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AFFORDABLE HOUSING: UPDATE ON FEDERAL AND STATE ACTIVITIES

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Report of the Committee on Land Use, Planning and Zoning Law
The National Quarterly on State and Local Government Law

AFFORDABLE HOUSING: UPDATE ON FEDERAL AND STATE ACTIVITIES

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I. Promoting Affordable Housing in the Northeast: Judicial Review and Reforming the Land-Use Process [FN1]

THE PROMOTION OF AFFORDABLE HOUSING continues to rank high on the agenda for state governments across the country. With limited dollars to spend as governments strive to accommodate the housing needs of a variety of constituents, the promotion of affordable housing through reforms and intrusions into the local land-use decision-making process remains viable on the legislative agenda. In this manner, state government can make an impact on the availability of affordable housing, oftentimes without expending significant funds. During the last few years, these approaches have included attempts to streamline the landuse decision-making process; [FN2] enactment of housing policy acts for the purpose of promoting affordable housing; [FN3] and creation of special appeals procedures in the land-use development process when affordable housing is at issue. [FN4] This report will focus on two approaches: the Connecticut Affordable Housing Appeals Procedure; and proposals in New York to streamline the local land-use regulatory system.

A. Promoting Affordable Housing Through Zoning Appeals Laws

While the traditional approach to settling land-use disputes has rested with the courts, some state legislatures have created special processes to expeditiously resolve these disputes when affordable housing is at issue, such as employing alternative dispute resolution techniques and establishing special panels to hear appeals. [FN5] One common thread running through local land-use fabric and the need for affordable housing is that where local governments fail to accommodate the need, the federal and state governments are increasingly intruding into an area once deemed sacred, by preempting local zoning decisions and mandating the siting of affordable housing. [FN6] Furthermore, the role of the judiciary in carrying out the statutory mandates, along with developing and enforcing common law principles to prevent discrimination against housing the less wealthy, continues to be an important part of the affordable housing toolbox. [FN7] One of the most recent state initiatives is the Connecticut approach.

Based upon the recommendation of a gubernatorial Blue Ribbon Commission on Housing, [FN8] the Connecticut legislature enacted a new law designed to modify judicial review of land development applications where a certain threshold of affordable

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housing was proposed. [FN9] The Affordable Housing Land Use Appeals Act (hereinafter "Act") provides that when an affordable housing [FN10] application is either denied or approved with restrictions which would have a substantial impact upon the viability of the affordable housing development or the degree of affordability of the units, the applicant may take a special appeal to the superior court for the judicial district of Hartford-New Britain. [FN11] Appeals may not be taken under this Act if the subject real property is located in a municipality in which at least 10 percent of the dwelling units therein are: (1) assisted housing; [FN12] (2) currently financed by Connecticut Housing Finance Authority mortgages; and (3) subject to certain deed restrictions which promote and preserve the property's affordability. [FN13] The Commissioner of Housing is to provide an annual listing of the exempted municipalities. [FN14]

Furthermore, the appeals procedure is not applicable for the one-year period following the receipt of certified affordable housing project completions. (The certification is granted when a municipality has completed initial eligible housing development(s) which would create affordable housing units equal to at least 1 percent of all dwelling units within the municipality; and the municipality is actively involved with either the Connecticut partnership program or the regional fair housing pilot program.) [FN15] If an appeal is taken pursuant to this section, the burden is upon the commission [FN16] to prove, based upon evidence in the record before it, that:

> (1) the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record;
>
> (2) the decision is necessary to protect substantial public interests in health, safety or other matters which the commission may legally consider;
>
> (3) such public interests clearly outweigh the need for affordable housing; and
>
> (4) such public interests cannot be protected by reasonable changes to the affordable housing development. [FN17]

In the event the commission fails to satisfy this burden, "the Court shall wholly or partly revise, modify, remand or reverse the decision." [FN18] Not only is this a significant shift in the traditional approach which grants to municipalities the presumption of validity when acting on behalf of the public health, safety, and welfare, [FN19] but it grants broad-sweeping powers to the court to craft remedies and provide affirmative relief to aggrieved parties.

The period for appeal under this section may be stayed in the event that the applicant wishes to submit a modified application to the commission which addresses some or all of the objections raised by the commission. [FN20] If the modified plan is also rejected, the applicant may choose to appeal the original application and/or the modified application. [FN21]

Since the statute's enactment, there have been dozens of appeals taken. As might be expected, some municipalities have attempted to narrowly construe the meaning of the Act's provisions, in the hopes of sustaining local decision making. For example, one town unsuccessfully argued that the Act was intended to apply only to administrative actions, including special permit and site plan applications, and not to legislative actions such as rezoning. [FN22] The Special Court, however, citing to the Act's legislative history, along with the statutory language which specifically defines affordable housing application as, "[a]ny application made to a commission in connection with an affordable housing development . . . ," found no ambiguity in the statute and held the Act applicable to any zoning application whether legislative or administrative. [FN23] In this landmark case, the first to uphold the validity of the Act, the court reviewed the nineteen reasons put forth by the commission as to why an application to site 480 condominiums in the affluent community was denied. [FN24] In his decision, the judge analogized the present situation to that of the Mt. Laurel case in nearby New Jersey, quoting that court's decision that, "'[e]very municipality must by its land-use regulations presumptively make realistically possible an appropriate variety and choice of housing . . . such municipalities must zone primarily for the living welfare of people and not for the benefit of the local tax rate."' [FN25] The case is full of judicial admonitions to municipalities, lecturing on the appropriate role of the zoning authority, the public, and the law. [FN26]

