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Local Housing Efforts: The Maturation of Laws Promoting Affordability

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Abstract: A shortage of workforce housing, especially in the New York metropolitan area where real estate prices are rapidly increasing, has long been a critical land use issue. Since amendments to New York state law that explicitly stated municipalities' implied power to incentivize affordable housing, municipalities have begun to create innovative laws to promote affordable housing. This review describes some of the basic concepts behind the affordable housing movement, and the considerations of local legislatures in defining, and providing for affordable housing.

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On March 21, 2006, the New Rochelle City Council voted unanimously to adopt an affordable housing law that requires developers to set aside 10% of the floor area of new developments for affordable housing units or pay a buy-out fee into an affordable housing trust fund. New Rochelle Zoning Code Article XIX, Section 331-152. The law will have a significant impact on the affordable housing stock in the City because there are currently approximately 2,000 new market rate housing units being built or in the planning stage. With the adoption of the law, the City joins an impressive number of other municipalities that have adopted similar laws. These include, among others, the City of White Plains, City of Yonkers, Town of Bedford, Town of Greenburgh, Village of Hastings-on-Hudson, Town of North Salem, Village of Port Chester, and Town of Somers. New York City has an affordable housing initiative under Mayor Bloomberg with a goal of 165,000 units by 2013. It is a $7.5 billion plan, the largest in the nation's history, and will provide affordable housing for 500,000 New Yorkers.

After 60 years of experimentation in New York, municipal housing laws of this sort are maturing and trends can be described and analyzed by practitioners. Beginning in 1947, the Village of Tarrytown invented the floating zone for garden apartments to house returning veterans, create a work force, and attract employers. *Rodgers v. Village of Tarrytown*, 96 N.E.2d 731 (1951). In the late 1970s, the northern suburb of Lewisboro adopted the successful bonus density incentive approach created in Montgomery County, Maryland to provide

moderate-cost, below market rate houses with a preference given to local workers. With amendments in 1991 and 1992, the state legislature made explicit the implied power of towns, villages, and cities to provide zoning incentives for affordable housing, among other "public benefits." Town Law § 261-b(2); Village Law § 7-703(2); General City Law § 81-d(2). Since then, the number of municipalities adopting affordable housing laws has steadily increased and the choices they have made in crafting them are now more evident.

Despite these impressive inventions and their success in providing various levels of below market rate housing, continued and increased inflation in housing prices throughout the New York metropolitan area over the past decade has exacerbated the shortage of workforce housing. The latest response to this problem is the new law in the City of New Rochelle and, in the City's initiative, practitioners can learn about the choices municipalities are making in fashioning zoning laws that facilitate or require the development of affordable housing. These choices include, among others, whether to encourage or require developers to provide affordable housing; whether such housing should be rental or for sale; the incomes of the households that are to benefit from affordable housing; whether to stipulate that developers provide housing on site, off-site, or to contribute to a local trust fund; whether to create a preference scheme to ensure that local workers' needs are met first; and how long to perpetuate the affordability of the newly created units. Several of these choices are examined in this article in the context of New Rochelle's new affordable housing law.

1. Defining Affordability. Unless the developer plans to use federal or state subsidies or tax incentives that require certain levels of affordability, defining who is to be housed in new units is a matter of local choice. For the most part, local housing laws reference the area median income based on the U.S. census as updated by the U.S. Department of Housing and Urban Development. New Rochelle's new law, for example, requires that rental units be affordable for those that earn a moderate income. The purpose section of the law states that the "City Council … is deeply concerned that there are insufficient opportunities for individuals and families of Low Income, Moderate Income, and Median Income to purchase or rent dwelling units in the City." Moderate income is defined as an "[a]nnual household income which does not exceed eighty (80%) percent of the Westchester County median annual income for its household size." New purchase housing (single family homes, condominiums, coops, subdivisions) is for families whose "[a]nnual household income … does not exceed one hundred (100%) percent of the Westchester County median annual income for its household size." Low income is defined as an "[a]nnual household income which does not exceed sixty (60%) percent of the Westchester County median annual income for its household size." To ensure a unit is affordable the law requires that the cost of renting or owning the home cannot exceed 30% of the household income. This is a standard national approach based upon how much a household can spend for housing and still meet its other essential needs: food, clothing, education, healthcare, transportation, etc.

2. Amount and Type of Affordable Housing Required: The New Rochelle law requires that new residential and mixed-use developments containing more than ten rental units set aside at least 10% of the floor area for *Moderate* Income Housing Units. New developments that contain more than ten for-sale housing units must set aside at least 10% of the floor area for *Median* Income Housing Units. The units must be distributed throughout the development and cannot be significantly different from the market rate units. The proportion of one, two, and three bedroom affordable units cannot be different from the proportion of market rate units. The floor area of the individual affordable unit cannot be less than 90% of the average floor area of the market rate housing units.

