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Exclusionary Housing vs. Fair Housing: the Need for State Legislation

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On September 23rd, Westchester County settled a lawsuit with U.S. Department of Housing and Urban Development and the Anti-Discrimination Center of Metro New York under which it agreed to develop and carry out an implementation plan to construct 750 affordable housing units in Westchester communities with low percentages of African American and Hispanic households.[1] Under this agreement, the County will provide over $50 million to create housing in these communities; if needed, the County agreed to withhold benefits from the communities or to bring litigation against them if the 750 units are not constructed. The County will be supervised by a federal monitor.

The settlement arose from a civil action brought by the Anti-Discrimination Center against the County under the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729, for damages sustained by the United States Government. The County received federal funding for housing and community development from several federal funding programs including the Community Development Block Grant (CDBG) program. Recipients of such funding are required by the Housing and Community Development Act to affirmatively further fair housing under 42 U.S.C. § 5304(b)(2). From 2000 to present, the County certified its compliance with this requirement. The Anti-Discrimination Center alleged that the County had failed to take such actions and, as a result, that its certifications were false. The United States Government intervened and filed a complaint.

In order to avoid the cost and inconvenience of litigation, the parties reached a settlement. The settlement is not a concession by either side regarding the merits of the case. The details of the settlement are as follows:

It stipulates that the County is obligated to conduct an analysis of the impediments to fair housing and take action to overcome impediments identified. This includes ensuring that municipalities do not interfere with the County's efforts of furthering fair housing. In addition to providing funding for 750 units of affirmatively marketed fair housing, the County agreed to provide other incentives to local governments and to bring litigation where necessary to ensure compliance.

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[1] Westchester Gov.Com, Stipulation and Order of Settlement and Dismissal (2009), http://www.westchestergov.com/pdfs/Housingsettlementtext.pdf.

Of the 750 units, 630 must be provided in communities with fewer than 3% African American households and 7% Hispanic households. The remaining 120 units may be provided half in communities with 7% and 10% and half in communities with 14% and 16% African American and Hispanic populations, respectively. The units must be affirmatively marketed. No more than 25% of the units may be developed as age-restricted senior housing, and no more than 25% of the units may be achieved through the acquisition of existing housing units.

Fifty percent of the 750 units must be rental and 20% of these must be affordable to households earning 50% of Area Median Income or less ($52,650 for a four-person household) and 80% of the rental units must be affordable to those earning at or below 65% of Area Mean Income ($63,180 for a four-person household). Fifty percent of the 75 units may be owner occupied for households earning at or below 80% of Area Median Income ($84,200 for a four-person household). All units provided under the settlement must remain affordable for 50 years.

State Legislative Action

Exactly one week before the County approved the settlement, the Governor vetoed the Westchester County Workforce Housing Incentive Program bill which passed both the Senate and the Assembly.[2] The bill is comparable to the Long Island Workforce Housing Act that was enacted in 2008.[3] Both require local governments in the affected areas to give 10% or greater zoning bonus densities to the developers of all new projects involving five or more residential units and require that 10% of the units be affordable workforce housing. Under the Westchester County bill, the required units had to be affordable to households earning 80% or less of Westchester's Area Median Income.

The density bonus was to be given on the maximum allowable density under the applicable zoning at the time an application for a project is submitted. This language does not seem to allow for reductions in the likely number of units that would be approved under subdivision and environmental review standards, which typically lower the prescribed zoning densities. The bill further specified that the density bonus units shall not be included in calculating the 10% of units that must be affordable. In certain cases where local governments make findings that the affordable units are not suitable on site, the developer may be required instead to develop them off site or to make a payment into a trust fund for affordable housing.

If the Governor had not vetoed this bill, municipalities in Westchester would have been required to adopt a local law that specifies how they would implement this law and establish procedures for waiving or modifying standards that inhibit the "utilization of the bonuses on specific sites." These local laws would have to provide that the affordable units will remain affordable for 30 years or more in certain instances. It is obvious that the 31 communities in Westchester that are subject to the County settlement agreement would have had very different obligations under the Workforce Housing Incentive Program law.

