

SENATE, No. 1988

STATE OF NEW JERSEY

219th LEGISLATURE

INTRODUCED MARCH 5, 2020

Sponsored by:

Senator CHRISTOPHER "KIP" BATEMAN

District 16 (Hunterdon, Mercer, Middlesex and Somerset)

SYNOPSIS

Clarifies scope of affordable housing obligations.

CURRENT VERSION OF TEXT

As introduced.



1 AN ACT concerning affordable housing obligations and amending
2 P.L.1985, c.222.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6

7 1. Section 4 of P.L.1985, c.222 (C.52:27D-304) is amended to
8 read as follows:

9 4. As used in this act P.L.1985, c.222 (C.52:27D-301 et al.):

10 a. "Council" means the Council on Affordable Housing
11 established in P.L.1985, c.222 (C.52:27D-301 et al.), which shall
12 have primary jurisdiction for the administration of housing
13 obligations in accordance with sound regional planning
14 considerations in this State.

15 b. "Housing region" means a geographic area of not less than
16 two nor more than four contiguous, whole counties which exhibit
17 significant social, economic and income similarities, and which
18 constitute to the greatest extent practicable the primary metropolitan
19 statistical areas as last defined by the United States Census Bureau
20 prior to the effective date of P.L.1985, c.222 (C.52:27D-301 et al.).

21 c. "Low income housing" means housing affordable according
22 to federal Department of Housing and Urban Development or other
23 recognized standards for home ownership and rental costs and
24 occupied or reserved for occupancy by households with a gross
25 household income equal to 50 percent or less of the median gross
26 household income for households of the same size within the
27 housing region in which the housing is located.

28 d. "Moderate income housing" means housing affordable
29 according to federal Department of Housing and Urban
30 Development or other recognized standards for home ownership
31 and rental costs and occupied or reserved for occupancy by
32 households with a gross household income equal to more than 50%
33 but less than 80 percent of the median gross household income for
34 households of the same size within the housing region in which the
35 housing is located.

36 e. "Resolution of participation" means a resolution adopted by
37 a municipality in which the municipality chooses to prepare a fair
38 share plan and housing element in accordance with P.L.1985, c.222
39 (C.52:27D-301 et al.).

40 f. "Inclusionary development" means a residential housing
41 development in which a substantial percentage of the housing units
42 are provided for a reasonable income range of low and moderate
43 income households.

44 g. "Conversion" means the conversion of existing commercial,
45 industrial, or residential structures for low and moderate income

**EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is
not enacted and is intended to be omitted in the law.**

Matter underlined thus is new matter.

1 housing purposes where a substantial percentage of the housing
2 units are provided for a reasonable income range of low and
3 moderate income households.

4 h. "Development" means any development for which
5 permission may be required pursuant to the "Municipal Land Use
6 Law," P.L.1975, c.291 (C.40:55D-1 et seq.).

7 i. "Agency" means the New Jersey Housing and Mortgage
8 Finance Agency established by P.L.1983, c.530 (C.55:14K-
9 1 et seq.).

10 j. "Prospective need" means a projection of housing needs
11 based on development and growth which is reasonably likely to
12 occur in a region or a municipality, as the case may be, as a result
13 of actual determination of public and private entities. In
14 determining prospective need, consideration shall be given to
15 approvals of development applications, real property transfers, and
16 economic projections prepared by the State Planning Commission
17 established by sections 1 through 12 of P.L.1985, c.398 (C.52:18A-
18 196 et seq.).

19 k. "Person with a disability" means a person with a physical
20 disability, infirmity, malformation, or disfigurement which is
21 caused by bodily injury, birth defect, aging, or illness including
22 epilepsy and other seizure disorders, and which shall include, but
23 not be limited to, any degree of paralysis, amputation, lack of
24 physical coordination, blindness or visual impairment, deafness or
25 hearing impairment, the inability to speak or a speech impairment,
26 or physical reliance on a service animal, wheelchair, or other
27 remedial appliance or device.

