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**Courts Prod Municipality:
Other States Offer Large Number of Models to Consider**

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Abstract: The state legislature's decision to leave the creation of affordable housing to New York's local governments has resulted in a segmented, slowly evolving, and insufficient resolution to a statewide problem. For example, the Orange County Supreme Court, in *Land Master v. Montgomery*, struck down a zoning law that eliminated all as-of-right multifamily development, in a municipality where affordable housing was in urgent need. This article reviews comprehensive initiatives from other states, and suggests that through the adoption of a state legislation and planning, the affordable housing problem is rectifiable.

Courts Call for Legislative Action

In our last column, we reported that the New York courts have not been heard from on the subject of exclusionary housing since 1998 when the Westchester Supreme Court decided *Triglia v. Town of Cortlandt*. Sup. Ct. Westchester Co., Jan. 8, 1998 Index No. 17976/96. *Triglia* declared Cortlandt's zoning ordinance unconstitutionally exclusionary because it failed to provide for the development of multi-family housing. As our article went to press, the Supreme Court in Orange County handed down an opinion confirming *Triglia* in a case with remarkably similar facts. In *Land Master Montgomery I, LLC v. Town of Montgomery*, Justice Joseph G. Owen struck down Montgomery's zoning law after the town board eliminated all as-of-right provisions for multi-family development. Sup. Ct. Orange Co., Sept. 18, 2006 Index No. 8125/04.

Both of these cases confirm the housing crisis in the New York Metropolitan area and remind the state legislature of the need to guide local governments in providing an adequate stock of housing for the workforce and other households of moderate income. *Triglia* and *Land Master* build on the seminal 1975 Court of Appeals decision, *Berenson v. New Castle*, which declared that "the primary goal of a zoning ordinance must be to provide for the

development of a balanced, cohesive community which will make efficient use of the town's land....[I]n enacting a zoning ordinance, consideration must be given to regional [housing] needs and requirements....There must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met." 38 N.Y.2d 102, 110 (1975).

In *Berenson*, the court added: "Zoning is essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the Legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning." In our article a month ago, we proposed state legislative reform and began a review of what other state legislatures have done in recent years. After a review of the *Land Master* case, this article continues that legislative review.

Land Master v. Montgomery

On October 28, 2004, the Montgomery town board adopted Local Law 4 which deleted RA-1, RA-3, and RM-1 zoning districts from the town's zoning ordinance. It did this over the objection of the County Planning Department which stated that this amendment would "effectively eliminate the possibility of multi-family homes in the Town...." which "will significantly impact the Town's ability to address affordable housing needs...." Orange County Planning Department Report, October 19, 2004.

Petitioners Land Master and Roswind Farmland Corp had submitted two mixed-use development proposals in 2001 and 2002 for land located in the eliminated zoning districts. Both included provision for multi-family dwelling units and Land Master proposed reserving 10% of its units as affordable. In April of 2002, the town board established a special board to review its comprehensive plan and in May it imposed a moratorium on all residential developments proposing more than three residences. These actions halted the town planning board's review of the petitioners' projects and Local Law 4 prevented them altogether.

In this case, the respondent town did not contest the need for affordable housing. Shortly after eliminating multi-family zoning from its zoning law, in fact, the town board created an Affordable Housing Committee. Its report, dated July 7, 2005, noted that the town had issued no building permits for multi-family housing since 1999 and that there was a need for from 688 to 1,010 affordable housing units in the Town. This need, no doubt, was exacerbated by the fact that the median sales price of single-family housing as reported by the New York State Association of Realtors increased an average of 15% annually between 2001 and 2005, from \$159,900 to \$317,600.

The court held that “Given these housing needs, the operative test becomes whether or not the zoning ordinances constitute a balanced and well-ordered plan for the community which adequately considers the acknowledged regional needs and requirements for affordable housing. The Court believes that the existing zoning structure fails this test.” The court, finally, dismissed a variety of discretionary and “narrow” methods of providing smaller lots, adult communities, mobile home parks, and incentives as vesting almost total discretion in the town and creating “the illusion of affordable housing availability.”

