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# STUDENT PIECES

## **Inclusionary Zoning in Westchester County, New York: Is it a Viable Tool to Reduce a County-Wide Housing Crisis?**

**Ann S. Matthews\***

### I. Introduction

Affordable Housing is more than a simple catch-phrase or the focus of a *pro bono* program. It is a real and present issue for towns, counties, states and the nation as a whole. As communities struggle to address housing needs, numerous innovative legal techniques and solutions are emerging and the topic of affordable housing is developing into its own distinct area of legal practice.<sup>1</sup> Perhaps this development is attributable to the fact that the solution, if attainable, will involve a multitude of

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1. The American Bar Association recognizes affordable housing as a new area of developing law and created The Forum on Affordable Housing & Community Development Law. Affordable Housing & Community Development Law Page, <http://www.abanet.org/forums/affordable/home.html> (last visited Sept. 4, 2006). The forum's stated purpose is to "serve[] as a clearinghouse of information and programs related to affordable housing and community development. We coordinate training programs for lawyers practicing in the field of affordable housing and community development and provide educational programs focusing on new issues and ongoing concerns." ABA Forums, Forum Profiles, <http://www.abanet.org/forums/home.html> (last visited Sept. 4, 2006). See also Diane M. Standaert, *Affordable Housing and Community Development Needs Lawyers*, STUDENT LAW, Nov. 2005, at 37.

legal and non-legal factors, such as, community acceptance, land use regulations, public funding, private funding, politics, and partnerships between public and private entities.<sup>2</sup>

The recognition of an affordable housing crisis is not new to this nation.<sup>3</sup> In 1949 Congress passed the Housing Act of 1949 and stated that the country should attain “as soon as feasible . . . the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation.”<sup>4</sup> While progress towards this goal has been made since 1949, the role of the federal government is decreasing and the role of local governments is increasing.<sup>5</sup>

The State of New York is not immune to this problem and is facing a continuing need for affordable housing.<sup>6</sup> Westchester County, in particular, faces a housing crisis and the county government describes the lack of affordable housing as “one of the most critical issues facing our County.”<sup>7</sup> While numerous techniques are available to local governments, Westchester County specifically identifies inclusionary zoning as a positive, low cost, and viable tool to solve its county-wide housing shortage.<sup>8</sup> The county notes that inclusionary zoning involves the private sector in the process and can encourage the construction of units where it might otherwise be cost prohibitive.<sup>9</sup> The county also

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2. THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT xxviii (Tim Iglesias & Rochelle E. Lento eds., 2005).

3. *Id.* at xxvii (stating that The Housing Act of 1949, 42 U.S.C.A. § 1441 (West 2005), recognized the need for affordable housing).

4. The Housing Act of 1949, 42 U.S.C.A. § 1441 (West 2005). In addition to recognizing the need for affordable housing in the Act, Congress also touched upon the resulting social and economic benefits that result from every American having a home. THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT, *supra* note 2, at xxvii.

5. THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT, *supra* note 2, at xxvii.

6. Julie M. Solinski, *Affordable Housing Law in New York, New Jersey, and Connecticut: : Lessons for Other States*, 8 J. AFFORDABLE HOUS. & CMTY. DEV. L. 36, 36 (1998).

7. Westchester County Department of Planning Home Page, <http://www.westchestergov.com/housing> (last visited Sept.,4, 2006).

8. Westchester County Department of Planning Home Page, <http://www.westchestergov.com/housing/> (follow “Inclusionary Zoning Helps Build Housing” hyperlink) (last visited Sept. 4, 2006).

9. *Id.*

points to advantages of inclusionary zoning, such as, “[w]hen developed on the same site as market rate units, affordable units are indistinguishable from market rate units” and it “encourages the building of affordable housing at a time when the financial resources needed to compensate for the high costs of development are shrinking.”<sup>10</sup>

Inclusionary zoning ordinances are enacted by local governments to increase the construction of low and moderate income affordable housing.<sup>11</sup> The ordinances are aimed at developers and may either act to encourage a developer to build affordable units in exchange for increased density bonuses, or mandate that a certain percent of affordable units be constructed in conjunction with the developer’s project.<sup>12</sup> The “mandatory” ordinances are termed “mandatory set-asides” and require developers to set-aside a certain percent, on average 15%, of the units for sale to qualifying low or moderate income persons.<sup>13</sup> The construction of the ordinances varies from municipality to municipality and may include alternatives to strict on-site construction of units, such as, off-site construction, fee-in-lieu of payments, or the donation of either on- or off-site lands to a community affordable housing fund.<sup>14</sup>

This article will discuss the lack of affordable housing in Westchester County, New York and whether mandatory set-asides are a viable means to produce an increased number of units within the county. As of September 2005, only eight of the forty-three municipalities in Westchester have employed mandatory set-asides.<sup>15</sup> These include: (1) the Town of Bed-

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10. *Id.* It is worth noting that even in its brief description of inclusionary zoning, the county addresses the concern that affordable housing could create an eyesore in the community and states that affordable units can appear just as attractive as an otherwise market rate unit. *Id.*

11. Cecily T. Talbert & Nadia L. Costa, *Inclusionary Zoning*, in *CURRENT TRENDS AND PRACTICAL STRATEGIES FOR LAND USE LAW AND ZONING* 145, 145 (Patricia E. Salkin ed., 2004).

12. *Id.*

13. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW* 282 (1998).

14. Talbert & Costa, *supra* note 11, at 145. The Town of Bedford’s affordable housing zoning ordinance is a good example. BEDFORD, N.Y., ZONING CODE § 125-29.6 (2006), available at <http://www.bedfordny.info/html/code.html> (follow “General Code” hyperlink).

