SENATE, No. 150

STATE OF NEW JERSEY
219th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2020 SESSION

Sponsored by:
Senator GERALD CARDINALE
District 39 (Bergen and Passaic)
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SYNOPSIS
Authorizes municipal challenge to non-redevelopment housing projects ordered by COAH unless order is based on exclusionary zoning; excludes flood-prone land from affordable housing vacant land analysis; provides housing obligation cap.

CURRENT VERSION OF TEXT
Introduced Pending Technical Review by Legislative Counsel.
AN ACT concerning affordable housing, vacant land analysis, and
municipal challenges to non-redevelopment housing projects
ordered by COAH, amending P.L.1985, c.222 and P.L.1995,
c.231, and supplementing chapter 16A of Title 58 of the Revised
Statutes.

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

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

a. "Council" means the Council on Affordable Housing
established in [this act] P.L.1985, c.222 (C.52:27D-301 et al.),
which shall have primary jurisdiction for the administration of
housing obligations in accordance with sound regional planning
considerations in this State, and any successor body, temporary or
otherwise, that obtains such primary jurisdiction.
b. "Housing region" means a geographic area of not less than
two nor more than four contiguous, whole counties which exhibit
significant social, economic and income similarities, and which
constitute to the greatest extent practicable the primary metropolitan
statistical areas as last defined by the United States Census Bureau
prior to the effective date of P.L.1985, c.222 (C.52:27D-301 et al.).
c. "Low income housing" means housing affordable according
to federal Department of Housing and Urban Development or other
recognized standards for home ownership and rental costs and
occupied or reserved for occupancy by households with a gross
household income equal to 50% or less of the median gross
household income for households of the same size within the
housing region in which the housing is located.
d. "Moderate income housing" means housing affordable
according to federal Department of Housing and Urban
Development or other recognized standards for home ownership
and rental costs and occupied or reserved for occupancy by
households with a gross household income equal to more than 50%
but less than 80% of the median gross household income for
households of the same size within the housing region in which the
housing is located.
e. "Resolution of participation" means a resolution adopted by
a municipality in which the municipality chooses to prepare a fair
share plan and housing element in accordance with [this act]
P.L.1985, c.222 (C.52:27D-301 et al.).
f. "Inclusionary development" means a residential housing
development in which a substantial percentage of the housing units

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.
are provided for a reasonable income range of low and moderate
income households.

g. "Conversion" means the conversion of existing commercial,
industrial, or residential structures for low and moderate income
housing purposes where a substantial percentage of the housing
units are provided for a reasonable income range of low and
moderate income households.

h. "Development" means any development for which
permission may be required pursuant to the "Municipal Land Use

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

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

k. "Disabled person" means a person with a physical disability,
infirmity, malformation or disfigurement which is caused by bodily
injury, birth defect, aging or illness including epilepsy and other
seizure disorders, and which shall include, but not be limited to, any
degree of paralysis, amputation, lack of physical coordination,
blindness or visual impediment, deafness or hearing impediment,
muteness or speech impediment or physical reliance on a service or
guide dog, wheelchair, or other remedial appliance or device.

l. "Adaptable" means constructed in compliance with the
technical design standards of the barrier free subcode adopted by
the Commissioner of Community Affairs pursuant to the "State
et seq.) and in accordance with the provisions of section 5 of

m. "Very low income housing" means housing affordable
according to federal Department of Housing and Urban
Development or other recognized standards for home ownership
and rental costs and occupied or reserved for occupancy by
households with a gross household income equal to 30% or less of
the median gross household income for households of the same size
within the housing region in which the housing is located.
(cf: P.L.2008, c.46, s.5)

2. Section 7 of P.L.1985, c.222 (C.52:27D-307) is amended to
read as follows:
7. It shall be the duty of the council, seven months after the confirmation of the last member initially appointed to the council, or January 1, 1986, whichever is earlier, and from time to time thereafter, to:
   a. Determine housing regions of the State;
   b. Estimate the present and prospective need for low and moderate income housing at the State and regional levels;
   c. Adopt criteria and guidelines for:
      (1) Municipal determination of its present and prospective fair share of the housing need in a given region which shall be computed for a 10-year period.

   Municipal fair share shall be determined after crediting on a one-to-one basis each current unit of low and moderate income housing of adequate standard, including any such housing constructed or acquired as part of a housing program specifically intended to provide housing for low and moderate income households. Notwithstanding any other law to the contrary, a municipality shall be entitled to a credit for a unit if it demonstrates that (a) the municipality issued a certificate of occupancy for the unit, which was either newly constructed or rehabilitated between April 1, 1980 and December 15, 1986; (b) a construction code official certifies, based upon a visual exterior survey, that the unit is in compliance with pertinent construction code standards with respect to structural elements, roofing, siding, doors and windows; (c) the household occupying the unit certifies in writing, under penalty of perjury, that it receives no greater income than that established pursuant to section 4 of P.L.1985, c.222 (C.52:27D-304) to qualify for moderate income housing; and (d) the unit for which credit is sought is affordable to low and moderate income households under the standards established by the council at the time of filing of the petition for substantive certification. It shall be sufficient if the certification required in subparagraph (c) is signed by one member of the household. A certification submitted pursuant to this paragraph shall be reviewable only by the council or its staff and shall not be a public record;