28 l. "Adaptable" means constructed in compliance with the
29 technical design standards of the barrier free subcode adopted by
30 the Commissioner of Community Affairs pursuant to the "State
31 Uniform Construction Code Act," P.L.1975, c.217 (C.52:27D-119
32 et seq.) and in accordance with the provisions of section 5 of
33 P.L.2005, c.350 (C.52:27D-123.15).

34 m. "Very low income housing" means housing affordable
35 according to federal Department of Housing and Urban
36 Development or other recognized standards for home ownership
37 and rental costs and occupied or reserved for occupancy by
38 households with a gross household income equal to 30 percent or
39 less of the median gross household income for households of the
40 same size within the housing region in which the housing is located.

41 n. "Present need" means an estimate of the number of deficient
42 housing units that are occupied by low and moderate income
43 households within each municipality.

44 o. "Gap period" means the period between the expiration of an
45 obligation for any given housing cycle and the date used to define
46 the present need and the commencement date of the next 10-year
47 prospective need period.

48 (cf: P.L.2017, c.131, s.199)

1 2. Section 7 of P.L.1985, c.222 (C.52:27D-307) is amended to
2 read as follows:

3 7. It shall be the duty of the council, seven months after the
4 confirmation of the last member initially appointed to the council,
5 or January 1, 1986, whichever is earlier, and from time to time
6 thereafter, to:

7 a. Determine housing regions of the State;

8 b. Estimate the present and prospective need for low and
9 moderate income housing at the State and regional levels;

10 c. Adopt criteria and guidelines for:

11 (1) Municipal determination of its present and prospective fair
12 share of the housing need in a given region which shall be
13 computed for a 10-year period.

14 Municipal fair share shall be determined after crediting on a one-
15 to-one basis each current unit of low and moderate income housing
16 of adequate standard, including any such housing constructed or
17 acquired as part of a housing program specifically intended to
18 provide housing for low and moderate income households.
19 Municipal fair share shall be determined for a 10-year period and
20 shall not include retrospective calculations of low and moderate
21 income households created during gap periods for which low and
22 moderate income households were not previously accounted for as
23 either present or prospective need by the council. Notwithstanding
24 any other law to the contrary, a municipality shall be entitled to a
25 credit for a unit if it demonstrates that (a) the municipality issued a
26 certificate of occupancy for the unit, which was either newly
27 constructed or rehabilitated between April 1, 1980 and
28 December 15, 1986; (b) a construction code official certifies, based
29 upon a visual exterior survey, that the unit is in compliance with
30 pertinent construction code standards with respect to structural
31 elements, roofing, siding, doors and windows; (c) the household
32 occupying the unit certifies in writing, under penalty of perjury, that
33 it receives no greater income than that established pursuant to
34 section 4 of P.L.1985, c.222 (C.52:27D-304) to qualify for
35 moderate income housing; and (d) the unit for which credit is
36 sought is affordable to low and moderate income households under
37 the standards established by the council at the time of filing of the
38 petition for substantive certification. It shall be sufficient if the
39 certification required in subparagraph (c) is signed by one member
40 of the household. A certification submitted pursuant to this
41 paragraph shall be reviewable only by the council or its staff and
42 shall not be a public record;

43 Nothing in P.L.1995, c.81 shall affect the validity of substantive
44 certification granted by the council prior to November 21, 1994, or
45 of a judgment of compliance entered by any court of competent
46 jurisdiction prior to that date. Additionally, any municipality that
47 received substantive certification or a judgment of compliance prior
48 to November 21, 1994 and filed a motion prior to

1 November 21, 1994 to amend substantive certification or a
2 judgment of compliance for the purpose of obtaining credits, shall
3 be entitled to a determination of its right to credits pursuant to the
4 standards established by the Legislature prior to P.L.1995, c.81.
5 Any municipality that filed a motion prior to November 21, 1994
6 for the purpose of obtaining credits, which motion was supported by
7 the results of a completed survey performed pursuant to council
8 rules, shall be entitled to a determination of its right to credits
9 pursuant to the standards established by the Legislature prior to
10 P.L.1995, c.81;