15. WESTCHESTER’S LOCAL HOUSING DESKBOOK ch. 3 (Rosemarie Noonan & Nancy Bensal eds., 2005) [hereinafter *HOUSING DESKBOOK*].

ford;<sup>16</sup> (2) the Town of Greenburgh;<sup>17</sup> (3) the Village of Hastings-on-Hudson;<sup>18</sup> (4) the Town of North Salem;<sup>19</sup> (5) the Village of Port Chester;<sup>20</sup> (6) the Town of Somers;<sup>21</sup> (7) the City of White Plains;<sup>22</sup> and (8) the City of Yonkers.<sup>23</sup> This article will focus on Bedford, Somers, White Plains and Yonkers and hopes to serve as a tool for other municipalities to use in considering whether to use mandatory set-asides to generate affordable housing.

Section II will define affordable housing and address some of the misconceptions concerning which segments of the population seek affordable housing in Westchester County. It will also describe the county government's identification of the housing need, its history of action regarding the construction of affordable housing, and the role it continues to take in encouraging and supporting municipal action.

Section III will define inclusionary zoning and mandatory-set-asides in greater depth. It will then discuss New York's inclusionary zoning law and what constitutional basis inclusionary zoning has in the law. Section III will also address whether a municipality has an obligation to provide affordable housing for its residents and the region as a whole. It will conclude with examples from around the country where inclusionary zoning has been successful.

Section IV will present a detailed description of the mandatory set-aside ordinances employed by the municipalities of Bedford, Somers, White Plains, and Yonkers. It will also present the number of affordable units built in each community resulting from adoption of the ordinances.

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16. BEDFORD, N.Y., ZONING CODE §§ 125-29.3 to 125-29.6 (2006), *available at* <http://www.bedfordny.info/html/code.html> (follow "General Code" hyperlink).

17. GREENBURGH, N.Y., CODE § 285-41 (2005), *available at* <http://www.greenburghny.com> (follow "Town Code" hyperlink).

18. VILLAGE OF HASTINGS-ON-HUDSON, N.Y., CODE § 295-112.1 (2005), *available at* <http://www.hastingsgov.org/docs/CODE.htm>.

19. NORTH SALEM, N.Y., CODE ch. 250 (2005), *available at* <http://www.northsalemny.org/forms.html> (follow "Zoning Ordinance" hyperlink).

20. VILLAGE OF PORT CHESTER, N.Y., CODE ch. 345 (2005), *available at* <http://www.portchesterny.com> (follow "Village Code" hyperlink).

21. SOMERS, N.Y., CODE ch. 170 (2005), *available at* <http://www.somersny.com/Links/default.htm> (follow "Somers Town Code" hyperlink).

22. WHITE PLAINS, N.Y., CODE § 5.4.1.5.1 (2006).

23. YONKERS, N.Y., CODE §§ 43-191 to -195 (2006), *available at* <http://cityofyonkers.com/> (follow "Publications" hyperlink; then follow "Yonkers City Code" hyperlink).

Finally, Section V will be a comparative analysis of the selected mandatory set-aside zoning ordinances. It will suggest why some municipalities have been more successful than others in using this technique and whether inclusionary zoning is an effective means of achieving the goal of increased affordable housing in Westchester County, New York.

## II. The Westchester County Housing Crisis

According to the Westchester County Government website, “[f]or a home to be affordable, it must cost no more than 30% of the monthly household income for rent (mortgage/taxes) and utilities. ‘Affordable’ housing refers to housing that is guaranteed to remain affordable for a period of time to families who qualify under specific income guidelines.”<sup>24</sup> Some posit that there should not be a strict definition or formula for affordable housing and that it exists any time a segment of the population can no longer afford to live within a community.<sup>25</sup> In broader terms, Westchester County defines affordable housing as including “housing for working families with financial restrictions (our young people, our older residents, the employees of our corporations and our teachers, police and firefighters) . . . .”<sup>26</sup>

There is a national housing crisis. According to the National Low Income Housing Coalition, the 2004 “national housing wage”<sup>27</sup> was \$15.37 per hour while the federal minimum wage was only \$5.15 per hour.<sup>28</sup> The Coalition named New York as one of the least affordable states with a housing wage of \$18.18 and Westchester County as one of the top ten least affordable communities with a housing wage of \$24.21.<sup>29</sup> This disparity in earnings to buying power results in the movement

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24. Westchester County Department of Planning Home Page, <http://www.westchestergov.com/housing> (follow “What is Affordable Housing” hyperlink) (last visited Sept. 4, 2006).

25. A LOCAL LEADER’S GUIDE TO MEETING HOUSING NEEDS 1 (Matthew Stauffer ed., 2003).

26. Westchester County Department of Planning Home Page, <http://www.westchestergov.com/housing> (last visited Sept. 4, 2006).

