

LEGISLATIVE FISCAL ESTIMATE

[Second Reprint]

SENATE, No. 50

STATE OF NEW JERSEY

221st LEGISLATURE

DATED: MARCH 21, 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, Highlands Water Protection and Planning Council, Municipalities.

Office of Legislative Services Estimate

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

## **BILL DESCRIPTION**

This bill abolishes the Council on Affordable Housing, 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. In advance of the fourth 10-year round of affordable housing obligations, beginning on July 1, 2025, the bill requires the department 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 Department of Community Affairs' 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 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, 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.

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. 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 the Department of Community Affairs. 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 the department to calculate regional need and municipal present and prospective obligations in accordance with formulas established in the bill. The department'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. 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, the Department of Community Affairs 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 based on three factors, as specified in the bill. The average of these three factors would be determined and multiplied by the regional prospective need to determine the municipality's gross prospective need.

Finally, the bill requires, where appropriate, adjustments for secondary sources of housing supply and demand by first calculating demolitions of low- and moderate-income housing, and housing creation through residential conversions. After applying these secondary sources, as appropriate, the municipality's prospective fair share obligation for the 10-year round would be established.

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 the Department of Community Affairs with an accounting of all such fees that have been collected and expended.

The bill requires the Department of Community Affairs 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 the department necessary to comply with this requirement.

The bill appropriates \$12 million to the program, and \$4 million to the Department of Community Affairs, 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 enable 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 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 and certain other exclusionary zoning lawsuits.

### *Impact*

The OLS concludes that the bill will result in increases 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 program related to any challenge of a municipality's obligation, housing element, or fair share plan. The bill appropriates a total \$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 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 Department of Community Affairs 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. The department would be required to make these calculations in advance of each new 10-year round. The calculations of municipal obligations would be informed by information provided by the Highlands Water Protection and Planning Council regarding Highlands-conforming municipalities.

Municipalities would then be required to determine their own affordable housing obligation, using the Department of Community Affairs' fair share calculations and local factors, and establish a housing element to encompass their obligation and a fair share plan to meet the obligation with accompanying resolutions and ordinances, which documents would be required to be made publicly available on the municipality's Internet website. 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. The OLS also notes that a municipality's affordable housing obligation can also be established through declaratory judgement or exclusionary zoning

litigation. The OLS is unable to predict the number of municipalities that will establish their affordable housing obligation through the program versus litigation.

Municipalities would be protected from exclusionary zoning litigation, including builder's remedy lawsuits, if the required resolution and ordinances are adopted by the deadlines established by the bill. However, the program may remove exclusionary zoning litigation 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 through the program, 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. Municipalities would be permitted to utilize monies from their Municipal Affordable Housing Trust Funds to resolve disputes under the Affordable Housing Dispute Resolution Program, but would not be permitted to utilize these monies for certain court costs that may arise outside of the program. 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 exclusionary zoning litigation due to noncompliance with the bill and is therefore unable to estimate any costs that may be incurred by a municipality due to participating in exclusionary zoning litigation.

Municipalities may also incur administrative costs associated with requirements to report to the Department of Community Affairs annually on any collection and expenditure of development fees as well as on number affordable of housing units actually constructed, construction starts, certificates of occupancy granted, the start and expiration dates of deed restrictions, and residential and non-residential development fees collected and expended, including purposes and amounts of such expenditures, along with the current balance in the municipality's affordable housing trust funds. The department would then be required to make this information publicly available on its Internet website.

The Administrative Director of the Courts would be required to appoint between three and seven members 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 entity that issues a municipality a compliance certification, through the program or through judgement of repose, would be required to include a written report containing the basis for issuing the compliance certification. The Administrative

Office of the Courts 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 Department of Community Affairs for purposes of carrying out its responsibilities for the fourth round of affordable housing obligations. The OLS is unable to predict the extent to which the department may incur costs in the fourth and future rounds. 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 cost shifting and 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 for various rulemaking responsibilities required pursuant to the bill.

*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.).