# ASSEMBLY HOUSING AND LOCAL GOVERNMENT COMMITTEE

## STATEMENT TO

## SENATE COMMITTEE SUBSTITUTE FOR SENATE COMMITTEE SUBSTITUTE FOR **SENATE, No. 1**

with committee amendments

# STATE OF NEW JERSEY

DATED: NOVEMBER 8, 2010

The Assembly Housing and Local Government Committee reports favorably with committee amendments a Senate Committee Substitute for a Senate Committee Substitute for Senate Bill No.1.

As amended, this bill would modify the "Fair Housing Act," P.L.1985, c.222, and other laws related to affordable housing development in New Jersey. If enacted, this legislation would abolish the Council on Affordable Housing and would permit municipalities to control planning for affordable housing within their boundaries while ensuring that municipalities "make realistically possible an appropriate variety and choice of housing" Mt. Laurel I, 67 N.J. 168, 174 (1973). This legislation also modifies the "Statewide Non-Residential Development Fee Act," N.J.S.A.40:55D-8.1 et seq., and provides for transfers from the "New Jersey Affordable Housing Trust Fund" to the "Urban Housing Assistance Fund" established by P.L.2008, c.46.

The amended, the bill abolishes the Council on Affordable Housing established by the 1985 "Fair Housing Act." The bill transfers the Council's remaining duties to the Department of Community Affairs. The amended bill also requires the Council to transfer necessary records to the department.

Under the amended bill, municipalities would meet their affordable housing obligations by achieving and maintaining 10 percent of their housing stock as long term affordable low and moderate income housing stock. Deed-restricted housing produced pursuant to a Regional Contribution Agreement or with federal project-based assistance, as well as public housing and mobile homes would count towards the computation of a municipality's affordable housing stock. If a municipality does not demonstrate that 10 percent of its housing stock is affordable, the municipality may show that it has complied with the law by filing an analysis demonstrating that at least 25, but

less than 50, percent of the children enrolled in schools in the municipality in October of the preceding year were eligible for free or reduced price meals under the federal School Lunch Program.

In addition, a municipality may show that it has complied with the legislation by adopting land use ordinances that set aside one-fifth of the developable land within the municipality as housing affordable to families making 150 percent of the area median income or less. In order to ensure that there is a realistic possibility for residential development, the bill defines developable land as property that has or will have access to sewer service.

As amended, a municipality that prepares and files a housing element with the department may be deemed compliant. The housing element would analyze the municipality's existing housing stock, and the municipality's capacity for growth.

Under this legislation, all municipalities are required to plan for the rehabilitation of substandard units within their boundaries. Municipalities in which more than half of the children qualify for federal free or reduced-price lunch would only be required to show how they are addressing dilapidated and substandard units within their boundaries.

Section 24 of this amended bill provides for an expedited variance procedure in municipalities that refuse to comply with the law. In a non-complying municipality, projects including 20 percent affordable units will be deemed to be an inherently beneficial use. These projects will need to prove only the "negative" criteria of the standard for a variance under the "Municipal Land Use Law," N.J.S.A.40:55D-1 et seq. The variance procedure would be available for any project in which 10 percent or more of the proposed units will be affordable housing, including mixed-use projects, conventional residential developments and 100 percent affordable developments. The amended bill clarifies that that proposed developments under that section are deemed inherently beneficial.

The bill also provides for inclusionary zoning throughout the State. Any new residential development, whether or not the development is new construction, that results in 10 or more units would be required to reserve 10 percent of the units produced for affordable housing. This bill requires municipalities to provide density bonuses, a compensatory benefit, to developers who develop mixed income projects to ensure the economic viability of the development. This legislation also preserves the payment of residential development fees to address affordable housing need as an alternative to on-site building by developers, consistent with the Supreme Court's endorsement of the use of fees as a "more flexible and comprehensive approach that will encourage the appropriate use and development of land within a municipality...." Holmdel Builders' Assoc. v. Twp. of Holmdel, 121 N.J. 550 at 570 (1990). In addition, the legislation authorizes a municipality to waive on-site construction of affordable units if a

developer specifies that the developer will rehabilitate or construct new units off site instead of providing of affordable units on site.

This set-aside requirement would not apply in municipalities in which 50 percent or more of the students are eligible for free or reduced-price meals, although the bill creates incentives and makes financing available for affordable units in these municipalities.

The bill would also maintain the provisions in the existing "Fair Housing Act" that require affordable units to be adaptable. In addition, the legislation provides regulatory incentives to encourage development of special needs housing and permanent supportive housing.

The amended legislation also modifies the "Statewide Non-Residential Development Fee Act," N.J.S.A.40:55D-8.1 et seq., to provide for a phase-in of the fee, in order to ensure that the fee is not an obstacle to development in the current economic climate. The amendments to the Fee Act would phase in the Statewide fee over five years. By retaining the "Statewide Non-Residential Development Fee Act," this bill retains the important link between development activities generating a need for lower-income housing and the financing of that housing.

Because the modifications to the "Statewide Non-Residential Development Fee" would reduce collections deposited in the "Urban Housing Assistance Fund," this bill authorizes transfers from the "New Jersey Affordable Housing Trust Fund" to the "Urban Housing Assistance Fund." No less than 10 percent, and up to 25 percent of the monies in the Trust Fund could be transferred to the Urban Fund.

Also, this legislation retains N.J.S.A.52:27D-329.2, which authorizes residential development fees and provides that these fees, along with the Statewide Non-Residential Development Fee, shall be deposited in a municipal affordable housing trust fund. Pursuant to this bill, fees collected could only be expended for affordable housing purposes, and must be expended within four years of collection.