With respect to the issue of appropriate judicial review over legislative matters, to wit, how much deference to give to local legislative bodies, the Connecticut Supreme Court held that, "Where a zoning commission has formally stated the reasons for its decision, the court should not go behind that official collective . . . statement of the commission;" failure, however, to comply with the obligation to state the reasons requires the court to search the record to determine whether the commission was justified in its actions. [FN27]

While municipal advocates may see the Affordable Housing Appeals Act as state government infringing on local home rule control, the message it sends loud and clear is that where municipalities exercise zoning authority in ways which appear to be inconsistent with the public welfare, local control over the matter will be lost, as the state or, in the case of Connecticut, the court, will dictate appropriate public policy with respect to the siting and availability of affordable housing in the community.

B. Streamlining the Local Land-Use Development Process

Through the statewide comprehensive land-use planning and growth management efforts of the 1970s and 1980s, a number of states established new land-use systems which directed local planning agencies to take into account affordable housing needs of the community and region when developing local comprehensive land-use plans. [FN28] Those states which are currently moving in this direction have also attempted to include affordable housing as a major required planning element. [FN29] For states which have not enacted completely new land-use systems, the federal government and many

affordable housing advocates have called for the streamlining of local land-use and development approval processes. [FN30]

Under contract with the New York State Division of Housing and Community Renewal, the New York City Partnership assumed responsibility for a special group called the Advisory Committee on the Preparation of a Land Development Guide. The Advisory Committee, chaired by then Senator Donald Halperin, [FN31] produced two documents, including approximately sixty recommendations for improving the land-use system in the state. [FN32] Following the release of the report, Governor Cuomo, in his Annual Message to the Legislature, charged the Director of Housing to conduct statewide hearings on the recommendations, and to prepare legislative and administrative proposals to "[a]chieve the goal of a streamlined and effective land-use review process." [FN33]

The report calls for consensus on reforms in eight general areas: promotion of planning; [FN34] integration of planning and the environmental review process; [FN35] elimination of unnecessary analysis in the environmental review process; [FN36] promotion of affordable housing; [FN37] increasing public accountability and early input into the review process; [FN38] improving local capacity to enforce regulations and implement reform; [FN39] minimizing inappropriate litigation; [FN40] and provision of adequate financial resources for reform. [FN41] In addition to these broad issues, the Advisory Committee identified seven areas where no specific endorsements or recommendations were made, but which deserve further study and review by state and local governments. [FN42]

With the exception of the State Land Use Advisory Committee, which was formed in 1989 to assist the Legislative Commission on Rural Resources with respect to investigating and proposing ways in which New York's planning and zoning enabling statutes could be brought up to date, the state has paid little or no attention to land-use planning and development for about fifteen years. [FN43] The mission of the Land Use Advisory Committee, thus far, has stopped short of seriously exploring a complete overhaul of the land-use planning and development system in the state, focusing instead on clarifying existing provisions, transferring certain common law concepts into statute, and providing for some flexibility in the local zoning process. [FN44]

To date, one significant Advisory Committee-driven proposal relating to affordable housing and zoning has been enacted: statutory authorization for incentive zoning. [FN45] The statute provides municipalities with the authority to offer incentives or bonuses to developers in return for the provision of specific community benefits or amenities where such action will advance the municipality's "[s]pecific physical, cultural and social policies in accordance with the city's . . . comprehensive plan." [FN46] A community amenity is defined in the statute to include housing for persons of low or moderate income. [FN47]

Whether the Director of Housing will be successful in implementing serious streamlining measures remains to be seen. As of this writing, no hearings have been held

or scheduled, although staff at the Division of Housing and Community Renewal is working on this task. [FN48] Certainly, with the federal requirement that state comprehensive affordable housing strategies describe activities to remove barriers to affordable housing, [FN49] and with the availability of federal funds to states for the removal of such barriers, [FN50] further attention and action is likely.

II. The Multifamily Housing Property Disposition Reform Act of 1994 [FN51]

Many state and local governments will be able to take positive steps toward dealing with their housing and related economic development problems as a result of the Multifamily Housing Property Disposition Reform Act of 1994 ("Reform Act"). [FN52] The major thrust of the Reform Act is to ease the problems that the U.S. Department of Housing and Urban Development (HUD) is having in managing and disposing of apartment projects to which it has acquired title as a result of foreclosure of mortgages originally insured by HUD's Federal Housing Administration. The statutory requirements in place prior to the Reform Act's enactment made it very difficult for HUD to dispose of those projects without attaching to them at the same time section 8 certificates for a fifteen-year period. The Reform Act greatly eases that requirement and, accordingly, relieves a budgetary problem HUD could not deal with because of present-day budget constraints. This has been accomplished through an almost complete rewrite of section 203 of the Housing and Community Development Amendments of 1978. [FN53]

The rewrite of section 203 also encourages the participation of state and local governments in the disposition process. For instance, HUD will be required to notify the appropriate agencies of both local and state government within thirty days of HUD's acquiring title to an apartment project, and these agencies will be given a first right of refusal to acquire these projects for use consistent with the disposition plan adopted by HUD. [FN54] It is not unreasonable to project that these state and local agencies may be able to have some influence on these disposition plans so as to assure their consistency with the agencies' housing needs and plans.

