market to affordable are in place and guaranteed and that as a result there is no reason to limit the number of units to ten percent; and

WHEREAS, the Borough is aware that using the tax exemption to satisfy the \$25,000 contribution is not conventional but the Borough asserts that the value of the tax exemption for 32 years totals \$2,763,808, which equals \$95,304 for each of the 29 units; and that while the PILOT value is based on all 122 units, the Borough states that it is granting the abatement to gain the 29 restricted units and therefore all of the forgone revenue should be considered only in relation to those units; and

WHEREAS, Fair Share Housing Center (FSHC) submitted papers on June 28, 2010 opposing the granting of the waiver as Metuchen is requesting credit for units constructed prior to 1980, which, FSHC states, is contrary to both COAH’s methodology and the Fair Housing Act; and

WHEREAS, FSHC argues that the FHA states, “notwithstanding any other law to the contrary, a municipality shall be entitled to credit for a unit if it demonstrates that ...the municipality issued a certificate of occupancy for the unit, which was either newly constructed or rehabilitated between April 1, 1980 and December 15, 1986...” N.J.S.A. 52:27D-307; and

WHEREAS, FSHC argues that based on COAH’s regulations, municipalities are not entitled to credits for units built prior to April 1, 1980 and maintains that since; and

WHEREAS, FSHC states that it would be permissible under COAH's regulations to grant Metuchen rehabilitation credit towards the units, and looks to the Council's December 9, 2009 decision involving the Town of Newton; and

WHEREAS, Metuchen Borough submitted a reply on June 29, 2010, arguing that the instant waiver request is distinguishable from Newton, as the Newton waiver was for an extension of controls while in the instant case, the waiver is for a market to affordable program; and

WHEREAS, Metuchen is only seeking credit for 29 units, unlike Newton which was seeking more credits; there are no deed controls currently in place in Metuchen, while in Newton there were deed restrictions currently in place, and all 122 units in Metuchen satisfy the affordability control requirements, unlike the case in Newton; and

WHEREAS, a task force met on June 22, 2010 which makes the recommendation that the Council grant Metuchen's request.

NOW THEREFORE BE IT RESOLVED, COAH's regulations concerning market to affordable programs, at N.J.A.C. 5:97-6.9, require that:

1. A municipal market to affordable (MTA) program provide a minimum of \$25,000 per unit to subsidize each moderate-income unit and/or \$30,000 per unit to subsidize each low-income unit, with additional subsidy depending on the market prices or rents in a municipality; and

2. The MTA program be limited to no more than ten for-sale and ten rental units, or an amount equal to a combined total of ten percent of the fair share obligation, whichever is greater, unless the municipality has demonstrated a successful history of a market to affordable program; and

BE IT FURTHER RESOLVED N.J.A.C. 5:96-15.2 permits a waiver to be granted if there is a showing that the strict application of the rule would create an unnecessary financial, environmental or other hardship; or 1. Granting the waiver fosters the production of affordable housing; 2. Granting the waiver fosters the intent of, if not the letter of, the Council's rules; and 3. The Housing Element and Fair Share Plan provide a mix of housing options; and

BE IT FURTHER RESOLVED Metuchen's waiver request is distinguished from the Newton decision because in that case, credit was not permitted in part due to the

units having been constructed prior to 1980, as granting credit could substantially dilute delivery of the affordable housing need, and also because the developers of the development entered into an agreement with the New Jersey Housing and Mortgage Finance Agency (NJHMFA) and the Public Housing Development Authority within the Department of Community Affairs (DCA), which permitted the developers to pay off their mortgage early in return for adhering to a number of conditions among which was the extension of the affordability controls for a period of 27 years to April 30, 2029; and

BE IT FURTHER RESOLVED in Metuchen's case, while the units were created prior to 1980, there are no deed controls in place on 80 percent of the units in the project, and permitting Metuchen to utilize a market to affordable program would put deed controls in place; and

BE IT FURTHER RESOLVED the Council agrees that, regarding the requirement that a MTA program provide a minimum of \$25,000 per unit to subsidize each moderate-income unit and/or \$30,000 per unit to subsidize each low-income unit, the value of the tax exemption for 32 years totals \$2,763,808, which equals \$95,304 for each of the 29 units which would be subject to the new restrictions, which exceeds the \$25,000 and \$30,000 amounts required by N.J.A.C. 5:97-6.9; and

BE IT FURTHER RESOLVED regarding the waiver of N.J.A.C. 5:97-6.9 (b)4, the requirement that a MTA program be limited to no more than ten for-sale and ten rental units, or an amount equal to a combined total of ten percent of the fair share obligation only ten percent, the granting of the waiver would place permanent controls on 29 units which are currently not creditworthy, representing 13.4 percent of Metuchen's fair share obligation, and that the purpose of the 10 percent limitation is to ensure that a municipality can fulfill that portion of the municipal affordable housing plan. In this case, Metuchen's entire market to affordable plan relies on existing and identified units, which will be deed restricted in one transaction. The placement of new controls on these units fosters the intent of COAH's regulations as it is ensuring that the units remain affordable; and

BE IT FURTHER RESOLVED Metuchen's affordable housing plan offers a mix of housing options as set forth in the procedural history section, above; and

BE IT FURTHER RESOLVED, Metuchen's request for a waiver is granted for the reasons stated above.

I hereby certify that this resolution was duly adopted by the Council on Affordable Housing at its public meeting on July 15, 2010.

A handwritten signature in cursive script that reads "Renee Reiss". The signature is written in black ink and is positioned above a horizontal line.

Renee Reiss, Secretary
Council on Affordable Housing