11 (2) Municipal adjustment of the present and prospective fair
12 share based upon available vacant and developable land,
13 infrastructure considerations or environmental or historic
14 preservation factors and adjustments shall be made whenever:

15 (a) The preservation of historically or important architecture and
16 sites and their environs or environmentally sensitive lands may be
17 jeopardized,

18 (b) The established pattern of development in the community
19 would be drastically altered,

20 (c) Adequate land for recreational, conservation or agricultural
21 and farmland preservation purposes would not be provided,

22 (d) Adequate open space would not be provided,

23 (e) The pattern of development is contrary to the planning
24 designations in the State Development and Redevelopment Plan
25 prepared pursuant to sections 1 through 12 of P.L.1985, c.398
26 (C.52:18A-196 et seq.),

27 (f) Vacant and developable land is not available in the
28 municipality, and

29 (g) Adequate public facilities and infrastructure capacities are
30 not available, or would result in costs prohibitive to the public if
31 provided.

32 (3) (Deleted by amendment, P.L.1993, c.31).

33 d. Provide population and household projections for the State
34 and housing regions;

35 e. In its discretion, place a limit, based on a percentage of
36 existing housing stock in a municipality and any other criteria
37 including employment opportunities which the council deems
38 appropriate, upon the aggregate number of units which may be
39 allocated to a municipality as its fair share of the region's present
40 and prospective need for low and moderate income housing. No
41 municipality shall be required to address a fair share of housing
42 units affordable to households with a gross household income of
43 less than 80% of the median gross household income beyond 1,000
44 units within **ten** 10 years from the grant of substantive
45 certification, unless it is demonstrated, following objection by an
46 interested party and an evidentiary hearing, based upon the facts
47 and circumstances of the affected municipality that it is likely that
48 the municipality through its zoning powers could create a realistic

1 opportunity for more than 1,000 low and moderate income units
2 within that **ten-year** 10-year period. For the purposes of this
3 section, the facts and circumstances which shall determine whether
4 a municipality's fair share shall exceed 1,000 units, as provided
5 above, shall be a finding that the municipality has issued more than
6 5,000 certificates of occupancy for residential units in the **ten-**
7 year 10-year period preceding the petition for substantive
8 certification in connection with which the objection was filed.

9 For the purpose of crediting low and moderate income housing
10 units in order to arrive at a determination of present and prospective
11 fair share, as set forth in paragraph (1) of subsection c. of this
12 section, housing units comprised in a community residence for the
13 developmentally disabled, as defined in section 2 of
14 P.L.1977, c.448 (C.30:11B-2), shall be fully credited pursuant to
15 rules promulgated or to be promulgated by the council, to the extent
16 that the units are affordable to persons of low and moderate income
17 and are available to the general public.

18 The council, with respect to any municipality seeking substantive
19 certification, shall require that a minimum percentage of housing
20 units in any residential development resulting from a zoning change
21 made to a previously non-residentially-zoned property, where the
22 change in zoning precedes or follows the application for residential
23 development by no more than 24 months, be reserved for occupancy
24 by low or moderate income households, which percentage shall be
25 determined by the council based on economic feasibility with
26 consideration for the proposed density of development.

27 In carrying out the above duties, including, but not limited to,
28 present and prospective need estimations the council shall give
29 appropriate weight to pertinent research studies, government
30 reports, decisions of other branches of government, implementation
31 of the State Development and Redevelopment Plan prepared
32 pursuant to sections 1 through 12 of P.L.1985, c.398 (C.52:18A-196
33 et seq.) and public comment. To assist the council, the State
34 Planning Commission established under that act shall provide the
35 council annually with economic growth, development and decline
36 projections for each housing region for the next **ten** 10 years. The
37 council shall develop procedures for periodically adjusting regional
38 need based upon the low and moderate income housing that is
39 provided in the region through any federal, State, municipal or
40 private housing program.