The rewrite continues the authorization, added to section 203 in 1988, for HUD to sell mortgages held by it to state and local governments on a negotiated basis. [FN55] Although the previous authorization only covered subsidized or formerly subsidized mortgages, the rewrite contains no such restriction. Nevertheless, the governmental purchaser will be required to assure that the owners of these projects maintain them for occupancy by their originally intended tenant group for the life of the mortgage. [FN56] It is unclear how either HUD or a purchasing mortgagee will be able to assure such a result, unless the project's mortgage already contains limitations on pre-payment without HUD's approval.

The Reform Act authorizes the state or local government acquiring the mortgages to do so on its own or as part of a group of investors, which may be public or private or a combination thereof. [FN57] Sales prices for any mortgages sold in this fashion may be set on the basis that the projects will be retained for use under the applicable mortgage

insurance program for the life of the initial mortgage insurance contract. [FN58]

Other significant provisions of the Reform Act which should be of interest to state and local governments are several sections simplifying the HOME program, which has become HUD's principal means of assisting the provision of low- and moderate-income housing. For instance, the Reform Act completely eliminates the differential in the local matching requirement between new construction and all other types of housing. Henceforth, the matching requirement will be 25 percent for all types of housing activity. [FN59] This removes one of the last vestiges of the Bush/Kemp Administration's bias against new construction. The Reform Act also authorizes the use of Community Development Block Grant (CDBG) funds to administer a community's HOME program. [FN60]

In order to spur local economic development, the Reform Act expands HUD's section 108 loan guarantee program in several ways. For instance, section 108 loans would be allowed to be used for the acquisition, construction, reconstruction, or installation of public facilities, except for buildings for the general conduct of government. [FN61] In addition, HUD would be authorized to make grants in connection with obligations guaranteed under section 108, in order to enhance the viability of projects financed with the guaranteed loans. [FN62] HUD also would be authorized to guarantee the timely payment of the principle and interest on trust certificates offered by HUD or others and which are backed by a trust or pool of section 108 guaranteed loans. [FN63]

In connection with this enhancement of the scope of the section 108 program, the Reform Act further authorizes the use of recaptured UDAG funds to make the grants authorized in the Reform Act in support of section 108 obligations. [FN64] In addition, a community with unexpended UDAG grant funds will be able to enter into an agreement with HUD to keep one-fourth of those funds for use to support other development activities eligible under the CBDG program, or one-third of the grant funds if it agrees to use at least one-half of that amount in support of grants backing section 108 loan guarantees. [FN65]

Set out below is a more detailed summary [FN66] of the principal provisions of the Multifamily Housing Property Disposition Reform Act of 1994.

A. Summary of Multifamily Housing Property Disposition Reform Act of 1994

This Reform Act rewrites HUD's property disposition statute (section 203 of the Housing and Community Development Amendment of 1978), attempts to reduce the recent high incidence of defaults in FHA-insured multifamily mortgages, and contains a mix of other provisions unrelated to property disposition.

1. PROPERTY DISPOSITION

The major thrust of the revision of section 203 is to reduce sharply the instances in which fifteen-year project-based section 8 certificates are statutorily mandated, with the objective of expediting disposal by reducing the budgetary impact. Under the revision, only those units which were under contract (prior to acquisition by the Secretary or foreclosure) for project-based assistance under section 8, rent supplements, section 23, or section 236 additional rental assistance payments would be required to receive project-based section 8 assistance upon a project's disposition.

There is one exception to the requirement that previous section 8 project-based contracts be replaced with new contracts. For projects that had section 8 Loan Management Set-Aside (LMSA) units in a number not in excess of 50 percent of all units in the project and which otherwise were unsubsidized, only tenant-based section 8 assistance to preexisting tenants is required. For any project, section 8 project-based assistance could be provided for a term less than fifteen years if the Secretary imposed use and rent restrictions on the new owner that provided the same benefits to tenants as section 8 would over the fifteen-year period.

Under prior law, fifteen-year project-based section 8 certificates were required for all units in section 221(d)(3) below-market-interest-rate (BMIR) housing, sections 236, 202, 312, and rent supplement projects and in section 23 and project-based section 8 assisted projects where over 50 percent of the units were assisted. In all other multifamily projects, fifteen-year section 8 project-based assistance was mandatory for all units occupied by low-income tenants eligible for section 8 assistance.

Units not previously under contract as described above would be treated differently depending on whether they were located in "subsidized" or "unsubsidized" multifamily projects. Subsidized projects consist of sections 221(d)(3) BMIR, 236, and 202 projects and projects with over 50 percent of their units under contract for rent supplement, section 8, or section 23 payments. The noncontract units in these projects would be required to have use and rent restrictions for the "useful life of the project" (presumably established by HUD at no longer than fifteen years), so that low-income tenants (80 percent of median income or below) would pay a rent no greater than 30 percent of 80 percent of area median income and very low-income tenants (50 percent of median income or below) would pay a rent no greater than 30 percent of 50 percent of area median income. Noncontract units in unsubsidized projects would not be rent restricted.

However, any preexisting very low-income tenant (a tenant who resides in the project immediately prior to acquisition by the purchaser) in either a subsidized or unsubsidized project, whose rent would exceed 30 percent of family income after the acquisition, would have its preacquisition rent frozen for two years and would be considered a "displaced person" in order to obtain a preference for tenant-based section 8 assistance. Further, HUD is authorized to provide section 8 tenant-based assistance to any eligible tenants who do not qualify for project-based assistance.

