

SENATE BUDGET AND APPROPRIATIONS COMMITTEE

STATEMENT TO

[First Reprint]

ASSEMBLY, No. 4

with committee amendments

STATE OF NEW JERSEY

DATED: MARCH 11, 2024

The Senate Budget and Appropriations Committee reports favorably and with committee amendments Assembly Bill No. 4 (1R).

As amended, this bill abolishes the Council on Affordable Housing (COAH), initially established by the "Fair Housing Act," and establishes 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 the Department of Community Affairs (DCA). In advance of the fourth, 10-year round of affordable housing obligations, beginning on July 1, 2025, the bill requires DCA to complete these calculations, and provide for their publication, within the earlier of seven months of the effective date of the bill or December 1, 2024.

The bill permits a municipality to diverge from DCA's calculations in determining its obligation as long as it adheres to the methodology established by the bill. In advance of the fourth round, the bill requires a municipality to adopt its obligation by binding resolution, on or before January 31, 2025, in order to be assured of protection from exclusionary zoning litigation, as defined in the bill, 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, beginning on March 1, 2025, as the municipality's obligation for the fourth round. However, if a challenge is filed with the "Affordable Housing Dispute Resolution Program" (program), established in the bill, on or before February 28, 2025, the program would be required to facilitate a resolution of the dispute prior to April 1, 2025. The presence of this ongoing dispute would not change the deadline for adoption of implementing ordinances and resolutions, but the implementing ordinances and resolutions adopted prior to the resolution of the dispute may be subject to changes to reflect the results of the dispute. As an alternative to adopting all necessary implementing ordinances and resolutions by the March 15 deadline, a municipality involved in a continuing dispute over the issuance of compliance certification would

be permitted to adopt a binding resolution by this date to commit to adopting the implementing ordinances and resolutions following resolution of the dispute, with necessary adjustments.

The bill 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 proposes necessary changes to associated ordinances, on or before June 30, 2025, in order to be assured of protection from exclusionary zoning litigation.

A municipality would be required to submit its adopted fair share plan and housing element to the program. The bill permits an interested party to initiate a challenge to a municipal fair share plan and housing element, if submitted through the program on or before August 31, 2025. The program would facilitate communication over the challenge, and provide the municipality until December 31, 2025 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. The bill requires municipalities to adopt associated changes to municipal ordinances on or before March 15, 2026. If a municipality fails to meet these deadlines, then the immunity of the municipality from exclusionary zoning litigation would end unless the program determines that the municipality's immunity shall be extended. If a municipality fails to materially adhere to any of these deadlines due to circumstances beyond the municipality's control, the bill directs the program to permit a grace period for the municipality to come into compliance with the timeline, the length of which, and effect of which on later deadlines, is to be determined on a case-by-case basis.

After providing immunity, the bill also authorizes the program to subsequently terminate immunity under certain circumstances if it becomes apparent that the municipality is not determined to come into constitutional compliance. The municipality would still be permitted to seek immunity from exclusionary zoning litigation by initiating an action in Superior Court. The deadlines for subsequent 10-year rounds of affordable housing obligations would conform to the dates established in the bill for the fourth round.

The bill provides that a municipality with compliance certification would only benefit from presumptive validity, not immunity, if an interested party is to: (1) challenge a municipality for failure to comply with the terms of its compliance certification; or (2) bring a challenge before the program alleging that, despite the issuance of compliance certification, a municipality's fair share obligation, fair share plan, housing element, or ordinances implementing the fair share plan or housing element are in violation of the Mount Laurel doctrine. A municipality's determination of its fair share obligation, if determined to be in compliance with the bill, would have a presumption of validity in any challenge initiated through the program, before the issuance of compliance certification.

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. Further, the challenger would be required to provide the basis for its challenge based on applicable law, and the program would have the power to dismiss challenges that do not provide such a basis.

All parties would be required to bear their own fees and costs for proceedings within the program. A determination by the program as to municipal obligations or compliance certification would be considered a final decision, subject to appellate review.

The Administrative Director of the Courts would appoint an odd number of at least three and no more than seven members to serve as program leaders for the program established by the bill, consisting of retired and on recall judges, or other qualified experts. The members and employees of the program would be considered State officers and employees for the purposes of the "New Jersey Conflicts of Interest Law," P.L.1971, c.182 (C.52:13D-12 et seq.). 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.

Each municipality's determination of its fair share obligation would be made through the guidance of preliminary calculations made by DCA. No later than August 1 of the year prior to the year when a new round of housing obligations begins, or, for the fourth round, within seven months of the effective date of the bill or December 1, 2024, whichever is earlier, the bill requires DCA to calculate regional need and municipal present and prospective obligations in accordance with formulas established in the bill. DCA's calculations would be

made publicly available, and provided to each municipality for use in determining their present and prospective obligations.