3. Duration of Affordability: Unlike some other local affordable housing laws that only require the units remain affordable for some set period of time, the New Rochelle law requires that the units remain affordable for the life of the building. To ensure that a unit stays affordable, a restrictive covenant that runs for the life of the building must be recorded against the property before a certificate of occupancy will be given. The Department of Development or a City Council designee will be responsible for the administration and enforcement of the covenants. When a renter moves out of one of the affordable rental units, the new renter must be of moderate income and the rent shall not exceed the then current rent for a Moderate Income Housing Unit. The for-sale housing units can only be resold to buyers who are of median income, and the sales price must not exceed the then current sales price for a Median Income Housing Unit.

4. Buy-Out Options for Developers: For projects in excess of ten units, a payment to New Rochelle's Affordable Housing Fund may be made in lieu of providing affordable housing units within the project. The fee is "the differential between a) the typical construction cost, including land and improvements, of a new three (3) bedroom Moderate Income Housing Unit in the City, and (b) the typical sales price for a new three (3) bedroom Moderate Income Housing Unit in the City." The City has calculated a flat fee for 2006 that is $33.33 per square foot for the portion of the square footage that is less than 50% of the required square footage and $66.67 per square foot for the square footage that is 50% or more of the required square footage. For developments of three to ten units outside the Downtown Area, a payment to the Fund is required in the amount of $25 per square foot for the 10% floor area. Payments to the Fund must be made before issuance of the first temporary or permanent certificate of occupancy for purchase housing and before the issuance of the building permit for rental construction.

5. Use of Buy-Out Funds: All fees paid are deposited in the City's Affordable Housing Fund. Money in the fund is to be used to acquire land for low income or moderate income housing units, the construction of those units, renovation or rehabilitation of existing low income or moderate income housing units, or direct assistance to persons purchasing moderate income housing units,

with preference to New Rochelle residents. "The monies appropriated from the Affordable Housing Fund for such Affordable Housing Programs shall be allocated so that the aggregate floor area square footage of new Low Income Housing Units and Moderate Income Housing Units created through the assistance of such Fund shall not, in any given City Council District over any given ten (10) year period, exceed 50% of the total floor area square footage of such Low Income Housing Units and Moderate Income Housing Units so created in the entire City during such period of time."

6. Use of Bonus, or Incentive, Zoning: To encourage developers to set aside floor area for affordable housing units within the project itself, the developer will qualify for a density bonus that allows for an increase in the maximum floor area of the rental housing. For example, if all 10% of the required floor area for affordable housing is provided on site, then an increase in the floor area square footage is allowed that is equal to 15% above the maximum floor are ratio allowed in the district and the project can exceed the maximum building height by one floor. Five percent of the increase in floor area can be used for market rate housing. When less than 10% of the floor area is set aside for affordable units on site, the developer can exceed the floor area allowed in the district by the amount of affordable housing square footage built on the site.

7. No Net Loss of Affordable Housing: To ensure that the current stock of affordable housing is not lost by new development, the law contains a demolition provision. If a building containing low income housing and/or moderate income housing is demolished, then the units must be replaced in the new construction in similar kind. For those units not replaced, a fee must be paid.

8. Local Preferences: The New Rochelle law does not contain a preference scheme to ensure that local workers' or current residents' needs are met first. In contrast, the White Plains affordable housing law includes a preferencing system to ensure that the affordable units are first available to City employees, next to retirees of the City, and then to current residents of the City, followed by non-residents who meet certain income requirements.

We last looked at the topic of affordable housing in 1998 in a New York Law Journal article titled *Exclusionary Zoning: Limited Relief Provided in New York*. That article focused on the obligation of municipalities to accommodate affordable housing in their zoning ordinances. Municipalities cannot exclude from their residential zoning districts types of accommodations, such as multi-family housing, that generally are more affordable than single-family homes on individual lots. The 1998 article concluded that missing in New York is a reliable definition of housing need and municipal responsibility regarding that need. The New Rochelle law and the many others adopted by municipalities in the last few years constitute an effort to fill that gap.

Local affordable housing law begins with the adoption of zoning laws that encourage or require affordable housing of the type discussed in this article. Of course, there is much more to the subject than municipal zoning. In future articles, and at a regional conference scheduled for November 16, 2006, the authors will explore additional regulatory and non-regulatory techniques employed from Manhattan to Albany to provide below market rate workforce housing. Practitioners with experience in using any successful mechanisms, or who would like to attend the conference, are encouraged to contact the authors at jbacher@law.pace.edu.