

**LEGISLATIVE FISCAL ESTIMATE**  
**ASSEMBLY, No. 4**  
**STATE OF NEW JERSEY**  
**220th LEGISLATURE**

DATED: JANUARY 8, 2024

**SUMMARY**

**Synopsis:** Reforms municipal responsibilities concerning provision of affordable housing; abolishes COAH; appropriates \$16 million.

**Type of Impact:** State and local cost impacts.

**Agencies Affected:** The Judiciary, Department of Community Affairs, New Jersey Housing and Mortgage Finance Agency, Municipalities.

**Office of Legislative Services Estimate**

<b>Fiscal Impact</b>	<b><u>Fourth 10-Year Round</u> (Beginning in FY 2026)</b>	<b><u>Every 10-Year Round</u> Thereafter</b>
<b>State Cost Increase</b>	\$16 million	Indeterminate
<b>Potential State Cost Decrease</b>	Indeterminate	Indeterminate
<b>Local Cost Impact</b>	Indeterminate	Indeterminate

- The Office of Legislative Services (OLS) concludes that the bill will result in an indeterminate impact to State costs associated with the role of special obligation masters to determine the regional need for affordable housing and the prospective fair share per municipality, as well as with certain responsibilities of the Affordable Housing Dispute Resolution Program related to any challenge of a municipality’s obligation, housing element, or fair share plan.
- The bill appropriates a total of \$16 million for the new program and for the Administrative Office of the Courts to fulfill the requirements of the bill in the fourth 10-year round of affordable housing obligations, which begins on July 1, 2025.
- The OLS finds that the State may experience cost avoidance in implementing the provisions of the bill, in lieu of the current Substantive Certification and Fair Share Housing Settlement Agreement regimes.
- The bill will also result in an indeterminate impact to municipal costs associated with the requirement that a municipality determine its affordable housing obligation and establish a housing element and fair share plan. The OLS notes that municipalities have incurred

significant costs in the third round of affordable housing obligations through the court process that followed the Council on Affordable Housing.

## **BILL DESCRIPTION**

The bill would abolish the Council on Affordable Housing, initially established by the Fair Housing Act, and would establish a process to enable a municipality to determine its own present and prospective fair share affordable housing obligation based on the formulas established in the bill, as calculated by three court-appointed obligation special masters, representing the northern, central, and southern areas of the State.

The bill permits a municipality to diverge from the obligation special master's calculations in determining its obligation, in case local factors exist that make the special master's calculations unreasonable. In advance of the fourth round, the bill requires a municipality to adopt its obligation by binding resolution in order to be assured of protection from a builder's remedy lawsuit through which a municipality may otherwise be compelled to permit development, when the fourth round begins. If the municipality meets this deadline, then the municipality's determination of its obligation would be established by default, without any approval, as the municipality's obligation for the fourth round. However, if a challenge is filed with the Affordable Housing Dispute Resolution Program, the program would be required to facilitate a resolution of the dispute.

The bill also requires a municipality to establish a "housing element" to encompass its obligation, and a fair share plan to meet its obligation, in advance of the fourth round, and propose necessary changes to associated ordinances in order to be assured of protection from a builder's remedy lawsuit. The bill permits an interested party to initiate a challenge to a municipal fair share plan and housing element. The program would facilitate communication over the challenge, and allow the municipality to commit to revising its fair share plan and housing element in response to the challenge, or provide an explanation as to why it will not make all or the requested changes, or both. If the municipality fails to meet the deadlines associated with the challenge, the immunity of the municipality from builder's remedy litigation would end unless the program extends the municipality's immunity. In any challenge to a municipality's determination of its affordable housing obligation, or to its fair share plan and housing element, the bill requires the program to apply an objective assessment standard to determine whether or not the municipality's obligation determination, or its fair share plan and housing element, fails to comply with the requirements of the bill. All parties would be required to bear their own fees and costs for proceedings within the program.