The revision also provides several alternatives to the use of section 8 project-based assistance, including:

1. Section 8 tenant-based assistance in soft markets; in subsidized projects alternative tenant-based assistance could not exceed 10 percent of the aggregate number of units in subsidized projects disposed of during the year.

2. Other assistance, including a discounted sales price, short-term loans, and upfront grants for rehabilitation and related expenses; use and rent restrictions would apply to the units formerly under contract; and very low-income tenants whose rent would otherwise exceed 30 percent of their incomes would receive tenant-based section 8 assistance.

3. Removal of a limited number of units from residential rental use for various purposes identified in the statute, including homeownership, community, commercial or office space, and security (up to 10 percent of the total disposed of), and to further fair housing, community development, or neighborhood revitalization goals (5 percent); section 8 tenant-based assistance would be available for displacees;

4. Transfer for use under other HUD programs, such as public housing and section 202.

5. Rent restrictions (or section 8 project-based assistance) for an equal number of units in an unsubsidized project in the area and tenant-based section 8 assistance to low-income tenants in units in the project that would otherwise have been required to have project-based assistance.

Finally, authority is provided to use section 8 project-based assistance to support the rebuilding of a project, in whole or part and on- or off-site, if rebuilding would be less expensive than substantial rehabilitation.

2. RELATED PROVISIONS

1. Gives tenants displaced, from HUD-owned or possessed projects or projects with HUD-held mortgages, because of demolition, repairs or conversion to other uses the rights: (a) to return to a repaired or rebuilt unit; (b) to occupy a unit in a HUD-owned project; (c) to obtain section 8 or public housing assistance; or (d) to receive other relocation assistance determined by HUD to be appropriate.

2. Makes clear that HUD has the authority to sell mortgages covering unsubsidized projects.

3. Creates two demonstration programs that (a) authorize the Secretary to restructure "troubled" HUD-held mortgages and to sell them "through the establishment of partnerships with public, private, and nonprofit entities"; and

(b) authorize the Secretary to dispose of "troubled" HUD-owned projects "through the establishment of partnerships with public, private, and nonprofit entities."

4. Defines "owner" under the section 8 program to include a federal agency. The intent is to permit section 8 payments to continue after HUD assumes ownership of a project which had a section 8 contract.
5. Replaces statutory authority that permits HUD to request the mortgagee to accept a partial payment of an insurance claim and to recast the remaining principal balance of the mortgage, if HUD determines that partial payment would be less costly than other alternatives for maintaining the "low-income character" of the project. (Previous law used the term "low and moderate income character." This change may limit the types of projects eligible for partial payment.)

3. PREVENTING MULTIFAMILY MORTGAGE DEFAULTS

1. Makes several changes to the "needs assessment" provisions of the 1992 Housing and Community Development Act, which require owners of multifamily projects that are subsidized or designed for the elderly to assess their financial and physical needs and the resources available to meet those needs, including:

   a. A delay in completion dates for assessments, from the 1992 schedule of FY 1993 to FY 1995, to FY 1994 to FY 1997 (10 percent of total required assessments to be completed in first year and 30 percent in each of the remaining years);

   b. Prohibition of the preparation of an assessment by an entity with an identity of interest with the owner;

   c. Revision of HUD procedures for the review and approval of assessments; and

   d. Authority for HUD to provide flexible subsidy and LMSA funds on a noncompetitive basis to meet identified needs.

2. Flexible Subsidy program changes include:

   a. Repeal of mandatory 20 percent owner contribution for capital improvement loans;

   b. Repeal of requirement that an applicant consider ways to reduce utility costs;

c. Authority for HUD to set aside, and to award noncompetitively, capital improvement funds for projects assisted under the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA);

d. General rules for allocating funds to projects and authority to make noncompetitive awards; selection criteria stress correction of financial and physical problems identified in a needs assessment and whether correction is necessary to prevent a default of a federally insured mortgage (but HUD is given authority to base awards on other criteria if published in the Federal Register); the extent to which tenants have an opportunity to be involved in the management of the project is a relevant consideration in the award of funds; and
e. Repeal of prohibition on assistance to projects under both the flexible subsidy program and ELIPHA or the Low Income Housing Preservation and Resident Homeownership Act of 1990.

3. Section 223(a)(7) multifamily refinancing--directs HUD to streamline the processing of applications for mortgage insurance.

4. Mortgage Insurance Funds—

   a. Directs GAO to study adequacy of insurance reserves and recommend ways to prevent losses, and to evaluate performance of nursing home, hospital and retirement service center programs.

   b. Directs HUD to make annual risk assessments of each program covered by the General Insurance and Special Risk Insurance Funds.

   c. Attempts to limit scoring of use of subsidy appropriation for insured refinancings of insured mortgages to any additional risk of loss in excess of the risk on the refinanced mortgage.

5. Authorizes a multifamily housing project with a mortgage insured under Title II of the National Housing Act to be used for a different purpose if necessary to prevent a default (if such alternative use is insurable under the Title II and the tenants can be protected with section 8 tenant-based assistance).

6. Repeals the statutory requirement that HUD reduce the interest rate on assigned mortgages, which was subject to appropriations being made available.