27. 33 Hous. & Dev. Rep. 6 (West) (Jan. 3, 2005). The “national housing wage” statistic is a measure of what a full-time worker would need to earn in order to pay no more than 30% of his income to rent a modest two-bedroom home. *Id.*

28. *Id.*

29. *Id.* Westchester shared this distinction with “San Francisco, \$29.60; Stamford-Norwalk, Conn., \$27.63; Ventura, Calif., \$26.58; Santa Cruz-Wat-

of affordable units from the core of metropolitan business centers to the urban fringe.<sup>30</sup> Thus, a “doughnut hole” effect is created where some affordable units remain at the core, with a wide ring of unaffordable units surrounding the core and affordable units on the perimeter and thus away from the concentration of jobs.<sup>31</sup> The National Association of Homebuilders warns that a lack of affordable work force housing can create negative consequences for a community.<sup>32</sup>

Essential workers must either commute longer or live in less desirable homes or neighborhoods to be closer to their jobs. If communities do not provide affordable housing for the mix of jobs required to make them function, filling those jobs and maintaining essential services become more expensive and more difficult . . . .<sup>33</sup>

What level of government should bear the burden to alleviate the crisis? Although Congress initially vested this job with the Department of Housing and Urban Development (HUD),<sup>34</sup> the HUD Secretary has since recognized that local governments are both the source of the affordable housing problem and its solution.<sup>35</sup> The HUD Secretary suggests that exclusionary zoning<sup>36</sup> at the local level has driven up housing costs and in turn driven out affordable housing.<sup>37</sup> However, the Secretary stated that it is both his and the current administration’s policy that “meeting the nation’s affordable housing needs will not come out of Washington.”<sup>38</sup>

In accordance with HUD’s philosophy to vest local governments with the responsibility of providing affordable housing, Westchester County took action and voluntarily developed an

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sonville, Calif., \$25.90; Oakland, \$25.81; Orange County, Calif., \$25.33; San Jose, \$25.25; Boston, Mass.-N.H., \$24.35; . . . and Nassau-Suffolk, N.Y., \$23.56.” *Id.*

30. *Id.* at 9.

31. *Id.*

32. *Id.*

33. *Id.*

34. HUD was created in 1965 under the Housing and Urban Development Act. [need citation to Act]

35. 30 Hous. & Dev. Rep. 79 (West) (June 10, 2002).

36. Exclusionary zoning exists where “local zoning ordinances prevent non-affluent households from living in the community. . . .” A LOCAL LEADERS GUIDE TO MEETING HOUSING NEEDS, *supra* note 25, at 2.

37. 30 Hous. & Dev. Rep. 79, *supra* note 35.

38. *Id.*

allocation plan for its forty-three municipalities.<sup>39</sup> After a decade of various task forces and studies, the Board of Legislators created the Housing Implementation Commission in 1990.<sup>40</sup> The Commission was charged with developing an allocation plan to dole out the responsibility for creating a target 5000 affordable units from 1990-2000.<sup>41</sup> This was an innovative plan in light of the fact that county governments in the state of New York possess neither the power to build the units or to adopt zoning.<sup>42</sup> Instead, the county government harnessed its authority to provide resources and technical assistance to the localities so that they could take the most appropriate action to meet their allocation numbers.<sup>43</sup> In order to fairly allocate responsibility among the diverse municipalities, the following four factors were considered: “(a) the aggregate excess household income (1989); (b) municipal acreage after deduction of the aggregate area of interior water bodies, watershed lands, dedicated park lands and cemeteries; (c) employment generated housing demand (1980-1990); [and] (d) presence of overcrowded housing units (occupied by more than one person per room).”<sup>44</sup> All of the municipalities were assigned target numbers for the period of 1990 through 2000 and as a whole; the County realized an unmet obligation of 3360 units.<sup>45</sup> Of the 5000 units allocated, only 2309 were built within the ten year period.<sup>46</sup> In fact, some towns such as Somers, Pound Ridge, Scarsdale, and Eastchester report zero units built.<sup>47</sup>

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39. Solinski, *supra* note 6, at 49-52.

40. *Id.* at 49; Patricia E. Salkin, *Local Initiative: The Westchester Experience*, 2 N.Y. ZONING L. & PRAC. § 20:15 (Apr. 2005).

41. Salkin, *supra* note 40.

42. *Id.*

43. *Id.*

44. *Id.*

45. Draft Affordable Housing Allocation Plan 2000-2015, Westchester County Housing Opportunity Commission, Table A (July 14, 2005), <http://www.westchestergov.com/planning/housing/Reports/AllocationMethodology1.pdf> [hereinafter Allocation Plan].

46. *Id.*

47. *Id.* Bedford was allocated 198 units and built 68; Somers was allocated 188 and built none; White Plains was allocated 344 and built 97; and Yonkers was allocated 547 units and built 829 (282 units above the allocated amount. *Id.* Note, these numbers represent the total number of units and do not reflect what portion, if any, are the result of inclusionary zoning. The raw numbers attributable to inclusionary zoning are contained in Section IV of this article.



When the Housing Implementation Commission's term ended in 1993, the Board of Legislators took action and enacted a new commission in 1994 – The Westchester County Housing Opportunity Commission (HOC).<sup>48</sup> The HOC was charged with encouraging municipal participation in the allocation plan and to develop a method to monitor each locality's performance.<sup>49</sup> To that end, the HOC created a guide to Affordable Housing Development in 1997.<sup>50</sup> In addition to suggesting tools, such as, property tax abatement, tenant subsidies and a grant system, the plan also encourages enactment of inclusionary zoning ordinances.<sup>51</sup>

The allocation plan (the Affordable Housing Allocation Plan 2000-2015), currently in place, takes into account the 3360 unmet units from the previous plan and provides that a total of 10,768 affordable units are required to meet the County's needs over the fifteen year period.<sup>52</sup> The subject municipalities of this article were allocated the following obligations (representing the unmet obligation from the previous period and the newly assigned amount): Bedford, 400 units; Somers, 226 units; White Plains, 600 units; and Yonkers, 895 units.<sup>53</sup> In addition to the four factors used to allocate responsibility in the 1990-2000 period, the HOC also considered the impact of traffic congestion.<sup>54</sup> The availability of public transportation was measured by the B-Line Bus route mileage in each municipality.<sup>55</sup>

### III. Inclusionary Zoning and Mandatory Set-Asides in New York

Whether or not a community has identified an affordable housing need within its borders, it is important to note that there is no constitutionally established right to receive housing, affordable or otherwise.<sup>56</sup> In 1972 the United States Supreme

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48. Solinski, *supra* note 6, at 50; Salkin, *supra* note 40.

