


Expiring Affordability Controls

Maintaining Affordable Housing in Our Municipalities

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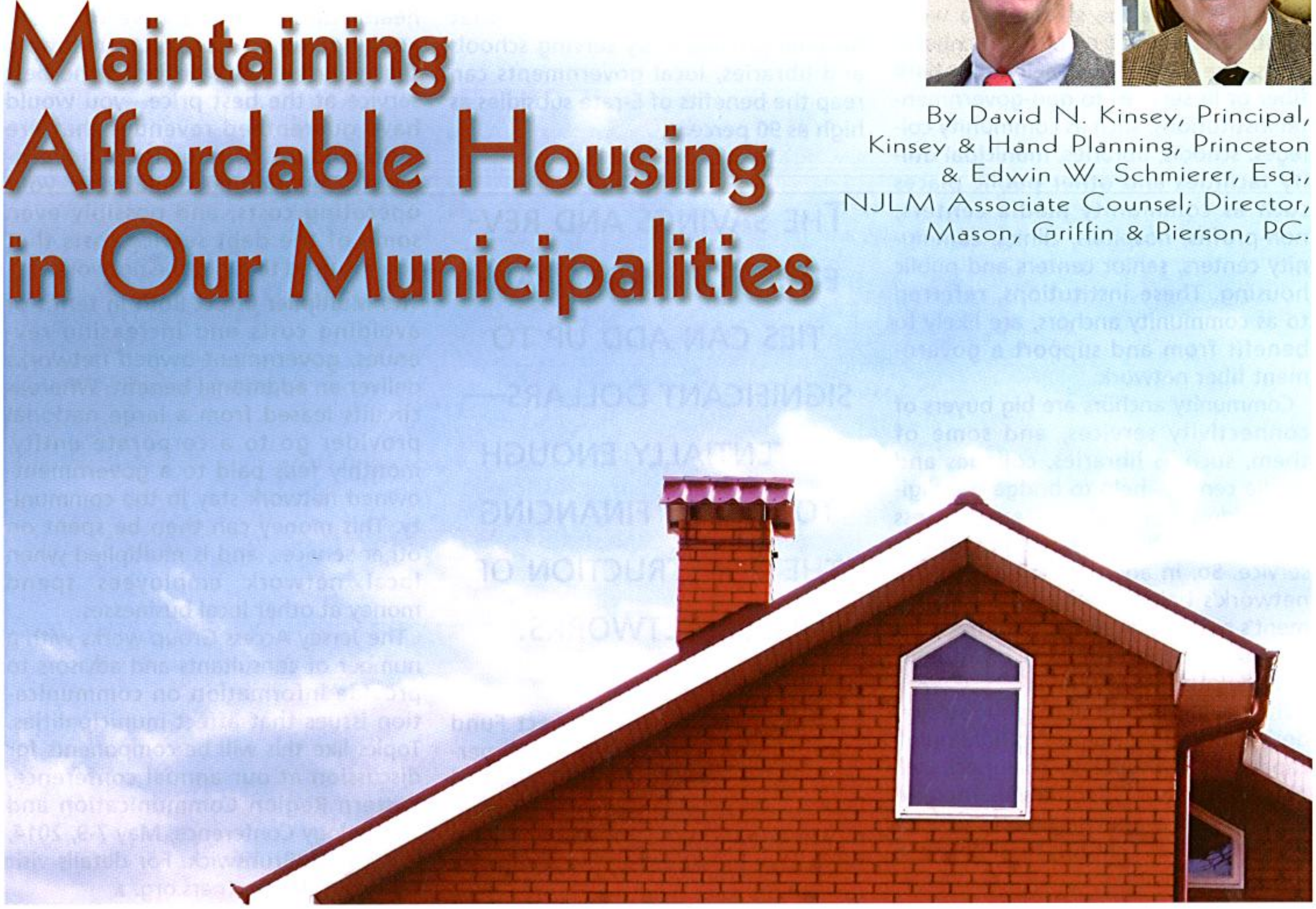

The following white paper, the 19th paper in the series "Friends of Local Government" sponsored by the NJLM Educational Foundation, was published September 2013 as Volume 5, Number 3.