The effect of the court’s holding is to restore the multi-family zones to the ordinance leaving the petitioners free to pursue their approvals and the town free to consider how to react to the court’s declaration of unconstitutionality. The court noted that, as happened in previous exclusionary zoning cases, the petitioners are entitled to an award of their attorneys’ fees. *Continental Building Co. v. Town of North Salem*, 625 N.Y.S.2d 700, 704-05 (N.Y. App. Div 1995); 42 USC § 1988. After hearings on these fees in the *Triglia* and *Continental* cases, the towns were required to pay the petitioners over \$750,000 in attorney fees.

The Need for State Legislation

In our column last month, we called for the adoption of a Local Housing Planning and Implementation Act. We proposed that the Act designate a state agency to identify high cost housing regions, conduct regional housing need studies, make housing data available to localities for their consideration, and to coordinate the provision of technical and financial assistance to localities within those regions to meet critical housing needs. This proposal is one of several approaches New York can take. The following review of legislative activity in other states provides a valuable menu of options for our lawmakers to consider.

Needs Identification

The New Jersey Fair Housing Act of 1985 (N.J. STAT. ANN. §§ 52:27 D-301-329) requires municipalities to fulfill a proportionate share of regional low and moderate income housing needs. An oversight committee formed by the Act, the Council on Affordable Housing (COAH), assesses current and future regional needs and is also responsible for ensuring municipal compliance. Each municipality must include a housing element in its land use plan that addresses its “fair-share requirement” within the guidelines set out by COAH. N.J. STAT. ANN. § 52:27D-301. Nebraska statutes charge its Department of Economic Development with the task of creating a comprehensive housing affordability strategy for the state, including the identification of housing needs. The strategy describes how local land use controls affect the return on residential investment and define the role of local governments in implementing the state’s housing policy. NEB. REV. STAT. § 81-1281. In California, the Department of Housing and Community Development determines “the existing and projected need for housing for each region.” CAL. GOV. CODE § 65584.

Comprehensive Plan Component

Arizona state law requires municipalities to include a housing element in their comprehensive land use plans. These housing plans must identify and analyze housing needs and provide for housing for households at all economic levels. ARIZ. REV. STAT. § 9-461.05. Comprehensive plans in Maine must provide for the development of affordable housing for low- and moderate-income households. ME. REV. STAT. ANN. tit. 30, § 4752. The Maine State Housing Authority provides technical assistance and information to assist in the development of provisions that effectively address the shortage of affordable housing. Municipalities are given the authority to develop regional comprehensive plans with neighboring municipalities. The Idaho Code directs as part of the duties of the planning commission that different housing types be incorporated into the master plan including a provision for low cost conventional housing. IDAHO CODE § 67-6508(l). In addition, the plan should include an analysis of housing conditions and needs. Section 25 of the Illinois Planning and Technical Assistance Act provides grant money as an incentive to municipalities for affordable housing planning. Delaware, Nevada, Tennessee, and California all require that local governments include a housing element in the comprehensive plan. DEL. CODE ANN. tit. 22 § 702; NEV. REV. STAT. ANN. §§ 278.230 & 278.250; TENN. CODE ANN. § 6-58-107; CAL. GOV. CODE § 65583.

Other Techniques

Property Tax Breaks

The Maryland legislature enables municipalities to provide real property tax exemptions when the real property is used for affordable housing and other requirements under the statute are met. MD. CODE ANN. TAX-PROP. § 7-506.1.