49. Solinski, *supra* note 6, at 50; Salkin, *supra* note 40.

50. Salkin, *supra* note 40.

51. *Id.*

52. Allocation Plan, *supra* note 45, at Table C.

53. *Id.*

54. *Id.* at 3.

55. *Id.*

56. THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT, *supra* note 2, at xxvii; Solinski, *supra* note 6, at 36.

Court held that the Constitution does not provide a guarantee to housing access:

We do not denigrate the importance of decent, safe, and sanitary housing. But the 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 . . . . Absent constitutional mandate, the assurance of adequate housing . . . [is a] legislative, not [a] judicial, function[ ].<sup>57</sup>

Likewise, there is no federal or state obligation to provide low or moderate income housing.<sup>58</sup> However, communities and scholars have long recognized the benefits of providing housing for a broad range of income levels and creating residential diversity within a community.<sup>59</sup> Westchester County has identified six significant ways that affordable housing benefits the County: (1) Provides housing for the local workforce; (2) Revitalizes distressed areas; (3) Increases jobs and sales tax revenue; (4) Reduces commuter traffic and in turn improves air quality; (5) Promotes economic integration; and (6) Encourages volunteer emergency service workers to live within the community.<sup>60</sup>

Inclusionary zoning represents a community's desire to affirmatively include low and moderate income housing within its borders.<sup>61</sup> Although the legality of inclusionary zoning has not been firmly decided, its popularity has grown and is responsible for producing approximately 100,000 affordable units throughout the country.<sup>62</sup> In the neighboring state of New Jersey, inclusionary zoning is responsible for approximately 15,000 to 20,000 new units.<sup>63</sup>

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57. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); *see also Solinski, supra* note 6, at 37 (discussing whether there is a constitutional right to housing).

58. Solinski, *supra* note 6, at 37.

59. For a discussion on the benefits of a diverse community, *see* Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289 (2002).

60. Westchester County Department of Planning Home Page, <http://www.westchestergov.com/housing/> (follow "What is Affordable Housing" hyperlink) (last visited Sept. 4, 2006).

61. *See* 1 ZONING AND LAND USE CONTROLS § 3.07[1] (Patrick J. Rohan & Eric Damian Kelly eds., Sept. 2005).

62. Talbert & Costa, *supra* note 11, at 145-46.

63. *Id.* at 146.

Inclusionary zoning ordinances exist in two forms: (1) set-asides and (2) density bonuses.<sup>64</sup> Set-asides can be voluntary or mandatory and in both cases they specify a particular percent of a development that a developer must allocate for sale/rent to low or moderate income families.<sup>65</sup> A mandatory program will tend to require that 5% to 25% of the development consists of affordable units.<sup>66</sup> The ordinances act as conditions placed upon the approval process for site plans or rezoning applications.<sup>67</sup> On the other hand, voluntary set-asides act as variances and allow a developer to construct the most profitable type of housing available, so long as a defined portion of affordable units are built.<sup>68</sup> In both cases, the ordinances “must specify the following: (1) the threshold for when the requirement is triggered; (2) percentages of units that must be made affordable; (3) the target population for the affordable units; and (4) the length of time for which affordability is required.”<sup>69</sup> Because both mandatory and voluntary programs rely upon private sector involvement, they will only be successful where developers are working in a housing market that supports their ability to bear the burden of cost lost from the sale of a unit at a below market price.<sup>70</sup> In either case, the profitability of a project may be so hindered by the set-aside model that its success may rely upon federal or state funding or the combined use of a density-bonus program.<sup>71</sup>

Density bonus programs are a type of “incentive zoning” and are purely voluntary.<sup>72</sup> The developer is able to increase the density of construction in a zone that would not otherwise allow it in exchange for the construction of affordable units.<sup>73</sup> The ratio of units to density varies from ordinance to ordinance and can be based on a fixed amount or a sliding scale.<sup>74</sup> These

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64. THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT, *supra* note 2, at 90.

65. *Id.*

66. *Id.*

67. *Id.* at 91.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 92.

73. *Id.*

74. *Id.*

types of zoning programs are particularly attractive to developers because they are exercised at the option of a developer and do not serve as a “condition” on project approval.<sup>75</sup> They may be more likely to withstand constitutional challenges.<sup>76</sup> In contrast, they are less desirable for a community that seeks to take affirmative action in including low and moderate income housing because the decision is placed in the hands of the developer. Because both set-asides and density bonuses can be combined within a municipality’s inclusionary zoning program, this may be the best way to achieve the somewhat elusive goal of increased affordable units.