Municipal fair share obligations would be determined by applying the methods provided in the bill, along with the methods used by the Superior Court for the third round, to the extent that applicable methodologies are not explicitly articulated in the bill. Municipal present need obligations would be determined by estimating the existing deficient housing currently occupied by low- and moderate-income households within the municipality.

Regional prospective need would next be determined, upon which to base the municipal obligation, by estimating the regional growth of low- and moderate-income households during the housing round at issue. The bill simplifies the regional need estimation from the processes used in previous rounds in order to ease the administrative burden that has been associated with this process. First, projected household change for a 10-year round in a region would be estimated by establishing the household change experienced in the region between the most recent federal decennial census, the second-most recent federal decennial census. Although this relies on historical data, recent household change in a region is relevant to estimating future household change and associated housing need. This household change would be divided by 2.5 to estimate the number of low- and moderate-income homes needed to address population change in the region, thereby determining the regional prospective need for the 10-year round. If household change is zero or negative, the number of low- and moderate-income homes needed to address low- and moderate-income household change in the region and the regional prospective would be zero.

After determining regional prospective need, each municipality's fair share prospective obligation of that regional prospective need would be determined. To do this, DCA would first determine whether a municipality is a qualified urban aid municipality, and if so, the municipality would not have a prospective need obligation.

If the municipality is not a qualified urban aid municipality, three factors necessary for the prospective fair share determination would be calculated. First, the equalized nonresidential valuation factor, representing the municipality's share of the regional change in the value of nonresidential property, would be calculated. In prior rounds, this calculation, concerning nonresidential (commercial and industrial) property values, has been adopted as a representation of a municipality's employment potential. Data available from the Division of Local Government Services in DCA would be used for this calculation. Next, an income capacity factor would be determined, using a formula comparable to one used in prior rounds to estimate the municipality's ability to absorb low- and moderate-income households. The municipality's land capacity factor would then be determined, representing the municipality's relative share of

developable land, available to accommodate development, using data made available by the Department of Environmental Protection or the Division of Taxation in the Department of Treasury. The average of these three factors would be determined and multiplied by the regional prospective need to determine the municipality's gross prospective need.

A municipality would be permitted to make adjustments for a lack of available land resources as part of the determination of a municipality's fair share of affordable housing when, for example certain municipal lands are devoted for conservation purposes. However, the bill requires a municipality that receives such a vacant land adjustment to its fair share obligation to identify parcels for redevelopment to address at least 25 percent of the prospective need obligation that has been adjusted, and adopt zoning that allows for the adjusted obligation, or demonstrate why this is not possible.

A municipality would ultimately be permitted to reduce its prospective need if necessary to prevent establishing a prospective need obligation that exceeds 1,000 units in total or 20 percent of the estimated occupied housing stock at the beginning of the 10-year round, whichever limitation results in a lower number.

In response to the growth in population of senior citizens in the State, the bill changes the limit on the percentage of a municipality's prospective affordable housing obligation that may be satisfied through the creation of age-restricted housing to 30 percent of the units in a municipality's fair share plan, exclusive of any bonus credits. However, the bill requires that a municipality is required to satisfy a minimum of 50 percent of the actual affordable housing units, exclusive of any bonus credits, created to address its prospective need affordable housing obligation through the creation of housing available to families with children. The bill amends existing statutory language to ensure that affordable housing is constructed that is accessible to persons with disabilities.

The bill permits a municipality to be credited for as much as 10 percent of its affordable housing obligation through transitional housing, and defines "transitional housing" as temporary housing, including but not limited to, single room occupancy housing or shared living and supportive living arrangements, that provides access to on-site or off-site supportive services for very low-income households who have recently been homeless or lack stable housing.

The bill establishes limitations on the use of municipal affordable housing trust fund moneys for administrative costs, attorney fees, court costs to obtain immunity from exclusionary zoning litigation, to contest the municipality's fair share obligation, or use of the trust fund moneys while a municipality does not have immunity from exclusionary zoning litigation. The bill authorizes a municipality to expend a portion of its affordable housing trust fund on actions and efforts reasonably related to, or necessary for, certain processes of the

program, as provided in the bill. The bill requires each municipality authorized to retain and expend non-residential development fees to periodically provide DCA with an accounting of all such fees that have been collected and expended.

The bill prohibits a municipality from receiving bonus credit for any particular type of low- or moderate-income housing, unless authority to obtain bonus credit is expressly provided by the "Fair Housing Act." The bill expressly prohibits a municipality from receiving more than one type of bonus credit for any unit, or from satisfying more than 25 percent of its prospective need obligation through the use of bonus credits. The bill expressly authorizes bonus credits in the amounts provided in the bill for: (1) housing for individuals with special needs or permanent supportive housing; (2) ownership units created in partnership sponsorship with a non-profit housing developer; (3) housing located in a Garden State Growth Zone or certain transit-oriented locations; (4) certain age-restricted housing units; (5) family housing with at least three bedrooms above the minimum number required by the bedroom distribution; (6) housing constructed on certain land previously used for retail, office, or commercial space; (7) certain existing rental housing for which affordability controls are extended through municipal contributions; (8) certain 100 percent affordable developments built through municipal contributions of real property or funding; (9) certain housing for very low-income households; and (10) certain transformation of existing market rate units to affordable housing. The bill also clarifies that all parties would be entitled to rely upon regulations on municipal credits, adjustments, and compliance mechanisms previously adopted by COAH unless those regulations are contradicted by statute, including but not limited to this bill, or binding court decisions.