   Nothing in P.L.1995, c.81 shall affect the validity of substantive certification granted by the council prior to November 21, 1994, or of a judgment of compliance entered by any court of competent jurisdiction prior to that date. Additionally, any municipality that received substantive certification or a judgment of compliance prior to November 21, 1994 and filed a motion prior to November 21, 1994 to amend substantive certification or a judgment of compliance for the purpose of obtaining credits, shall be entitled to a determination of its right to credits pursuant to the standards established by the Legislature prior to P.L.1995, c.81. Any municipality that filed a motion prior to November 21, 1994 for the purpose of obtaining credits, which motion was supported by the results of a completed survey performed pursuant to council rules,
shall be entitled to a determination of its right to credits pursuant to the standards established by the Legislature prior to P.L.1995, c.81;

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

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

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

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

(d) Adequate open space would not be provided,

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

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

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

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

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

e. In its discretion, place a limit, based on a percentage of existing housing stock in a municipality and any other criteria including employment opportunities which the council deems appropriate, upon the aggregate number of units which may be allocated to a municipality as its fair share of the region's present and prospective need for low and moderate income housing. An allocation of units to a municipality as its fair share shall not exceed an amount that would result in an increase of the municipal population by more than five percent in any 10-year period. For the purposes of this limit, each unit of affordable housing shall be deemed to be occupied by four residents, except that units of housing for seniors shall be deemed to be occupied by two residents. No municipality shall be required to address a fair share of housing units affordable to households with a gross household income of less than 80% of the median gross household income beyond the lesser of: (1) the number of units that represent housing for five percent of a municipality’s population; or (2) 1,000 units within ten years from the grant of substantive certification, unless it is demonstrated, following objection by an interested party and an evidentiary hearing, based upon the facts and circumstances of the affected municipality that it is likely that the municipality through its zoning powers could create a realistic
opportunity for more than: (1) the number of low and moderate income units that would represent housing for a five percent increase of the municipal population; or (2) 1,000 low and moderate income units in a municipality where 1,000 units would represent housing for less than five percent of the municipal population, within that [ten-year] 10-year period. For the purposes of this section, the facts and circumstances which shall determine whether a municipality's fair share shall exceed 1,000 units, as provided above, shall be a finding that the municipality has issued more than 5,000 certificates of occupancy for residential units in the [ten-year] 10-year period preceding the petition for substantive certification in connection with which the objection was filed.

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

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

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

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

The council shall not order a non-redevelopment housing project on undeveloped land unless the council makes a determination that such a project would counteract exclusionary zoning practices occurring in the municipality at the time the order is made.

(cf: P.L.2008, c.46, s.6)

3. Section 1 of P.L.1995, c.231 (C.52:27D-310.1 et seq.) is amended to read as follows:

1. When computing a municipal adjustment regarding available land resources as part of the determination of a municipality's fair share of affordable housing, the Council on Affordable Housing shall exclude from designating as vacant land:

(a) any land that is owned by a local government entity that as of January 1, 1997, has adopted, prior to the institution of a lawsuit seeking a builder's remedy or prior to the filing of a petition for substantive certification of a housing element and fair share plan, a resolution authorizing an execution of agreement that the land be utilized for a public purpose other than housing;

(b) any land listed on a master plan of a municipality as being dedicated, by easement or otherwise, for purposes of conservation, park lands or open space and which is owned, leased, licensed, or in any manner operated by a county, municipality or tax-exempt nonprofit organization including a local board of education, or by more than one municipality by joint agreement pursuant to P.L.1964, c.185 (C.40:61-35.1 et seq.), for so long as the entity maintains such ownership, lease, license, or operational control of such land;

(c) any vacant contiguous parcels of land in private ownership of a size which would accommodate fewer than five housing units if current standards of the council were applied pertaining to housing density;

(d) historic and architecturally important sites listed on the State Register of Historic Places or National Register of Historic Places prior to the submission of the petition of substantive certification;

(e) agricultural lands when the development rights to these lands have been purchased or restricted by covenant;

(f) sites designated for active recreation that are designated for recreational purposes in the municipal master plan; and

(g) environmentally sensitive lands where development is prohibited by any State or federal agency; and

(h) any land that is (1) lower than the most recent flood elevation determination, measured pursuant to federal standards, (2) lower than the applicable flood elevation standard required under regulations adopted pursuant to the "Flood Hazard Area Control
Act,” P.L.1962, c.19 (C.58:16A-50 et seq.), or (3) within 100 feet of category one waters designated by the Department of Environmental Protection, pursuant to the “Water Pollution Control Act,” P.L.1977, c.74 (C.58:10A-1 et seq.), or any other law, or any rule or regulation adopted pursuant thereto.

No municipality shall be required to utilize for affordable housing purposes land that is excluded from being designated as vacant land.