The Administrative Director of the Courts would also establish procedures for the purpose of efficiently resolving circumstances in which the program is unable to address a dispute over compliance certification within the time limitations established in the bill. As a part of these procedures, in order to facilitate an appropriate level of localized control of affordable housing decisions, for each vicinage, the bill directs the Chief Justice of the Supreme Court to designate a Superior Court judge who sits within the vicinage, or a retired judge who, during his or her tenure as a judge, served within the vicinage, to serve as county level housing judge to resolve disputes over the compliance, of fair share plans and housing elements of municipalities within their county, with the Fair Housing Act, when those disputes are not be resolved within the deadlines established in the bill. The Administrative Director of the Courts would adopt and apply a Code of Ethics for the program and county level housing judges modeled on the Code of Judicial Conduct of the American Bar Association, adopted by the State Supreme Court, and may establish additional more restrictive ethical standards in order to meet the specific needs of the program and of county level housing judges.

The bill also directs the Housing and Mortgage Finance Agency to update the Uniform Housing Affordability Controls and adjust certain affordability control periods to establish a sliding scale for deed restrictions based on the percentage of affordable units set aside in a given project in which projects with a higher percentage of affordable units have a shorter required deed restriction.

The bill would appropriate \$12 million to the program, and \$4 million to the Administrative Director of the Courts, from the General Fund, for the purposes of carrying out their respective responsibilities for the fourth round of affordable housing obligations.

## **FISCAL ANALYSIS**

### ***EXECUTIVE BRANCH***

None received.

### ***OFFICE OF LEGISLATIVE SERVICES***

#### ***Background***

In 1975 and 1983, respectively, the New Jersey Supreme Court ruled that each municipality has a constitutional obligation to provide a realistic opportunity for the construction of their fair share of affordable housing and created the “builder’s remedy” suit. The purpose of the builder’s remedy is to encourage builders to commence litigation against municipalities to defend the constitutional rights of low- and moderate-income households in return for having their properties rezoned for high density multi-family housing which contain an affordable housing element. In response to these Supreme Court decisions, lawmakers enacted the Fair Housing Act which provided an alternative administrative process for municipalities to participate in, to be overseen by the Council on Affordable Housing. One purpose of the council was to review a municipality’s affordable housing plan and provide “substantive certification” to those plans that would provide a realistic opportunity for the construction of affordable housing within the municipality. Any municipality that received substantive certification would be shielded from the costly court process of a builder’s remedy lawsuit. The council was also responsible for developing regulations and creating criteria related to each municipality’s affordable housing obligation. Using its rulemaking authority the council was meant to determine and assign a municipality’s affordable housing obligation. Between 1986 and 1999, the council undertook two successful rounds of rulemaking to establish a formula meant to set each municipality’s affordable housing obligation, but ultimately failed to establish rules for the third round, which was intended to begin in 1999, but ultimately began in 2015 following a 16-year gap period.

Today, the Council on Affordable Housing has been effectively defunct through inaction in appointing members as required by the Fair Housing Act. Municipalities are currently required to go through the process created by the court and overseen by a court appointed special master to obtain the functional equivalent of Substantive Certification, and to be protected from builder’s remedy lawsuits.

#### ***Impact***

The OLS concludes that the bill will result in increases to State costs associated with the role of special obligation masters to determine the regional need for affordable housing and the prospective fair share per municipality, as well as with certain responsibilities of the program related to any challenge of a municipality’s obligation, housing element, or fair share plan. The

bill appropriates a total of \$16 million for the program and for the Administrative Office of the Courts to fulfill the requirements of the bill in the fourth 10-year round of affordable housing obligations, which begins on July 1, 2025. The bill will also result in an indeterminate impact to municipal costs associated with the requirement for a municipality to determine its affordable housing obligation and establish a housing element and fair share plan.

Under the bill, the Chief Justice of the New Jersey Supreme Court would be required to appoint three obligation special masters, one for each of the northern, central, and southern regions of the State. Obligation special masters would be responsible for determining regional affordable housing need and for calculating the prospective fair share for each municipality using formulas prescribed by the bill. The bill's regional need formula considers factors in a method similar to what was used by the courts in the third round of affordable housing obligations. Obligation special masters would be required to make these calculations in advance of each new 10-year round.