41 No housing unit subject to the provisions of section 5 of
42 P.L.2005, c.350 (C.52:27D-123.15) and to the provisions of the
43 barrier free subcode adopted by the Commissioner of Community
44 Affairs pursuant to the "State Uniform Construction Code Act,"
45 P.L.1975, c.217 (C.52:27D-119 et seq.) shall be eligible for
46 inclusion in the municipal fair share plan certified by the council
47 unless the unit complies with the requirements set forth thereunder.
48 (cf: P.L.2008, c.46, s.6)

1 3. This act shall take effect immediately.

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STATEMENT

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6 Although the “Fair Housing Act,” P.L.1985, c.222 (C.52:27D-
7 301 et al.), clearly states that the State Constitution’s affordable
8 housing obligation is comprised of the “present and prospective
9 need” for affordable housing only, some courts have misunderstood
10 the intent of the Legislature behind the “Fair Housing Act,” and
11 imposed a retroactive obligation for the so-called gap period. The
12 purpose of this bill is to eliminate any possible misconception with
13 respect to the Legislature’s intent to ensure that determinations of a
14 municipality’s fair share of affordable housing will be based upon
15 the present and prospective need for affordable housing, as clearly
16 set forth in the “Fair Housing Act,” and that a fair share obligation
17 will not include retrospective need that may have arisen during any
18 “gap period” between housing cycles.

19 The New Jersey Supreme Court, through its rulings in South
20 Burlington County NAACP v. Mount Laurel, 67 N.J. 151 (1975)
21 and South Burlington County NAACP v. Mount Laurel, 92 N.J. 158
22 (1983), determined that every municipality in a growth area has a
23 constitutional obligation to provide through its land use regulations
24 a realistic opportunity for a fair share of its region's present and
25 prospective needs for housing for low and moderate income
26 families.

27 By enacting the “Fair Housing Act,” the Legislature accepted the
28 Supreme Court’s request that the Legislature occupy the field of
29 affordable housing and defined the constitutional obligation to
30 include the present and prospective needs for affordable housing
31 only. The Legislature directed each municipality to comply with its
32 constitutional obligation to address its obligations with respect to
33 the present and prospective need by:

34 including in the housing element of its master plan a
35 determination of the municipality's present and prospective fair
36 share for low and moderate income housing and a determination of
37 the municipality’s capacity to accommodate its present and
38 prospective housing needs, including its fair share for low and
39 moderate income housing as the present and prospective need; and

40 adopting or revising land use and other relevant ordinances
41 consistent with the provisions for low and moderate income housing
42 in its housing element.

43 The courts and the Legislature of this State require
44 municipalities to allow low and moderate income families a chance
45 to find housing based upon the present need and the prospective
46 need for affordable housing in each municipality and region of the
47 State. This requirement has always been about planning and

1 zoning; municipalities may not limit opportunities for affordable
2 housing through exclusionary zoning.

3 Differences of opinion between the judicial and executive
4 branches of government over how to calculate each municipality's
5 "fair share" of affordable housing have resulted in a "gap period" of
6 over 15 years, which is still going on, during which the State
7 provided municipalities no clear guidelines on how to zone to
8 satisfy their obligation to allow for a fair share of affordable
9 housing. Now that the courts have assumed control over municipal
10 compliance with affordable housing obligations, it is possible that
11 municipalities may be obligated to allow for the production of
12 affordable housing based upon the speculated need for affordable
13 housing which arose during the gap period.

14 While laudable, such a result is contrary to current law, which
15 confines municipal fair share determinations to a present and
16 prospective need for affordable housing, and would impose an
17 unrealistic and excessive burden upon the residential communities
18 of our State. Requiring fair share obligations to include the need
19 developed through a long regulatory gap period would result in an
20 unreasonable burden, the resolution of which would force
21 municipalities to allow rapid, unsettling changes to the physical and
22 demographic nature of their communities. This bill eliminates any
23 possible misconception of what the Legislature intended the fair
24 share obligation to include so as to preclude the imposition of a fair
25 share obligation based upon a concept of retrospective need during
26 the gap period.