[2] Westchester County Workforce Housing Incentive Program, Bill S4946, A3173, available at http://open.nysenate.gov/openleg/api/html/bill/S4946.
[3] NY CLS Gen Mun, Art. 16-A, § 699 (2009).

There is no state-wide legislation in New York that requires local governments to provide affordable housing. Contrast this to New Jersey where, since 1985, the state legislature has enacted and amended state legislation establishing housing regions, allocating fair shares to municipalities within those regions for the construction of new affordable housing, and awarding builders zoning remedies where municipalities fail to amend their zoning to comply with their fair share.[4] In Connecticut, the state legislature adopted the Affordable Housing Land Use Appeals Act of 1990, which expressly reverses the presumption when a municipality denies a developer's application to construct affordable housing. Under the Act, a municipality that denies such an application carries the burden of proving that its action is justified by showing not only that the denial was necessary to protect substantial public interests in health and safety, but that these interests clearly outweigh the need for affordable housing. Connecticut communities, in which at least 10 percent of the housing stock is affordable to low and moderate income families, are exempt from the application of this statute.[5]

Exclusionary Municipal Zoning: Berenson v. Town of New Castle

The 1975 seminal Court of Appeals decision, *Berenson v. New Castle*,[6] declared "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."[7] This case and an associated line of cases establish the legal rules used by courts in New York to decide whether municipal zoning unconstitutionally excludes affordable types of housing. These cases establish standards that urge localities to adopt inclusionary zoning provisions, while urging the state legislature, in turn, to provide for regional and state-wide planning in these matters.

The first *Berenson* case was brought in the early 1970s. The plaintiff was a land developer aggrieved by the absence of any provision in the Town of New Castle zoning ordinance that allowed the construction of multi-family housing. The plaintiff claimed that the state derived its power to zone from the state constitution and that the authority to zone had to be exercised in the interest of all of the people of the state. The plaintiff further claimed that zoning prohibiting construction of affordable types of housing unconstitutionally excludes a large portion of the state's population.

The first formal opinion was rendered by the New York Court of Appeals in 1975. The court established a test to be applied by the courts when determining the reasonableness of local zoning ordinances. The test includes two factors: (1) "whether the town has provided a properly balanced and well ordered plan for the community . . . that is, are the present and future housing needs of all the town's residents met;" and (2) whether regional needs have been considered.[8] After adopting these guidelines, the state's highest court remanded the case for trial to the

[4] N.J. Stat. Ann. Sections 52:27D-301 et seq. (2007).
[5] Conn. Gen. Stat. § 8-30g (2002).
[6] 38 N.Y.2d 102 (N.Y.1975).
[7] Id. at 109-110.
[8] Id. at 110.

Supreme Court in Westchester County, which decided the case in 1977.[9] The court found that New Castle's ordinance violated both prongs of the test. The zoning ordinance was declared invalid to the extent that it failed to allow for multifamily development at densities of at least eight units to the acre. New Castle was directed to issue a building permit for the project and given six months to amend its ordinances to provide for the construction of 3,500 units of multifamily housing over a 10-year period.

The Appellate Division upheld the lower court's declaration of the invalidity of the ordinance and the requirement that the plaintiff's land be rezoned.[10] It reversed the judicially prescribed fair share goal and the requirement that the town award a specific density for the plaintiff's development and ordered New Castle to remedy the constitutional problems in its ordinance within six months. The immediate result was the development of upper-income condominiums on the plaintiff's land. Twenty-five years later, very little additional multifamily housing has been developed in the town.

A third factor was added to the *Berenson* test *in Robert E. Kurzius, Inc. v. Village of Upper Brookville.*[11] The court held that if the ordinance was enacted with an exclusionary purpose it would fail constitutional examination. In *Allen v. Town of North Hempstead*, decided in 1984, a durational residency requirement imposed as a precondition to qualifying for residence in a Golden Age Residence District was found to violate *Berenson's* standards, and was therefore unconstitutional.[12] The court wrote that "[t]he durational residence requirement at bar has a more direct exclusionary effect on nonresidents like plaintiffs than the almost total exclusion of multi-family housing held to be unconstitutional by this court [in *Berenson*]."[13]