Municipalities would then be required to determine their own affordable housing obligation, using the obligation special master's fair share calculations and local factors, by resolution. Municipalities would also be required to establish, by ordinance, a housing element to encompass their obligation and a fair share plan to meet the obligation. Municipalities would be permitted to utilize monies from their respective Municipal Affordable Housing Trust Funds for the development of their obligation, housing element, and fair share plan. While municipalities are expected to incur costs to come into constitutional compliance based on the bill's amendatory nature of the current statutory process, the OLS notes that certain municipalities have incurred significant costs over lengthy periods of time through the process created by the court for the third round of affordable housing obligations.

Municipalities would be protected from a builders remedy lawsuit if the required resolution and ordinances are adopted by the deadlines established by the bill. However, the program may remove builder's remedy immunity in certain circumstances in which it is apparent that the municipality is not determined to come into constitutional compliance. Additionally, any party can bring a challenge to the program of a municipality's obligation, housing element, or fair share plan. The municipality would be required to participate in the resolution of any challenges and, in the event a housing element or fair share plan is challenged, commit to revising its fair share plan and housing element to be in compliance with the changes requested in the challenge, or provide an explanation as to why it will not make all of the requested changes, or both. Municipalities would be required to bear the costs for their role in resolving disputes, and would not be permitted to utilize monies from their Municipal Affordable Housing Trust Funds to do so. The OLS is unable to predict the number or complexity of disputes that may need to be resolved for each municipality and is therefore unable to estimate the costs that may be incurred by municipalities as a result of disputes. Additionally, the OLS is unable to predict whether municipalities will lose their immunity to builder's remedy lawsuits pursuant to the bill and is therefore unable to estimate any costs that may be incurred by a municipality due to participating in a builder's remedy lawsuit.

The Chief Justice of the New Jersey Supreme Court would also be required to appoint between three and seven former judges or other experts to the Affordable Housing Dispute Resolution Program. In the event a challenge is brought by an interested party, the program would be required to receive the challenge, and generally facilitate communication between the parties to assist the municipality and challenger in reaching a resolution. The program would also be required to apply an objective assessment of the obligation, housing element, or fair share plan to determine whether the municipality is in compliance with the provisions of the bill. Of the bill's \$16 million appropriation, \$12 million is intended for use by the program in the fourth round, which begins in 2025. The OLS is unable to predict the number or complexity of challenges sought to be resolved by the program and whether the \$12 million appropriation will be sufficient for the program's

responsibilities in the fourth round. Therefore, the OLS is unable to estimate the amount that may need to be appropriated by the Legislature for future rounds.

If the program is unable to facilitate the resolution of a challenge, a superior court judge assigned to the applicable vicinage or retired superior court judge who, during the judge's tenure, served in the applicable vicinage, to be appointed by the Chief Justice of the Supreme Court, would be responsible for resolving the dispute, through procedures to be established by the Administrative Office of the Courts. The administrative office would also be responsible for adopting a code of ethics for the program and county-level housing judges to be modeled upon the Code of Judicial Conduct of the American Bar Association, as amended and adopted by the Supreme Court of New Jersey. Of the bill's \$16 million appropriation, \$4 million is intended to be used by the Administrative Office of the Courts in the fourth round to establish procedures concerning disputes in addition to other administrative responsibilities. The OLS is unable to predict the extent to which the administrative office may incur costs in future rounds to update the procedures established pursuant to the bill. The OLS is also unable to predict any potential cost avoidance that might be experienced by the State in implementing the provisions of the bill, in lieu of the current Substantive Certification and Fair Share Housing Settlement Agreement regimes.

The bill is also expected to result in increased administrative costs to the State to transfer responsibilities from the Council on Affordable Housing to the Department of Community Affairs and the New Jersey Housing and Mortgage Finance Agency, as well as specifically to the Housing and Mortgage Finance Agency to update the Uniform Housing Affordability Controls and adjust certain affordability control periods on a sliding scale based on the number of affordable housing units in a particular project.

*Section: Local Government*  
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This legislative fiscal estimate has been produced by the Office of Legislative Services due to the failure of the Executive Branch to respond to our request for a fiscal note.

This fiscal estimate has been prepared pursuant to P.L.1980, c.67 (C.52:13B-6 et seq.).