On June 18, 2013, the Affordable Housing Professionals of New Jersey (AHPNJ) held a day-long symposium, cosponsored by the New Jersey Chapter of the American Planning Association, on the issue of how municipalities can deal with expiring affordability controls. The AHPNJ is non-profit association formed to promote and enhance professionalism and knowledge in the field by supporting affordable housing through dialogue, ethical standards, education, advocacy and policy guidance. The AHPNJ represent a wide variety of administrative agents, property managers, state and municipal employees, nonprofit and for-profit corporations, financial institutions, planners and attorneys, all of whom are working to ensure that our affordable housing programs are working effectively.

The two articles in this paper are drawn from two presentations at the June 18 symposium. Many municipalities must deal with a number of affordable housing units with expiring deed restrictions in the upcoming years. The June 18 program provided housing professionals guidance on potential planning strategies to assist municipalities. Any opinions expressed in any of the Friends of Local Government series are those of the authors and we believe that these papers provide some background and resources for municipalities going forward. Previous papers are on the Foundation's website at www.njlmef.org.

Article Two:

By Edwin W. Schmirerer, Esq.

Since Mount Laurel II in 1983 and creation of COAH, 65,000 new affordable housing units have been created and 15,000 substandard units rehabilitated, throughout New Jersey, restricted to low and moderate income households. Long-term affordability controls, in the form of deed restrictions and mortgage liens, insure that this housing, often developed at significant controversy and cost, remains affordable over time. But these controls eventually expire, typically after six to 30 years, depending on the type of housing, its sponsor, its financing, and public policy. As the end of the controls approaches, the units become at risk of converting to market-rate, unless the controls are extended. Meanwhile, the need for affordable housing persists.

These controls have begun to expire on post-Mount Laurel II affordable housing. This article aims to demystify the opportunities for extending expiring affordability controls, as well as steps to take to unwind controls that cannot be extended.

Expiring affordability controls, sometimes called "expiring use restrictions," is an important issue nationwide.[1] For example, rental affordable housing financed by federal Low Income Housing Tax Credits (LIHTC) initially required only a 15-year term of controls, later extended by Congress to 30 years, and now encouraged to be in effect for 45 years in New Jersey, but required to be 50 years and more in some states. To extend controls and preserve affordable housing, many states, including New Jersey, reserve some of their LIHTCs for preservation projects that finance needed rehabilitation and extend controls.

The length in years and the conditions in affordability controls have evolved in New Jersey since the 1980s.[2] Before COAH existed, Mount Laurel trial courts and municipalities experimented in fashioning affordability controls. Then followed several waves of standardizing rules adopted by COAH, DCA, and NJHMFA. During COAH's First Round (1987-1993), the term was at least 20 years for both ownership and rental affordable housing. During COAH's Second Round (1993-1999), the term changed to a maximum of 30 years for both ownership and rental affordable housing.[3] In 2004, NJHMFA, in cooperation with COAH and DCA, adopted uniform Housing Affordability Controls rules (UHAC) applicable to all three agencies, which prescribed controls for at least 30 years for both post-2004 ownership and rental housing.[4]

Options for extending controls also evolved.[5] COAH's First Round rules required the first seller after the controls expired on ownership units to offer the unit at a restricted sales price to the municipality, DCA, or a non-profit, before either: (a) selling the unit to another income-qualified household at a restricted price, beginning a new 20 year controls period; or (b) exercising a repayment option when the unit was sold, with 95 percent of the difference between the restricted and market prices paid to the municipality to be used for affordable housing and 5 percent retained by the seller. Or, a municipality could simply extend the term of controls by resolution, even without notice to the homeowner. Controls on rental units lapsed upon expiration of controls. The 2004 UHAC rules changed the recapture provision to the amount of subsidy that the buyer received at the time of the initial purchase of the unit. UHAC rules also, significantly, authorized municipalities to extend unilaterally the term of controls on both ownership and rental affordable housing, beyond the initial 30 years, by ordinance, essentially in perpetuity.