Inclusionary zoning has its flaws and may be subject to attack on takings, due process, equal protection and the imposition of invalid restraints on alienation actions.<sup>77</sup> However, an inclusionary zoning ordinance will withstand constitutional scrutiny so long as it is reasonably related to a legitimate governmental purpose; is not arbitrary or capricious; does not cause a property owner to suffer a total economic loss; does not unfairly discriminate against a particular party; and provides incentives sufficient to allow the average developer to earn a reasonable profit.<sup>78</sup>

“Municipalities must consider whether the inclusionary zoning program they adopt will be mandatory or voluntary.”<sup>79</sup> “Advocates of a mandatory approach contend that voluntary programs lack sufficient incentives over typical market-based conditions to encourage the development of affordable units.”<sup>80</sup> The inclusion of incentive provisions within a mandatory scheme may not only act as an economic benefit, but may also help to stave off takings challenges.<sup>81</sup> Examples of incentives include: waivers from density, area, height or other zoning requirements; waiver of permit fees and a faster permitting process; local tax abatement; and a reduction in the developer-

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75. *Id.*

76. *Id.*

77. See Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability*, 23 HOFSTRA L. REV. 539 (1995) (providing a comprehensive overview of criticisms and legal challenges to inclusionary zoning programs).

78. *Id.* at 588.

79. TALBERT & COSTA, *supra* note 11, at 155.

80. *Id.*

81. *Id.* at 154.

required amenities and an increase in municipal-provided infrastructure.<sup>82</sup>

Because the concept of inclusionary zoning is often considered in conjunction with exclusionary zoning, the state of the law on exclusionary zoning in New York warrants discussion. Exclusionary zoning exists where a municipality enacts legislation that has the effect of excluding low and moderate income families from obtaining housing.<sup>83</sup> In the preeminent 1972 land use case of *Golden v. Planning Bd. of Town of Ramapo*, the Court announced a warning to municipalities in exercising their zoning authority that “[w]hat we will not countenance, then, under any guise, is community efforts at immunization or exclusion.”<sup>84</sup> In New York, communities cannot exclude the construction of housing types that are typically more affordable than others, such as multi-family housing, and if a court finds that the community has zoned to the exclusion of affordable housing, it can require rezoning.<sup>85</sup> In New York’s seminal case on exclusionary zoning, *Berenson v. New Castle*, the town’s zoning scheme was found unconstitutionally exclusionary because it prohibited the construction of multi-family housing in all zoning districts.<sup>86</sup> In its ruling, the New York Court of Appeals held that a municipality is not an island and cannot zone without consideration for the surrounding regional needs.<sup>87</sup> “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 available land.”<sup>88</sup> Furthermore, the Court stated that “in enacting a zoning ordinance, consideration must be given to regional needs and requirements . . . [and] [t]here 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.”<sup>89</sup> Thus, while New York law

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82. *Id.* at 154-55.

83. JOHN R. NOLON, *WELL GROUNDED: USING LAND USE AUTHORITY TO ACHIEVE SMART GROWTH* 358 (2001).

84. *Golden v. Planning Bd. of Town of Ramapo*, 285 N.E.2d 291, 302 (N.Y. 1972); see NOLON, *supra* note 83, at 358.

85. NOLON, *supra* note 83, at 358.

86. *Berenson v. New Castle*, 341 N.E.2d 236 (N.Y. 1975); NOLON, *supra* note 83, at 364.

87. *Berenson*, 341 N.E.2d at 242.

88. *Id.* at 240.

89. *Id.* at 242.

does not require that municipalities enact inclusionary zoning laws, it does require that they take regional needs into consideration when drafting their zoning regulations and they may not zone in an exclusionary manner.

The regional needs of the Westchester County area are well documented by the Westchester County Affordable Housing Allocation Plan as described above.<sup>90</sup> Although municipalities are not under court order as to how best to recognize the County's needs within their scheme, some have taken on the Westchester County Planning Department's call to implement inclusionary zoning as a means to meet their burden.<sup>91</sup> Section IV of this article discusses four municipalities that have adopted mandatory set-asides and to what extent they have been successful.

In addition to Westchester County, other municipalities throughout the country have implemented inclusionary zoning schemes.<sup>92</sup> Perhaps the most well-regarded is the Montgomery County, Maryland Moderately Priced Development Unit ordinance.<sup>93</sup> The ordinance requires that developers include between 12.5% to 15% moderately priced units in subdivisions of more than fifty units.<sup>94</sup> The ordinance also includes density bonuses and options to contribute land or cash in lieu of construction, but only if construction of the units is not feasible on the subject site or another site.<sup>95</sup> The ordinance is extremely successful and led the state legislature to enact legislation authorizing all counties and towns to enact similar ordinances.<sup>96</sup>

In California, the state legislature enacted legislation that requires inclusionary zoning in certain areas and requires that the ordinances contain incentives for developers, such as density bonuses.<sup>97</sup> When a developer proposes to construct either

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90. Allocation Plan, *supra* note 45, at 1-4.

91. See generally *Berenson*, 341 N.E.2d 236.

92. Talbert & Costa, *supra* note 11, at 146.

93. MONTGOMERY COUNTY, MD., CODE §§ 25A-1 to -13 (2005), available at [http://www.amlegal.com/montgomery\\_county\\_md/](http://www.amlegal.com/montgomery_county_md/) (follow "Frames" hyperlink; then Quick Search "25A"). For a detailed description of the ordinance see THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT, *supra* note 2, at 93-95.

94. THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT, *supra* note 2, at 93.

95. *Id.* at 93-94.

96. *Id.* at 94-95.

97. *Id.* at 95.