Conveying Public Lands

Arizona counties are authorized to sell, lease, convey, or otherwise dispose of real property at less than fair market value without holding an auction if the land will be used for housing for low-income households. ARIZ. REV. STAT. § 11-251.10. North Carolina counties may convey property to a public or private entity if the property will be used to provide affordable housing to persons of low or moderate income and covenants or conditions are included that assure this limitation. N.C. GEN. STAT. § 153A-378. Under the New Mexico Affordable Housing Act, municipalities and counties may donate land or buildings to provide affordable housing and are authorized to pay for the infrastructure necessary to support such projects. N.M. STAT. ANN. § 6-27-5. In Nevada, a non-profit organization may submit an application to the governing body of a city for conveyance of a property owned by the city to develop affordable housing for families residing in that city. NEV. REV. STAT. ANN. § 268.058. If the governing body approves such conveyance without consideration it must enter into an

agreement with the non-profit organization requiring such organization to provide affordable housing for at least 50 years.

Trust Funds

Tennessee local governments are authorized to establish housing trust funds to provide affordable housing for low-income persons. TENN. CODE ANN. § 7-8-101 & § 13-23-501.

Cluster Development

In Maine, municipalities are given the express authority to employ cluster zoning and explicitly encouraged to use it in conjunction with the development of affordable housing. ME. REV. STAT. ANN. tit. 30-A, § 4326.

Advisory Board

Colorado law authorizes and encourages local governments to establish affordable housing dwelling unit advisory boards. The board “shall address the housing needs of low- and moderate-income persons, promote a full range of housing choices, and develop effective policies to encourage the construction and continued existence of affordable housing.” COLO. REV. STAT. § 29-26-101. Ohio amended its Constitution to include the “availability of adequate housing” as a legitimate “public purpose.” Ohio Const. art. VIII, §16. One of the prerequisites for local governments engaging in housing activities is the establishment of a housing advisory board. OHIO REV. CODE ANN. §176.04.

Technical Assistance

Illinois adopted the Local Planning and Technical Assistance Act 2002. The law’s purpose is to provide technical assistance to encourage comprehensive planning, promote the use of model ordinances, and to support planning efforts in communities with limited funds. 20 ILL. COMP. STAT. ANN. 662/5. The Department of Commerce and Community Affairs is authorized to provide technical assistance grants to local governmental units to “develop, update, administer, and implement comprehensive plans, subsidiary plans, land development regulations...that promote and encourage the principles of comprehensive planning.” 20 ILL. COMP. STAT. ANN. 662/15.

Appeals of Denials of Below Market Housing Projects

Several states, including Oregon, Massachusetts, Illinois and Connecticut, have state statutory guidance for appeals of denials of below market housing projects. In Connecticut, the state legislature adopted the Affordable Housing Land Use Appeals Act of 1990 which requires that a locality that denies a developer’s affordable housing proposal must show that the denial was “necessary to protect substantial public interests in health, safety....and such public interests clearly outweigh the need for affordable housing.” Conn. GEN. STAT. § 8-30g. State law in Massachusetts establishes a Housing Appeals

Committee to which developers of affordable housing can appeal local denials of their housing proposals. MASS. GEN. LAWS § ch. 40B, §§ 20-23. The statute requires that the denial be vacated if the Committee finds that it was not reasonable and not consistent with local needs. Under the Commonwealth's Low and Moderate Income Housing Law, certain entities who wish to build affordable housing may follow a streamlined application process.

The Illinois Affordable Housing Planning and Appeals Act seeks to “encourage counties and municipalities to incorporate affordable housing within their housing stock sufficient to meet the needs of their county or community.” The Act also allows developers to seek relief where local ordinances would otherwise prevent the development of low- and moderate-income housing, except in the case of “non-appealable local government requirements” that are essential to safeguard public welfare and safety. Furthermore, all “non-exempt” local governments (e.g., less than 10 percent of total housing dedicated to affordable housing) must develop an “affordable housing plan” that identifies the percentage of locally available affordable housing; designates lands appropriate for the development of affordable housing; and identifies goals, objectives, incentives, and other means that may be employed to comply with the Act.

Conclusion

This listing suggests that there are many models for the New York legislature to consider and that a large number of other states are paying attention to the topic of affordable housing.