(cf: P.L.2008, c.46, s.39)

4. Section 15 of P.L.1985, c.222 (C.52:27D-315) is amended to read as follows:

15. a. The council shall engage in a mediation and review process in the following situations: (1) if an objection to the municipality’s petition for substantive certification is filed with the council within the time specified in section 14 of this act; [or] (2) if a request for mediation and review is made pursuant to section 16 of this act; or if the municipality challenges an order issued by the council to construct a non-redevelopment housing project on undeveloped land not later than the 30th day after the order was issued.

b. (1) In cases in which an objection is filed to substantive certification the council shall meet with the municipality and the objectors and attempt to mediate a resolution of the dispute. If the mediation is successful, the council shall issue a substantive certification if it finds that the criteria of section 14 of this act have been met.

(2) In cases where a municipality challenges a non-redevelopment housing project on undeveloped land ordered by the council, the order of the council shall be overturned unless it is determined that the council’s order is based on exclusionary zoning practices occurring in the municipality at the time the order is made.

c. If the mediation efforts are unsuccessful, the matter shall be transferred to the Office of Administrative Law as a contested case as defined in the “Administrative Procedure Act,” P.L. 1968, c. 410 (C. 52:14B-1 et seq.).

The Office of Administrative Law shall expedite its hearing process as much as practicable by promptly assigning an administrative law judge to the matter; promptly scheduling an evidentiary hearing; expeditiously conducting and concluding the evidentiary hearing; limiting the time allotted for briefs, proposed findings of fact, conclusions of law, forms of order or other disposition, or other supplemental material; and the prompt preparation of the initial decision. A written transcript of all oral testimony and copies of all exhibits introduced into evidence shall be submitted to the council by the Office of Administrative Law simultaneously with a copy of the initial decision. The evidentiary hearings shall be concluded and the initial decision issued no later
than 90 days after the transmittal of the matter as a contested case to
the Office of Administrative Law by the council, unless the time is
extended by the Director of the Office of Administrative Law for
good cause shown.
(cf: P.L.1985, c.222, s.15)

5. (New section) The Department of Environmental Protection
shall, pursuant to the “Administrative Procedure Act,” P.L.1968,
c.410 (C.52:14B-1 et seq.), adopt rules and regulations, by the first
day of the seventh month next following enactment, to guide
determinations of flood-prone lands excluded from available land
resources for affordable housing purposes pursuant to section 3 of
P.L. , c. (C. ) (pending before the Legislature as this
bill).

6. This act shall take effect immediately, but section 3 shall
remain inoperative until the first day of the seventh month next
following enactment.

STATEMENT

This bill allows a municipality to challenge an order by the
Council on Affordable Housing (COAH) to construct, or allow to be
constructed, a non-redevelopment housing project on undeveloped
land. The municipal challenge would be successful, unless the
order by COAH is based on exclusionary zoning practices occurring
in the municipality at the time the order is made.

Additionally, this bill caps the number of units a municipality
may have allocated as its fair share affordable housing obligation
with regard to the size of the municipal population. Current law
provides that no municipality shall be required to address a fair
share of affordable housing units beyond 1,000 low and moderate
income units within 10 years from the grant of substantive
certification; except that a municipality may be allocated more than
1,000 units if, based upon an evidentiary hearing, it is found likely
that the municipality, through its zoning powers, could create a
realistic opportunity for more than 1,000 low and moderate income
units within that 10-year period. For some municipalities in the
State, this many additional units may increase the overall municipal
population dramatically. In order to prevent the disparate impact
this can create for municipalities with small populations, this bill
provides that an allocation of units to a municipality as its fair share
shall not exceed an amount that would result in an increase of the
municipal population by more than five percent.

Finally, this bill requires the exclusion of flood-prone land when
computing a municipal adjustment of available land resources as
part of the determination of a municipality's fair share affordable housing obligation. Currently, land may not be considered in determining a municipality’s available land resources for affordable housing purposes if it contains any one of various special features, consisting of: (a) land owned by a government entity, and intended for a public purpose, (b) certain park land, open space and other land dedicated for conservation, (c) certain very small land parcels held in private ownership, (d) historic and architecturally important sites, (e) agricultural land with restricted development rights, (f) sites designated for active recreation, and (g) environmentally sensitive land where development is prohibited by law.

This bill would also exclude from determinations of available land resources for affordable housing purposes any land that is (1) lower than the most recent “flood elevation determination,” measured under federal standards, (2) lower than the applicable flood elevation standard required under regulations adopted pursuant to the "Flood Hazard Area Control Act," P.L.1962, c.19 (C.58:16A-50 et seq.), or (3) within 100 feet of category one waters, as designated by the Department of Environmental Protection. As defined under 44 C.F.R.59.1, a “flood elevation determination” refers to a determination by the Federal Insurance Administrator of the water surface elevations of a “base flood,” also understood as a flood level that has a one percent or greater chance of occurrence in any given year.

This bill directs the Department of Environmental Protection to adopt rules and regulations to guide determinations of flood-prone lands by the first day of the seventh month next following enactment. This bill remains inoperative until the first day of the seventh month next following enactment.