“(1) 10% of the units in a development for lower-income households; (2) 5% of the units for very low-income households; (3) a senior citizen housing development; or (4) 10% of the units in a condominium project or planned development for moderate-income households” and requests density bonuses, local governments are required to grant the requests.<sup>98</sup> In fact, the local government may not refuse the request unless it makes certain specific findings, such as when the project would have an adverse impact on the health, safety, or welfare of the community.<sup>99</sup>

Two municipalities have specifically dealt with whether a mandatory or voluntary program is more effective.<sup>100</sup> The city of Cambridge, Massachusetts implemented a voluntary inclusionary scheme which also offered density bonuses to those developers who chose to participate.<sup>101</sup> When the program did not produce any affordable housing, the city made it mandatory.<sup>102</sup> Since then, 131 affordable units were created and another 130 are proposed.<sup>103</sup>

Likewise, Boulder, Colorado implemented an inclusionary zoning plan.<sup>104</sup> When the plan was voluntary, one private development containing affordable units was constructed.<sup>105</sup> After the program became mandatory, 150 on-site units were constructed with another 150 units made possible through the fee-in-lieu of alternative.<sup>106</sup>

Westchester County hopes to have similar success. Although only eight of the county’s forty-three municipalities have adopted inclusionary zoning techniques within their zoning scheme, they have been met with varied success and raise questions as to whether inclusionary zoning alone can make a difference.<sup>107</sup>

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98. *Id.* at 96.

99. *Id.*

100. Policy Link, Inclusionary Zoning Tool Page – How to Use It, <http://www.policylink.org/EDTK/IZ/How.html> (last visited Sept 4, 2006).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. HOUSING DESKBOOK, *supra* note 15, at ch. 3.

#### IV. Mandatory Set-Aside Zoning Ordinances in Westchester County

##### A. *The Town of Bedford, New York*

###### 1. The Ordinance:

In the late 1970s, the Town of Bedford, New York identified a growing need for affordable housing for its senior residents and the town responded. Even though the community was not under a court order, it acted with social responsibility and recognized a need to provide housing for its diverse citizenry.<sup>108</sup> “Bedford is one of the most fashionable communities in northern Westchester and its housing prices are high. The town covers 39 square miles of rolling countryside and horse trails, with properties that sell for an average of \$340,000.”<sup>109</sup> The Town Supervisor described Bedford as “a community with a strong sense of social responsibility . . . .”<sup>110</sup> He noted that although the town was not under a mandate to provide affordable housing, ““we were sensitive to the need” and “[w]e had a lot of service and blue-collar people who were really in difficulty as they grew older.”<sup>111</sup> In addition to targeting the need for senior housing, the town also expressed the need to provide a mix of units for purchase as well as rental.<sup>112</sup> The town’s commitment to providing affordable housing is expressed in the affordable housing section (and related sections) of the municipal code.<sup>113</sup>

The town’s zoning code defines affordable housing as

[d]welling units constructed for families whose annual income does not exceed 80% of the actual Westchester County median income . . . and the annual rental cost of which does not exceed 30% of said income or, for homeowners, the annual cost of the sum of principal, interest, taxes and insurance (PITI) and

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108. Andrea Brooks, *About Real Estate; Sales lag at Complex for the Elderly*, N.Y. TIMES, Aug. 11, 1989, at A18.

109. *Id.* Today, prices for housing in Bedford, New York range from \$417,000 to \$11,500,000. Weichert Realtors Homepage, <http://www.weichert.com/> (quick search “Bedford, NY”) (last visited Sept. 4, 2006).

110. Brooks, *supra* note 108, at A18.

111. *Id.*

112. *Id.*

113. BEDFORD, N.Y., ZONING CODE § 125-29.6 (2005), available at <http://www.bedfordny.info/html/code.html> (follow “General Code” hyperlink) (last visited Sept. 4, 2006).



common charges, as applicable, does not exceed 30% of said income.<sup>114</sup>

Bedford implemented several inclusionary zoning techniques to produce affordable units.<sup>115</sup> The Elderly District was created in 1985 and later amended in 1994.<sup>116</sup> The District specifically targets housing for the town's elderly community because they tend to live on low fixed incomes.<sup>117</sup> The goal of the Elderly district is to provide the "lowest cost housing possible" within the district.<sup>118</sup> The mandatory set-aside provision of the ordinance mandates that "[a]t least 20% of the dwelling units constructed in the EL District shall be middle income dwelling units . . . ."<sup>119</sup> In addition to targeting the community's elderly population, Bedford also enacted an ordinance creating a district to provide housing for an economically diverse population that would otherwise not be able to live in the town.<sup>120</sup> The DH District was created in 1994 when the EL District was last modified.<sup>121</sup> In essence, the town recognized that market prices had increased to such a high rate that segments of the population were prevented from residing in Bedford.<sup>122</sup> The ordinance mandates that at least 20% of units constructed in the DH District be affordable to middle income purchasers.<sup>123</sup>

The EL and DH Districts both work in conjunction with the town's Affordable Housing ordinance.<sup>124</sup> The ordinance was enacted on February 1, 2005 and is a fairly aggressive step towards involving the private sector building community in the affordable housing problem.<sup>125</sup>

Before discussing the detailed workings of the ordinance, the ordinance's stated purpose and goals serve to illustrate the affordable housing crisis and why local governments should take action, whether through mandatory set-aside zoning ordi-

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114. *Id.* § 125-3.

115. *Id.* §§ 125-29.2, .3, .6.

116. *Id.* § 125-29.3.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* § 125-29.2.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* § 125-29.6.