In *Suffolk Housing Services v. Town of Brookhaven*, the plaintiff alleged that Brookhaven's zoning ordinance was unconstitutional under *Berenson* because it did not allow for enough low-income housing.[14] While the court expressed an abhorrence of "unconstitutional zoning barriers that frustrate the deep human yearning of low income and minority groups for decent housing they can afford in decent surroundings,"[15] it held that Suffolk Housing Services failed to "overcome the presumption of the constitutionality of the Brookhaven zoning ordinance. . . ."[16]

In *Continental Building Co., Inc. v. Town of North Salem*,[17] the plaintiff developer challenged the 1987 rezoning of its land by the town of North Salem. This rezoning reduced the number of residential units permitted on the parcel from 184 to 16. In 1979, North Salem had been ordered by the Supreme Court to adopt zoning that would provide 200 units of multifamily housing in the

[9] Unpublished opinion, Westchester County Sup.Ct. (Dec. 30, 1977), discussed in Berenson v. Town of New Castle, 415 N.Y.S.2d 669, 670 (N.Y. App. Div. 1979).
[10] Berenson v. Town of New Castle, 415 N.Y.S.2d 669 (N.Y. App. Div. 1979)
[11] 414 N.E.2d 680 (N.Y.1980), cert. denied, 450 U.S. 1042 (1981).
[12] Allen v. Town of North Hempstead, 478 N.Y.S.2d 919 (N.Y. App. Div. 1984).
[13] Id. at 922.
[14] Suffolk Hous. Servs. v. Town of Brookhaven, 511 N.E.2d 67 (1987).
[15] Id. at 71.
[16] Id. at 69.
[17] 567 N.Y.S.2d 328 (1991).

town.[18] The trial court agreed, holding again that North Salem's zoning was unconstitutional under *Berenson*, and adding an affordability standard to the multifamily requirement. The court also awarded Continental attorneys' fees and costs amounting to $750,000 under 42 USC § 1988. The town's submission of its corrective actions to the court in compliance with this order was not completed until 2002.

These cases fall short of an effective judicial requirement to adopt inclusionary zoning at the local level. They require local zoning to include multifamily housing where local and regional needs are unmet; they caution localities against acting overtly to exclude, and they suggest that local zoning officials should periodically examine whether their ordinances have provisions that, in a court challenge, could be said to invite persons of modest income to live in the community. The obvious limitation affecting the courts in this field is the same one that faces a local government that wishes to be inclusionary: the lack of a definition of its affordable housing responsibility. What is the standard for its performance? What is its share of the regional need? What is its housing region? Who is it that is in need of housing within that region? What incomes do they have? How many of them are there? What is our proportionate share of that need?

Legal Claims Against Communities with Low Percentages of Minorities

The courts have made it clear that beyond certain minimum judicial supervision of local zoning, requiring municipal governments to provide affordable housing is a matter for legislative action. At the federal level, we have known this since 1972 when the Court stated that "We do not denigrate the importance of decent, safe, and sanitary housing. But the [U.S.] Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality…."[19] In the 1975 *Berenson* case, the court noted that "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."[20] While the legislatures of our sister states have acted aggressively to ensure that localities provide affordable housing through zoning, New York's has been silent, except for the modest 2008 Long Island Workforce Housing Act.

The limited holdings of the New York courts regarding exclusionary zoning and the virtual absence of relevant state legislation raise interesting questions under the Westchester False Claims Settlement Agreement. Does the Settlement Agreement convey standing on the County to sue local governments for exclusionary zoning? If so, would a community with multifamily zoning be liable where the County can show that it is not meeting its obligations under the Settlement? Does the County have the power to claim that affordable housing projects under the Settlement are County projects and, thus, are exempt from local zoning? In a state where the

[18] 208 East 30th Corp. v. Town of North Salem (Westchester Co. Index No. 12588/1979). The Town's appeal was dismissed by the Appellate Division, 488 N.Y.S.2d 723 (N.Y. App. Div. 1982).
[19] Lindsey v. Normet, 405 U.S. 56, 74 (1972).
[20] *Berenson*, 38 N.Y.2d at 111.

courts have crafted modest judicial remedies and where the legislature has delegated all relevant power to regulate private land to towns, villages, and cities, these are novel questions.