4. CHANGES TO HOME PROGRAM

These changes are effective for existing HOME appropriated funds that are uncommitted on the date of enactment and for future appropriations.

1. Authorizes a state agency to be designated to administer the HOME program for the state.

2. Replaces requirement that 90 percent of HOME funds assist families at 60 percent of median income or below with the requirement that 90 percent of the assisted families be, or 90 percent of the assisted units be occupied by, families at or below 60 percent of median income.

3. Eliminates higher local match for new construction (resulting in a match of at least 25 percent of the HOME grant for all activities).

4. Removes limitation that homeownership assistance be made available only to first-time homebuyers.

5. Allows recaptured homeownership assistance to be reused for any HOME purpose, not just homeownership.

6. Eliminates separate independent audit requirement.

7. Provides for HUD training, monitoring, and disapproval in connection with state and local environmental reviews.

8. Allows CDBG funds to be used to pay for HOME administrative costs.

9. Appears to limit the provision of "housing services" with CDBG funds to HOME assisted activities (rather than CDBG and HOME activities as under prior law) and deletes provision making expenditures for housing services subject to the limitation on administrative expenses (for CDBG funds).

10. Authorizes Secretary to waive many HOME statutory requirements for disaster areas (CDBG provisions as well).

5. HOPE III (SINGLE FAMILY)

Reduces the required matching contribution from 33 percent to 25 percent.

6. SECTION 108 LOAN GUARANTEES

1. Adds to eligible activities the acquisition, construction, reconstruction, or installation of public facilities, except for buildings for the general conduct of government.

2. Authorizes HUD to make grants in connection with the repayment of section 108 guaranteed loans used to finance economic development activities. The program is expected to be funded entirely from recaptured UDAG grants.

(Part of the recaptured funds would remain in the communities which received the UDAG grants and the remainder would be allocated by HUD on the basis of selection criteria, both statutory and administrative.)

3. HUD is authorized to package pools of guaranteed section 108 loans as security for guaranteed trust certificates (HUD believes the interest rate can be lowered by aggregating the loans).

7. TECHNICAL AMENDMENTS

Among several provisions, the Reform Act would make clear that state agencies can conduct low-income housing tax credit subsidy layering reviews, using HUD guidelines, that satisfy the certification requirements of federal law that the federal assistance involved is the least necessary amount. In addition, local governments would be given environmental review authority for public housing and section 8 projects, special projects, and lead based paint grants. The Reform Act also completely rewrites the FHA Risk-Sharing Pilot Program, authorized in 1992, and amends the recently implemented Housing Finance Agency Risk-Sharing Pilot Program.

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[FN2]. See, e.g., New York's Advisory Committee on the Preparation of a Land Development Guide, 1993 Recommendations [discussed infra].

[FN3]. Wash. Rev. Code Ann. § 43.185b.900 (West. 1994).

[FN4]. See, e.g., Connecticut Affordable Housing Appeals Procedure [[[discussed infra].

[FN5]. See Massachusetts Low and Moderate Income Housing Act, Mass. Gen. L. ch. 40B, § 21 (1969), which authorizes the State Housing Appeals Committee to review certain actions of local zoning boards (also known as the Anti-Snob Zoning Act), and R.I. Gen. Laws § 45-53 (1991).

[FN6]. For a discussion of the preemption of local zoning under the Federal Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1988), see Patricia E. Salkin & John M. Armantano, The Fair Housing Act, Zoning, and Affordable Housing, 25 Urb. Law. 893 (1993). See also United States v. Village of New Hempstead, 832 F. Supp. 76 (S.D.N.Y. 1993), which holds that provisions of the Stuart B. McKiney Homeless Assistance Act (codified in scattered sections of 42 U.S.C. (1988 & Supp. IV 1992)) can preempt local zoning.

[FN7]. Zoning is not considered a valid exercise of the police power when "[t]he general public interest would so far outweigh the interest of the municipality . . . . " Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926). Zoning regulations which discriminate against low-income individuals have been deemed by the courts to be contrary to the public welfare. See Berenson v. Town of New Castle, 341 N.E.2d 236 (N.Y. 1975); Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975), appeal dismissed for want of jurisdiction, 423 U.S. 808 (1975); Asian Americans for Equality v. Koch, 72 N.Y.S.2d 121 (1988); and Britton v. Town of Chester, 595 A.2d 492 (N.H. 1991).

[FN8]. The Blue Ribbon Commission on Housing was established in 1987 by Governor William A. O'Neill to address the problems of affordable housing. The Commission issued two reports, one in 1988 and one in 1989 (entitled, State of Connecticut Blue Ribbon Commission on Housing Report and Recommendations to the Governor and General Assembly (Feb. 1, 1989)) [hereinafter "Report"]. The Commission found a severe shortage of affordable housing in the state, identifying an unmet need of 181,535 units of housing. See Report at 7.

[FN9]. Conn. Gen. Stat. § 8-30g (1992).

[FN10]. Affordable housing development is defined in the statute as:
a proposed housing development (A) which is assisted housing or (B) in which not less than twenty per cent of the dwelling units will be conveyed by deeds containing covenants or restrictions which shall require that such dwelling units be sold or rented at, or below, prices which will preserve the units as affordable housing, as defined in section 8-39a, for persons and families whose income is less than or equal to eighty per cent of the area median income, for at least twenty years after the initial occupation of the proposed development.
Conn. Gen. Stat. § 8-30g(a).