125. *Id.*

nances or in other ways. Of particular note are the following conclusions: “[t]he Town faces a shortage of affordable housing due to the high cost of housing in the Town, *which impacts the general welfare of the municipality*.”<sup>126</sup> “*The Town has an obligation to assist Westchester County and New York State in the preservation, rehabilitation, and construction of affordable housing.*”<sup>127</sup> “*The social and economic diversity of the Town is dependent upon a reasonable supply of affordable housing.*”<sup>128</sup> “It is the policy of the Town to require builders to share in the affordable housing burdens *caused* by their developments.”<sup>129</sup>

The ordinance is based upon a mandatory set-aside framework with density bonuses and other incentives built in, to encourage developers to construct projects in Bedford.<sup>130</sup> In addition, the ordinance also provides the developer with several alternatives to strict on-site construction so that the developer can increase his economic benefits while also increasing the number of low and moderate income units within the community.<sup>131</sup>

When building in an area zoned for single family dwellings, a developer is required to designate a minimum of 10% of the units as affordable housing units.<sup>132</sup> The ordinance provides several ways for a developer to accomplish that requirement.<sup>133</sup> The developer may (1) build the units on-site; (2) build the units off-site, subject to approval by the Planning Board; (3) make the equivalent fee-in-lieu payment; or (4) donate land either on-site or off-site in fee simple to the Town Housing Agency.<sup>134</sup> The ordinance also praises the developer who makes affordable housing a larger part of the development.<sup>135</sup> Subdivisions that contain 20% or more affordable housing units receive financial benefits such as, but not limited to, the waiver of fees and help

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126. *Id.* § 125-29.6(A)(1) (emphasis added).

127. *Id.* § 125-29.6(A)(2) (emphasis added).

128. *Id.* § 125-29.6(A)(3) (emphasis added).

129. *Id.* § 125-29.6(A)(7) (emphasis added).

130. *Id.* § 125-29.6.

131. *Id.*

132. *Id.* § 125-29.6(D)(1).

133. *Id.*

134. *Id.*

135. *Id.* § 125-29.6(D)(2).

acquiring federal and state assistance in affordable housing development.<sup>136</sup>

When building an area zoned for multifamily residential development, a minimum of 20% of the units must be affordable housing units.<sup>137</sup> Unlike single family zoning districts, the ordinance does not provide for alternatives to on-site construction of the units, such as off-site construction, fee-in-lieu of payments, or land donation.<sup>138</sup>

## 2. The Results:

As of 2004, Bedford added a total of eighty-four units to its housing supply, which were a direct result of its mandatory set-aside ordinance. The following developments are responsible: Bedford Lakes (sixty-four units) and 796 N. Bedford Road (twenty units).<sup>139</sup> In addition to the units attributable to inclusionary zoning, twenty affordable housing units were constructed under the preexisting zoning and another twelve were constructed, but not under the inclusionary zoning ordinance (Doyle House (four units); 53 School Street (six units); and 8 Anderson Road (two units)).<sup>140</sup>

## B. *The Town of Somers, New York*

### 1. The Ordinance:

In 2002, the Town Board of Somers, New York took an affirmative step towards increasing the availability of affordable housing units and enacted section 170-13 of the Town Zoning Law.<sup>141</sup> The ordinance concerns multifamily residential districts and is targeted to “provide suitable opportunities within the Town for the development of housing designed . . . [for] the young, the elderly and families earning less than 80% of the county’s median income, and to permit a broad array of housing types, dwelling unit sizes and forms of ownership/occupancy.”<sup>142</sup>

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136. *Id.*

137. *Id.* § 125-29.6(D)(3).

138. *Id.*

139. HOUSING DESKBOOK, *supra* note 15, at ch. 3.

140. *Id.*

141. *Id.*; SOMERS, N.Y., CODE § 170-13 (2005), available at <http://www.somersny.com/Links/default.htm> (follow “Somers Town Code” hyperlink).

142. SOMERS, N.Y., CODE § 170-13.

The ordinance creates a specific multifamily district called the “Baldwin Place” district and seeks to encourage medium density multifamily housing within its boundaries.<sup>143</sup> The district is adjacent to the Baldwin Place business center.<sup>144</sup> The ordinance contains a set-aside provision requiring a minimum of 10% of affordable units for any development within the multifamily district.<sup>145</sup> In addition, the ordinance rewards developers who build over and above the 10% requirement with density bonuses.<sup>146</sup> For each affordable housing unit constructed over the 10% base amount, the developer may build one additional market rate unit.<sup>147</sup> The developer may build one additional market rate unit for every three units reserved for senior citizen housing and one additional market rate unit for every five units designated for rental use only.<sup>148</sup> In all three cases, the maximum allowable increase in market rate units may not exceed 15%.<sup>149</sup> In addition, in 1992 the Town Board created the Affordable Housing Board and vested it with authority to oversee and encourage affordable housing within the town.<sup>150</sup> Specifically, the Board is to consult with public officials to advance affordable housing and to work with lending institutions to create financial means to reduce the costs of housing for those in need.<sup>151</sup>

For future analysis it is important to note that the inclusionary zoning provisions are restricted to only the multi-family Baldwin Place area which represents a small portion of the residential housing.<sup>152</sup> For example, most of Somers is zoned for single family homes and the zoning code does not include inclusionary zoning provisions in single family districts as does the Bedford zoning code.<sup>153</sup>

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143. *Id.* § 170-13(A).

144. *Id.*

145. *Id.* § 170-13(A)(2)(a).

146. *Id.* § 170-13(A)(3).

147. *Id.* § 170-13(A)(3)(b)[1][a].

148. *Id.* § 170-13(A)(3)(b)[1][b], [c].<sup>“</sup>

149. *Id.* § 170-13(A)(3)(b)[1].

150. *Id.* § 3-1, -3.