The bill, as amended, also provides that municipalities shall submit a plan for remaining residential and non-residential development fees collected before the effective date of the act.

Under the bill, the Department of Community Affairs will be required to establish an online, searchable website containing housing information. The department will be required to post all municipal housing planning information that it receives on the website.

COMMITTEE AMENDMENTS

The committee amended the bill to:

1) Make technical changes to update various sections of the existing statutory law.

2) Establish that a municipality has complied with its housing obligations if 10 percent of the housing stock of the municipality is

qualified housing, or if between 25 and 50 percent of the children in the municipality qualify for free and reduced price lunch.

3) Insert a new section to allow municipalities to be deemed compliant upon filing a county planning board-approved housing element with the department.

4) Allow municipalities to adopt an ordinance setting aside 20 percent of their developable land for housing for households making 150 percent of the area's median income to be deemed compliant.

5) Amend sections of existing law to provide that that regional needs be considered in the allocation of Low Income Housing Tax Credits, and to provide that the credits shall be issued for non-complying municipalities.

6) Create a new phase-in of the fee collected pursuant to the Statewide Non-Residential Development Fee Act.

7) Modify the priorities in the award of funds from the New Jersey Affordable Housing Trust Fund.

8) Revise language in existing law to permit the transfer of funds between the New Jersey Affordable Housing Trust Fund and the Urban Housing Assistance Fund.

9) Create a process by which the Department of Environmental Protection can make a determination on whether a property has access to sewer if there is no water quality management plan in place.

10) Include a year-long moratorium on the filing of new exclusionary zoning suits.

11) Modify the procedure for granting a variance in certain non-compliant municipalities.

12) Require the Department of Community Affairs to provide an assessment of the new legislation's effectiveness to the Legislature.

13) Require the Department of Community Affairs to establish a website containing housing information.

## MINORITY STATEMENT

By Assemblyman Carroll and Assemblywoman Vandervalk

The sponsors should be commended for attempting to address the various issues involved with overhauling the State’s affordable housing laws. However, we are unable to support this bill today for the reasons outlined below.

Pursuant to the doctrine first established by the New Jersey Supreme Court in South Burlington County NAACP v. Mount Laurel, 67 N.J. 151 (1975), and subsequently modified by that court in numerous other decisions, including South Burlington County NAACP v. Mount Laurel, 92 N.J. 158 (1983), every municipality in the State labors under an obligation, in effect, to ensure the construction, within its boundaries, of affordable housing.

In 1985, the Legislature responded to this series of decisions by creating the Council on Affordable Housing through the enactment of the "Fair Housing Act." Since that time, countless millions of scarce taxpayer dollars have been spent subsidizing affordable housing, litigating, and paying planners, engineers and attorneys to endlessly study COAH's ever changing rules and requirements, issue reports, appear before local land use boards and governing bodies, etc.

As is typical with such governmentally-imposed policies, the results have been nothing less than disastrous. Countless farms, fields, and forests were replaced by wholly inappropriate high density residential housing, which brought with it the costs normally attendant to population growth. At the same time as Mount Laurel compelled municipalities to grow, the Abbott v. Burke case required that the vast majority of State school aid flow to just 31 school districts. In hundreds of municipalities around the State, conformity with the requirements of Mount Laurel and Abbott produced huge property tax increases.

COAH's recent difficulties promulgating third round figures are well known; not only have they been delayed for years, but they have twice been struck down by the Appellate Division of the Superior Court as inconsistent with the Mount Laurel decision, most recently In the Matter of the Adoption of N.J.A.C. 5:96 and 5:97 by the New Jersey Council on Affordable Housing. (App. Div. 2010). Therein, Judge Skillman concluded that the "growth share" mechanism employed by COAH failed to satisfy the clear provisions of the Mount Laurel decision.

Both of the proposals presented before the Committee in S-1 and A-3447 today suffer from essentially the same defects as did the recently invalidated COAH regulations. Already, advocacy groups have promised to sue to stop them, contending – accurately, in our opinion – that same are inconsistent with the Mount Laurel requirements. Whether the bills – or any affordable housing proposal – are meritorious or not on their own terms, if they simply invite many more years of litigation and leave municipalities perpetually uncertain about their obligations, then they serve little purpose.

Municipalities have already wasted countless scarce taxpayer dollars seeking substantive certification from COAH, in compliance with third round regulations, only to see those regulations invalidated and all of the work rendered completely worthless. Assuming that either of these two bills were to become law, it simply will not do to have every locality in the State expend huge amounts of additional taxpayer funds complying with their provisions, with the potential that these expenditures will likewise go for naught should those provisions be stricken through litigation.

Ultimately, the matters of land use and housing policy that are presently subject to interpretation and litigation under the Mount Laurel decisions would be best resolved by the people of New Jersey

through exercise of their right to amend the State's Constitution. The two proposals under consideration by this committee, of problematic constitutionality as determined by the courts, would face no such hurdles, were Mount Laurel repealed and replaced by an explicit constitutional provision concerning land use policy and the Legislature's authority to determine how it is to be implemented.

We, then, believe that rather than spending uncountable millions of dollars on litigation over these proposals, and on the costs municipalities will incur to address the requirements therein contained, only to risk seeing those expenditures rendered wholly wasted by the end of a long process of litigation, the time is long since past for this Legislature, and the people, to address the underlying matter directly by placing clear language on land use and housing policy into the Constitution.

Until such a constitutional amendment is adopted by the people, the proposals before this committee today are premature.