

New Jersey Enacts Landmark Legislation to Overhaul Affordable Housing Laws

Steven Firkser

Greenbaum, Rowe, Smith & Davis LLP Client Alert

March 26, 2024

What You Need to Know

- New Jersey has enacted legislation revamping the state's affordable housing laws and providing an aggressive schedule for municipalities to prepare their plans before the next round of affordable housing obligations begins in 2025.
- The new law abolishes the Council on Affordable Housing, replaces its functions within the Department of Community Affairs, provides for new dispute resolution procedures through the courts, and creates new reporting obligations for municipalities.
- The legislation provides bonus credits as incentives for affordable housing near transit centers, for age-restricted housing, and in connection with redevelopment projects.

On March 20, 2024, New Jersey enacted legislation which substantially revises the Fair Housing Act governing housing for low-income and moderate-income families in New Jersey. The new law is intended to streamline compliance and reduce delays for the construction of new affordable housing, and to provide municipalities and developers with more certainty to enable smarter planning for the location of affordable housing.

COAH is Abolished – What's Next?

Acknowledging the agency's failure to function in addressing affordable housing in the state, the new legislation abolishes the Council on Affordable Housing (COAH). The move is intended to facilitate a more expeditious operation throughout New Jersey to produce affordable housing with appropriate standards.

Attorneys

Steven Firkser

Published Articles (Cont.)

In place of COAH, municipalities will prepare and seek court approval of their fair share affordable housing obligations, in accordance with formulas established by the new law and with the guidance of calculations provided by the Department of Community Affairs (DCA).

The legislation provides for compliance pursuant to a new Affordable Housing Dispute Resolution Program and the appointment of designated judges to resolve disputes and determine municipal compliance. The program will consist of current or retired judges and other qualified experts and may retain special masters or staff to assist in rendering determinations and resolving disputes.

The Administrative Director of the Courts will establish procedures for the purpose of efficiently resolving disputes. The Chief Justice will also designate a Superior Court judge in each vicinage to serve as a county level housing judge to resolve disputes over the compliance of fair share plans and housing elements as well as disputes that arise with respect to ongoing compliance.

Calculation of Affordable Housing Obligations

The DCA is charged with conducting a calculation of regional need, and present and prospective municipal obligations, following the methodology utilized by Superior Court Judge Mary C. Jacobson in her March 8, 2018 decision in the Municipality of Princeton:

- Regional prospective need will first be ascertained by determining household changes in the two most recent censuses, and the household change will be divided by 2.5 to estimate the number of low- and moderate-income homes needed in each region.
- Each municipality's present need obligation will then be determined by estimating the existing deficient housing units currently occupied by low-and moderate-income households within the municipality.
- A municipality's prospective fair share obligation will then be determined using data published by the DCA Division of Local Government Services. For the upcoming fourth round, the data will use the beginning of the gap period in 1999.
- The fair share obligation will also consider a municipality's land capacity factor, as well as the planning area classification for the municipality under the State Plan.
- Finally, municipalities are not required to provide affordable housing exceeding 1,000 housing units or 20% of the total number of households, whichever is less.

Expedited Timeframe

The DCA is required to provide a report on the calculations of regional need and municipal obligations within 7 months of the adoption of the new law. In order for the municipality to have immunity from exclusionary zoning litigation, the municipality must meet the following deadlines:

- The municipality must determine its present and prospective need by binding resolution no later than January 31, 2025, and file the resolution within 48 hours on the websites of the municipality and the

Published Articles (Cont.)

Dispute Resolution Program. Challenges may be filed by interested parties on or before February 28, 2025.

- The municipality must adopt its housing element and fair share plan by June 30, 2025, and file the same within 48 hours of adoption. Challenges may be filed by interested parties on or before August 31, 2025.
- Implementing ordinances and resolutions will be adopted on or before March 15, 2026.

The municipality will maintain immunity from exclusionary zoning litigation so long as it complies with the deadlines. The municipality may obtain grace periods for delays due to circumstances beyond the control of the municipality. The length of the grace period will be determined on a case-by-case basis by the county level housing judge.