The bill requires DCA to maintain certain affordable housing-related information on its website, including: (1) the start and expiration dates of deed restrictions; (2) residential and non-residential development fees collected and expended, including purposes and amounts of such expenditures; and (3) the current balance in the municipality's affordable housing trust funds. The bill also directs municipalities to provide the information to DCA necessary to comply with this requirement.

The bill amends various parts of the statutory law to remove references to COAH, and to transfer rulemaking authority, to the extent necessary, from COAH to DCA and the New Jersey Housing and Mortgage Finance Agency (HMFA). The bill directs HMFA to update the Uniform Housing Affordability Controls (UHAC) within nine months following the effective date of the bill. With certain exceptions, for the purpose of newly created affordable rental units, a 40-year minimum deed restriction would be required, and in the case of for-sale units, a 30-year minimum deed restriction would be

required. For housing units for which affordability controls are extended for a new term of affordability, a 30-year minimum deed restriction would be required, except that the bill permits certain flexibility on how the extensions are provided.

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

As amended and reported by the committee, Assembly Bill No. 4 (1R) is identical to Senate Bill No. 50 (1R), which was also amended and reported by the committee on this date.

COMMITTEE AMENDMENTS:

The committee amended the bill to:

- clarify the intent of the bill in furthering consistency with the State Development and Redevelopment Plan;
- qualify that a municipality with compliance certification would only benefit from presumptive validity, not immunity, if an interested party is to bring a challenge before the program alleging that, despite the issuance of compliance certification, a municipality's fair share obligation, fair share plan, housing element, or ordinances implementing the fair share plan or housing element are in violation of the Mount Laurel doctrine;
- to assist in the calculation of regional need and municipal obligations, require the Highlands Water Protection and Planning Council shall provide a list of Highlands-conforming municipalities to DCA no less than five business days following the effective date;
- remove a requirement to provide that the program would be responsible for defending its issuance of compliance certification in certain court actions;
- require that the issuance of a compliance certification be accompanied by a written report providing for the basis of the certification's issuance;
- clarify the forms of data that may be used by DCA, and municipalities, in determining regional need and municipal obligations;
- for the purposes of determining the equalized nonresidential valuation factor as a part of calculating a municipality's obligation, provide that the beginning of the round of affordable housing obligations preceding the fourth round would be the beginning of the gap period in 1999;
- revise language referencing the Highlands Region for the purposes of adjusting a municipality's land capacity factor due to environmentally-sensitive lands, and add a definition of "Highlands-conforming municipality";

- remove a requirement to adjust for secondary sources of supply and demand in determining a municipal obligation;
- change the deadline for certain development fee reporting from January 15 to February 15 of each year;
- in a municipal housing element, require the inclusion of an analysis of consistency with the State Development and Redevelopment Plan, and require certain municipalities in the Highlands Region to include an analysis of the housing element's compliance with the Highlands Regional Master Plan;
- clarify that this bill does not require a municipality to fund infrastructure improvements for affordable housing projects beyond any commitments made in a fair share plan and housing element that has been provided with compliance certification;
- revise language concerning controls on the affordability of low- and moderate-income units, and provide that a 100 percent affordable rental property would have a right to extinguish a deed restriction regardless of the original length, beginning 30 years following the start of the restriction, provided certain actions are taken for the purpose of affordability preservation, and a new deed restriction of at least 30 years is provided;
- clarify that a municipality would be eligible to receive credits for units preserved for affordability at the time of preservation;
- provide that 100 percent affordable projects would be eligible for any affordable housing preservation program administered by the State, beginning 30 years following the start of the deed restriction;
- authorize HMFA to provide for certain exceptions to deed restriction minimums;
- adjust restrictions on expenditures of municipal development fee trust funds, and specify that the restrictions would not apply to qualified urban aid municipalities;
- require DCA to adopt rules and regulations to address the cost of the assessments and fees of planned real estate developments on low- and moderate-income housing units;
- make other clarifying and technical changes.

FISCAL IMPACT:

The Office of Legislative Services (OLS) concludes that the bill will result in an indeterminate impact to State costs associated with the role of the Department of Community Affairs 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: (1) the new program to function in the fourth round, which begins on July 1, 2025, and (2) the Department of Community Affairs to fulfill the requirements of the bill. 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 becoming defunct.