[FN11]. Conn. Gen. Stat. § 8-30g(b). Note that as of September 1, 1996, the appropriate court is the judicial district of Hartford.

[FN12]. Regulations promulgated by the Connecticut Department of Housing define assisted housing as: (1) a unit occupied by a person receiving either state rental assistance under Ch. 138a of the Connecticut General Statutes or federal rental assistance under 42 U.S.C. § 1437f; or (2) the housing must be or will receive government financial assistance under any federal, state, or local program, for the construction or substantial

rehabilitation of low- and moderate-income housing for the purpose of housing low- and moderate-income persons. See Department of Housing, Affordable Housing Appeals Procedure, CONN. L.J., at 8C (Feb. 18, 1992).

[FN13]. See Conn. Gen. Stat. § 80-g(f) (1992). Regulations specify conditions which must be met to satisfy the exception for housing which is subject to deed covenants or restrictions. These restrictions must provide that each initial occupancy by a new household be persons and families: (1) whose income does not exceed 80% of the area median income adjusted for size; and (2) for whom the cost of housing does not exceed 30% of total family income. With respect to rental of housing, the housing cost includes rent, heat, and utility costs (except for telephone and cable television). With respect to ownership of housing, housing cost includes: mortgage payments, taxes, insurance, heat, and utility (except for telephone and cable television). The covenants and restrictions must run with land, and, in the event they fail to be binding on subsequent property owners, the exemption may only be counted for the period of time for which the restriction is in effect. See Department of Housing, Affordable Housing Appeals Procedure, § 8-30-g-2(c), Conn. L.J., at 9C (Feb. 18, 1992).

[FN14]. Conn. Gen. Stat. § 80-g(f) (1992). See also Department of Housing, Affordable Housing Appeals Procedure, § 8-30g-2(e) and (f), Conn. L.J., at 10C (Feb. 18, 1992) (implementing regulations which enumerate the data and information sources to be used when compiling the list, as well as the formula to be used for the purpose of calculating whether a municipality is entitled to placement on the list for possessing 10% or more units of qualified affordable housing).

[FN15]. See Conn. Gen. Stat. § 8-30g(g) (1992).

[FN16]. "Commission" is defined as a zoning commission, planning commission, planning and zoning commission, zoning board of appeals, or municipal agency exercising zoning or planning authority. See Conn. Gen. Stat. § 8-30g(a)(4).

[FN17]. Conn. Gen. Stat. § 8-30g(c) (1992).

[FN18]. Id. (emphasis added).

[FN19]. See Malafronte v. Planning & Zoning Bd., 230 A.2d 606, 608-10 (Conn. 1967).

[FN20]. Conn. Gen. Stat. § 8-30g(d) (1992).

[FN21]. Id.

[FN22]. TCR New Canaan, Inc. v. Planning & Zoning Comm'n, 1992 Conn. Super. LEXIS 683 (1992). According to the 1990 Census, the Town of Trumball was 95.3% white, with a population of approximately 32,000, 93% of whom resided in single-family homes, since there was no land zoned for apartments. See George Judson, Housing Law

Challenges Power of Zoning Boards, N.Y. TIMES, Nov. 5, 1991, at B5.

[FN23]. Id. at 19 (emphasis added). In another case, two years later, the applicability of the Act to a legislative determination was again raised as a defense in West Hartford Interfaith Coalition, Inc. v. Town Council, 636 A.2d 1342 (Conn. 1994), wherein the court also found the Act to apply based upon the plain meaning rule of statutory construction and upon the legislative history.

[FN24]. TCR New Canaan, 1992 Conn. Super. LEXIS 683. The court grouped the reasons into several categories: (1) reasons which suggest that the application violates the town's zoning ordinance and comprehensive plan; (2) reasons related to traffic and fire concerns; (3) issues regarding the ability of the applicant to actually provide long-term affordable housing; (4) burdens on the educational system; (5) the fact that no one from the community spoke in favor of granting the application; and (6) in the event that the proposed amendment were to be modified, it would make changes requiring another public hearing. Id.

[FN25]. Id. at 62, quoting Mt. Laurel, 336 A.2d at 731-33.

[FN26]. Judge Berger uses his opinion to cite zoning decisions from Connecticut and from other jurisdictions to educate municipalities on the appropriate roles and responsibilities of the players in the zoning game. For example, citing a Kansas case, he notes, "Zoning is not to be based upon a plebescite of the neighbors. Their wishes are to be considered but the final ruling is to be governed by the basic consideration of the benefit or harm involved to the community at large." TCR New Canaan, 1992 Conn. Super. LEXIS 683 at *77, citing Arkenberg v. City of Topeka, 421 P.2d 213, 219 (Kan. 1966). He also points out that ". . . zoning policy may not be based on fiscal considerations such as whether a particular residential development will result in added costs to the town." Id. at 76, citing Beach v. Planning & Zoning Comm'n, 103 A.2d 814 (Conn. 1954).

[FN27]. West Hartford Interfaith Coalition, 636 A.2d at 1350, quoting DeMaria v. Planning & Zoning Comm'n, 271 A.2d 105 (Conn. 1970).