COAH's Third Round rules incentivized municipalities to take stock of their at-risk affordable units. COAH offered credits against post-1999 fair share housing obligations for existing post-1980 affordable units with controls scheduled to expire during 1999-2018 whose controls were extended by at least 30 years.[6] This prompted municipalities to pursue both voluntary and involuntary approaches to extending controls in housing elements and fair share plans prepared in the 2000s. Approximately 35 municipalities that have petitioned COAH in its Third Round have proposed extending controls on an estimated 3,000 affordable units.

Under the voluntary approach, a municipality identifies eligible affordable ownership units with controls scheduled to expire, pays a willing homeowner (typically $10,000 per unit), and records a new deed restriction that extends the controls for at least 30 years.

Under the involuntary approach, the municipality exercises its right, under standard COAH First or Second Round deed restrictions, to extend unilaterally controls on ownership units by merely adopting a resolution and recording the new deed restriction.

Both approaches have different financial, political, and practical considerations that should be weighed by a municipality before pursing either option.

Extending controls on privately owned, pre-2004 multifamily rental affordable housing is more challenging, because the involuntary approach is not an option. Instead, municipalities must negotiate with private and nonprofit developer-owners and typically pay for extended terms.

When controls on rental units expire, municipalities, through their "administrative agent(s)," must carefully unwind the controls, paying close attention to the interests of both tenants and the rental property owners. For example, rents could double when controls are lifted, but income-qualified tenants could also remain as tenants, with their homes continuing to be affordable. Municipal tax assessors should also be involved, because as rental units become market-rate their value and proper assessment increase. Expiring affordability controls are a significant opportunity for municipalities to preserve needed affordable housing, but extending controls requires diligence, initiative, attention to detail, and sensitivity to the diverse interests of homeowners, tenants, and rental property owners. Funds may also be required, which could be drawn from municipal affordable housing trust funds, provided extending controls is included in a municipal "spending plan" approved by COAH.

Unfortunately, without a statewide database of affordable units specifying their controls, if any, and their anticipated expiration dates, it is impossible to address this issue systematically.

COAH's offer of a second credit for extending controls on existing units prompted only some municipalities to extend controls. By contrast, California requires all municipalities to identify and analyze assisted housing units at risk of conversion to market rate over the next ten years and provide a plan for addressing those at risk over the next five years.[7] Amending New Jersey's Municipal Land Use Law[8] and the Fair Housing Act[9] to require similar analyses and planning would focus more and systematic attention on the risks and opportunities of expiring controls.

This issue is a challenge, but a nice problem to have, a testament to the production of 65,000 new affordable housing units in New Jersey under the Mount Laurel doctrine.

End Notes:

1 For an excellent discussion of this issue and experience, see Alan Mallach, "Preserving Affordable Housing" (Chapter 10), A Decent Home: Planning, building, and Preserving Affordable Housing. Chicago: Planners Press, 2009.

2 N.J.A.C. 5:92-12.1 et seq.

3 N.J.A.C. 5:93-9.1 et seq.

4 N.J.A.C. 5:80-26.1 et seq. The COAH Third Round rules (1999-2018) merely required compliance with and referenced UHAC; see N.J.A.C. 5:97-9.1.

5 This note merely highlights selected aspects of New Jersey affordability controls. The actual rules, recorded deed restrictions, and any applicable municipal ordinances must be consulted before analyzing the controls on any specific property with affordable housing.

6 N.J.A.C. 5:97-6.14. Initially adopted in 2004 at N.J.A.C. 5:94-4.16.

7 For the details of the required analysis and planning, part of the mandated housing element, see California Department of Housing and Community Development Housing Element, Identification and Analysis of Developments At-Risk of Conversion. www.hcd.ca.gov/hpd/housing_element2/EHN_atrisk.php—Requisite_Analysis

8 N.J.S.A. 40:55D-28.b.(3).

9 N.J.S.A. 52:27D-310. ▲