If a challenge is filed, the Administrative Director of the Courts will establish procedures for the consideration of the challenge and resolution of disputes, and standards to determine whether the municipality's calculation of its obligation complies with the requirements of the new law.

The goal is to obtain 'compliance certification' in the form of a judgment of compliance or judgment of repose, which will protect the municipality from exclusionary zoning litigation challenging the municipal fair share plan and housing element or seeking a builder's remedy.

Housing Incentives

The new law provides a number of credits and bonuses for specified housing, and the municipality may satisfy up to 25% of its housing obligation through the use of credits. Credits and bonuses will be provided for:

- Housing for individuals with special needs
- Housing created in partnership with a non-profit housing developer
- Housing within ½ mile of a transit center
- Housing that exceeds the minimum number of units with at least 3 bedrooms
- Housing that exceeds the 13% minimum for very low income housing
- Housing in areas previously developed for retail, office or commercial space
- 100% affordable housing projects
- Transfers of market rate housing to affordable housing

Age-restricted housing is also encouraged, and the municipality may meet up to 30% of its obligation through age-restricted housing. The ultimate goal, however, is to address housing for families, and 50% of the municipal obligation must be addressed with housing for families with children.

Published Articles (Cont.)

The new law is also targeting areas that can be redeveloped and requires municipalities with vacant land adjustments to identify sufficient parcels that are likely to redevelop to address at least 25% of the prospective need, and must adopt realistic zoning to allow this or demonstrate why the municipality is unable to achieve this.

Reporting Requirements

The new law requires municipalities to provide the DCA with an accounting of development fees collected and expended, and trust fund expenditures. Municipalities are required to provide this accounting within 180 days following enactment, and by February 15th each year thereafter. The DCA will publish on its website a municipal status report, with detailed summary of trust fund expenditures, collection of development fees, the balance in affordable housing trust funds, and the start and expiration dates of deed restrictions for affordable housing.

There are limitations on the use of affordable housing trust funds. Trust funds may not be expended until a municipality has immunity, and trust funds may not be expended on costs and attorney fees to obtain a judgment of repose to or contest a determination of the fair share obligation. There is also a 20% cap on the use of trust funds for administration expenses.

The DCA is also required to promulgate processes and standards for the certification of administrative agents and municipal housing liaisons and standards for measuring performance and enforcing compliance. The county level housing judge may issue fines and order corrective actions for violations.

Related Legislation

Five companion bills were also enacted in connection with the satisfaction of affordable housing obligations, in order to facilitate development and reduce construction costs. This additional legislation includes bills which:

- allow taxpayers to accelerate depreciation of eligible property expenditures in connection with construction of new affordable housing developments;
- exempt receipts from sales made to contractors or repairmen of materials, supplies, or services related to the construction of 100%-affordable housing projects;
- require the New Jersey Housing Mortgage and Finance Agency to establish a pilot program to support insurance premiums for eligible affordable housing projects constructed by for-profit affordable housing developers;
- allow a municipal governing body to delegate to the municipal clerk the authority to issue statements of support for projects; and
- permit "payment in lieu of taxation" (PILOT) agreements between municipalities and affordable housing projects that receive funding through the State Affordable Housing Trust Fund or municipal affordable housing trust funds.

Published Articles (Cont.)

More to Come

The new legislation provides for regulations to be adopted in 9 months, which may further refine the new affordable housing requirements. Moreover, given New Jersey's 50-year history of litigation involving affordable housing, there are likely to be challenges to the new legislation.

Since the dawn of the Fair Housing Act, the firm's real estate team has been guiding developers and property owners in evaluating properties for affordable housing opportunities and compliance with regulations. We will continue to monitor affordable housing developments and provide updates and guidance as new regulations are adopted.

Please contact the author of this Alert with questions concerning affordable housing in New Jersey or the impact the new legislation may have on your specific circumstances. **Steven Firkser**

Counsel, Real Estate and Redevelopment & Land Use Departments

sfirkser@greenbaumlaw.com

732.476.2388