[FN28]. See generally Fla. Stat. Ann. §§ 186.001-186.801 (West 1987 & Supp. 1994); Ga. Code Ann. §§ 36-70-1 to 36-70-4 (Michie 1991 & Supp. 1993); Hawaii State Plan (1978); Md. Code Ann., State Fin. & Proc. § 5-401 to 5-408 (1988 & Supp. 1993); N.J. Stat. Ann. § 52:18A-196 to 52:18A-217 (West Supp. 1994); Or. Rev. Stat. § 197.005-197.806 (1993); R.I. Gen Laws §§ 45-22.1 to 45-22.1-6 (1991 & Supp. 1992); Vt. Stat. Ann. tit. 24, §§ 4301-4495 (1992); and Wash. Rev. Code Ann. §§ 36.70.010-36.70.980, 36.70A.045-36.70A.902 (West 1991 & Supp. 1994).

[FN29]. See Patricia E. Salkin, Statewide Comprehensive Planning: The Next Wave, in STATE & REGIONAL COMPREHENSIVE PLANNING: IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT (Peter A. Buchsbaum & Larry J. Smith,

eds. 1993); and Patricia E. Salkin, Regional Planning: New Political Magnetism, 6 LAND USE L. & ZONING DIG. 3 (1992).

[FN30]. See Report to President Bush and Secretary Kemp by the Advisory Comm'n on Regulatory Barriers to Affordable Housing, 'Not in My Back Yard': Removing Barriers to Affordable Housing (1991); United States Dep't of Housing and Urb. Dev., Office of Policy Dev. & Research, Affordable Housing: Development Guidelines for State and Local Government (Nov. 1991); United States Dep't of Housing and Urb. Dev., Office of Policy Dev. & Research, Proposed Model Land Development Standards and Accompanying Model State Enabling Legislation (1993 ed.); and Patricia E. Salkin, Barriers to Affordable Housing: Are Land-Use Controls the Scapegoat?, 4 LAND USE L. & ZONING DIG. 3 (1993).

[FN31]. Donald Halperin has since been named Director of Housing for the State of New York (this person also holds the title of Commissioner of the Division of Housing and Community Renewal) and currently holds the position. Halperin was the sponsor of Ch. 217 of the N.Y. Laws of 1987 (July 7, 1987), which required the Commissioner of Housing and Community Renewal to "[d]evelop, publish and distribute a land development guide which shall describe those issues which are relevant to the development of an appropriate local land use ordinance for localities of varying size and composition . . . and . . . other matters that will encourage efficiency and clarity in the land development approval process including the possible use of state inducements for localities to address land use development issues." (codified at N.Y. Pub. Hous. Law § 14(p) (McKinney 1989 & Supp. 1993)).

[FN32]. The two reports issued are: NEW YORK CITY HOUSING PARTNERSHIP FOR THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL, ANGELO J. APONTE, COMMISSIONER, RESOURCE GUIDE TO THE LAND USE AND DEVELOPMENT APPROVAL PROCESS IN NEW YORK (1993); and NEW YORK CITY HOUSING PARTNERSHIP FOR THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL, ANGELO J. APONTE, COMMISSIONER, RECOMMENDATIONS FOR IMPROVING THE LAND USE AND DEVELOPMENT APPROVAL PROCESS IN NEW YORK (1993).

[FN33]. Governor Mario M. Cuomo, Message to the Legislature (Jan. 5, 1994). His message on the topic began with the following introduction:
The land use and development process in New York is characterized by a seemingly ever-increasing thicket of red tape, regulations and procedures that cause unnecessary delays, confusion, and higher development costs. Fairness demands that we make this process more efficient and accountable-- and less time-consuming and costly--by eliminating unnecessary and ineffective regulations and procedures.
Id.

[FN34]. Specifically, the provision of financial support for comprehensive land-use planning, and the enactment of a state zoning appeals law and housing rule to promote

affordable housing. See, NEW YORK CITY HOUSING PARTNERSHIP FOR THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL, supra note 32.

[FN35]. In addition to repeating a call for funding of local comprehensive plans, specific recommendations include: redefining the term "environment" under the State Environmental Quality Review Act to "[t]he natural and physical environmental issues in those communities where the economic, social and community character factors have been addressed in the planning and zoning review and approval process;" and encouraging the use of generic environmental impact statements. See NEW YORK CITY HOUSING PARTNERSHIP FOR THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL, supra note 32.

[FN36]. Recommendations include: encouraging greater use of the conditional negative declaration; and encouraging targeted environmental impact statements (EIS) by having lead agencies provide specific information through scoping sessions and other means, as to what exactly should be addressed in the EIS. See NEW YORK CITY HOUSING PARTNERSHIP FOR THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL, supra note 32.

[FN37]. The Advisory Committee recommends a statute modeled after the Connecticut or Massachusetts state zoning appeals law, which would require special consideration, under certain circumstances, of development proposals which promote affordable housing. See, NEW YORK CITY HOUSING PARTNERSHIP FOR THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL, supra note 32.

[FN38]. The specific recommendation put forth would not only require that a scoping session take place prior to the drafting of an environmental impact statement, but that the lead agency make certain that at least one citizen-representative from each affected community is appointed to participate in the process. See NEW YORK CITY HOUSING PARTNERSHIP FOR THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL, supra note 32.

[FN39]. To achieve this, the Advisory Committee calls for county governments to facilitate training programs, regional workshops, and circuit rider programs, with technical assistance from the state and involvement of nonprofits (training should be available for volunteer players in the land-use development approval process, and for professional planners). Furthermore, the Committee recommends, among other things, the formal establishment of an ongoing state program to remove unnecessary regulation and barriers to affordable housing; and the creation of a statewide GIS system (in fact, in the 1994 Legislative Session, a measure was passed by both houses to create an inter-agency GIS Council to study the issue -S.5169-C/A.7130-C). See NEW YORK CITY HOUSING PARTNERSHIP FOR THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL, supra note 32.

[FN40]. The Report recommends reducing the negative impact of litigation on development (e.g., delays of up to three years) by amending the State Environmental Quality Review Act and the Civil Practice Law and Rules to: provide a shorter statute of limitations for appeals; provide a better definition of who has standing; impose more severe sanctions against frivolous lawsuits; consolidate lawsuits affecting the same project; and accelerate the timetable by which courts must act on these matters. See NEW YORK CITY HOUSING PARTNERSHIP FOR THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL, supra note 32.

[FN41]. The Advisory Committee calls for new federal appropriations to states and localities for programs aimed at removing regulatory barriers to affordable housing; using proceeds of local impact fees or processing fees to advance barrier removal activities which will ultimately result in more affordable housing; and outright state appropriations to promote this agenda. See NEW YORK CITY HOUSING PARTNERSHIP FOR THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL, supra note 32.

[FN42]. For example, the Committee listed: (1) environmental review: have municipalities manage the development of EISs, limit the size of the EIS, and require banks to publicly promulgate environmental review policies; (2) with respect to wetlands: strengthening the state role, establish state-lead in coordinated wetlands reviews, and integration of wetlands regulations with local planning; (3) under affordable housing and zoning: establish an as-of-right affordable housing classification; promote greater as-of-right development in special districts; and require a housing impact analysis in the rulemaking process for major policy changes and in the legislative process for all proposed bills which may impact housing; (4) for building permits: establish an office to clarify and monitor the permitting process; expedite tracking systems; provide for flexibility and require training; (5) with respect to historic review, require historic district management plans; (6) for official city (New York City) maps, centralize the recordkeeping, and standardize and rationalize requirements for official map change applications; and (7) with respect to New York City, create project coordinators for both environmental review and for land-use review applications, and improve access to information at the Department of Planning. See NEW YORK CITY HOUSING PARTNERSHIP FOR THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL, supra note 32.

[FN43]. See James A. Coon, Sheldon W. Damksy, & Dianne L. Rosen, The Land Use Recodification Project, 13 PACE L. REV. 559 (1993). Among the issues before the Advisory Committee is: "[i]s zoning a mechanism whereby various uses of land may be brought into harmony with one another, or is it a social engineering mechanism whereby socio-economic dilemmas are addressed?" Id. at 566.

[FN44]. See Coon, Damsky & Rosen, supra note 43; and Memorandum from the Legislative Commission on Rural Resources, 1994 Land Use Legislation as of July 4, 1994 (on file with author).

[FN45]. 1991 N.Y. Laws 1231 (codified at N.Y. Town Law § 261-b (McKinney Supp. 1994); N.Y. Village Law § 7-703 (McKinney Supp. 1994); and N.Y. Gen. City Law § 81-b (McKinney Supp. 1994)).

[FN46]. Id.

[FN47]. Id.

[FN48]. This paper was submitted for publication in mid-July. In a telephone conversation with and subsequent presentation by Joe Montalto, Special Assistant to the Commissioner, to the Land Use Advisory Committee, the Commissioner's plans to hold the hearings was articulated, but no dates or locations had yet been set, nor has the hearing format/specific issues to be addressed been determined.

[FN49]. Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. §§ 12701-12898a (1992) (codifying Pub. L. No. 101-625, § 105(b)(4), 104 Stat. 4089 (1990)).

[FN50]. See Removal of Regulatory Barriers to Affordable Housing Act of 1992, 42 U.S.C. §§ 12705-12705d (1992) (codifying Pub. L. No. 102-555, § 1204, 106 Stat. 3938 (1992)).

[FN51]. Part II was authored by Carl A.S. Coan, Jr., and Raymond K. James.

[FN52]. Multifamily Housing Property Disposition Reform Act of 1994, Pub. L. No. 103-233, 108 Stat. 342 (codified as amended in scattered sections of 12 U.S.C. and 42 U.S.C. (1994)) [hereinafter "Reform Act"].

[FN53]. Housing & Community Development Amendment of 1978, Pub. L. No. 95-557, 92 Stat. 2080 (codified as amended in scattered sections of U.S.C. (1994)).

[FN54]. Reform Act § 101(b), 12 U.S.C. § 1701z-11.

[FN55]. Id. § 101, 12 U.S.C. § 1701z-11.

[FN56]. Id.

[FN57]. Id.

[FN58]. Id.

[FN59]. Reform Act § 221, 42 U.S.C. § 12893(c)(1).

[FN60]. Id. § 207, 42 U.S.C. § 5305.

[FN61]. Id. § 231, 42 U.S.C. § 5308(a).

[FN62]. Id. § 232, 42 U.S.C. § 5308.

[FN63]. Id. § 233, 42 U.S.C. § 5308.

[FN64]. Reform Act § 232, 42 U.S.C. § 5318(o).

[FN65]. Id. § 232, 42 U.S.C. § 5318.

[FN66]. This summary was originally prepared by Raymond K. James, a partner in Coan & Lyons. Minor editorial changes have been made by the author, primarily to fit into the context of this report.