151. *Id.*

152. HOUSING DESKBOOK, *supra* note 15, at ch. 3.

153. *Id.*

## 2. The Results:

The results in Somers are discouraging. As of November 2003, no affordable housing units were constructed.<sup>154</sup> Although a plan for thirty affordable homes was submitted to the Affordable Housing Board, a combination of negative community sentiment and unfavorable existing zoning brought it to an end.<sup>155</sup> As of September 2005, the project has not been revitalized and no additional affordable housing units have been developed.<sup>156</sup>

### C. *The City of White Plains, New York*

#### 1. The Ordinance:

In Section 5.4.1.5.1 of the White Plains Zoning Code, the City expresses its desire to provide a variety of housing for its diverse citizenry.<sup>157</sup> It seeks construction of multi-family dwellings that “focu[s] “on the needs of young professionals, seniors and others who would benefit from proximity to ‘restaurants,’ shops, employment opportunities, cultural opportunities and transportation . . . .”<sup>158</sup> To carry out its goals, the City requires that a minimum of 6% of new multi-family units be affordable to moderate income families.<sup>159</sup> The 6% minimum applies to five different zoning districts located within the Central Parking Area.<sup>160</sup>

In conjunction with its overall revitalization plan for the city, the Common Council adopted an Affordable Rental Housing Program (ARHP) and an Affordable Home Ownership Program (AHOP).<sup>161</sup> The programs provide guidelines for the involved parties to follow with regard to rental amount, unit size, permitted occupancy numbers, eligibility requirements,

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154. *Id.*

155. *Id.*

156. *Id.*

157. WHITE PLAINS, N.Y., CODE § 5.4.1.5.1 (2005).

158. *Id.*

159. *Id.*

160. *Id.* The five different zoning districts are RM-0.35, CB-2, CB-3, CB-4, and UR-4. *Id.*

161. Affordable Rental Housing Program Rules and Procedures & Affordable Home Ownership Program Rules and Procedure. HOUSING DESKBOOK, *supra* note 15, at ch. 3.

and recertification.<sup>162</sup> The Affordable Rental Housing Program was first adopted in 2003 and most recently updated and revised through June 1, 2005.<sup>163</sup> The eligibility priority ratings with the ARHP echo county government's sentiment that affordable housing does not mean low income or slum housing.<sup>164</sup> Rather, it represents housing for the very individuals that manage the city's infrastructure. Priority for eligibility into the ARHP is based on a descending point scale system. For instance, employees of the City of White Plains or its school district, retired employees of the city or its school district, applicants who live in White Plains and either work within the city or are retired, and applicants who are currently employed in White Plains and want to move into the city are included.<sup>165</sup>

The original rules and regulations of the AHOP allowed a developer to pay a fee-in-lieu of on-site construction of affordable units.<sup>166</sup> However, when the program rules and regulations were amended in 2005, the Common Council made clear its preference for on-site construction as opposed to contribution into the Affordable Housing Assistance Fund (AHAF).<sup>167</sup> "[I]t is the Common Council's strong preference to have the minimum 6% of new units in new "for sale" residential and mixed-use residential developments provided on site as part of such development."<sup>168</sup> Notwithstanding the Common Council's policy, the AHOP makes available four options for a developer in lieu of incorporating affordable units within their development project.<sup>169</sup> They include: (1) contribution into the AHAF based on a per unit calculation; (2) purchase cooperative or condominium units and offer them for rent under the ARHP for a period of twenty years with a twenty year renewal option; (3) contribution of land or money for the City to buy land and construct affordable units under the ARHP or AHOP programs; and (4) contribution of funds for the cost of construction of affordable

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162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

housing units, amount to be determined by the Common Council.<sup>170</sup>

## 2. The Results:

The results from the inclusionary zoning techniques in White Plains are extremely encouraging. The City Center project produced forty-two units off-site and \$1.5 million from fee-in-lieu of payments.<sup>171</sup> The Hamilton project generated \$460,000 in lieu of constructing six on-site units.<sup>172</sup> The amount represents a discount for an all cash upfront payout.<sup>173</sup> The Jefferson project resulted in a payout overtime in the amount of \$1,456,000 in lieu of producing sixteen on-site units.<sup>174</sup>

In addition, the Bank Street Commons Project produced thirty on-site affordable housing units.<sup>175</sup> These units were the result of a public/private partnership revitalization project.<sup>176</sup> The developer received real property tax relief in exchange for designating 6% of the units as affordable housing.<sup>177</sup>

Also encouraging are two new projects partly funded by fee-in-lieu of payments.<sup>178</sup> The Common Council voted to give \$1.2 million to nonprofit developers for the construction of forty-two rental apartments and seventeen townhouses.<sup>179</sup> The units will be built under the ARHP and AHOP programs.<sup>180</sup> While the Council is encouraged by the additional affordable units for its citizens, members noted that the most preferred and economical method of providing additional affordable housing is on-site construction.<sup>181</sup>

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170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. Robyn Hanson & Jennifer Reinke, *City of White Plains: Bank Street Commons*, in *REINVENTING REDEVELOPMENT LAW* (Noelle V. Crisalli ed., 2005).

176. *Id.*

177. *Id.*

178. Keith Eddings, *2 Affordable Housing Projects Get Subsidies*, *THE JOURNAL NEWS* (Westchester, N.Y.), Oct. 10, 2005, at 10A.

179. *Id.*

180. *Id.*

181. *Id.*

D. *The City of Yonkers, New York*

1. The Ordinance:

Article XV of the Yonkers Zoning Code is titled “The Affordable Housing Ordinance” (AHO).<sup>182</sup> Unlike the other three ordinances addressed in this article, the AHO stems from a federal district court case, *United States v. Yonkers Bd. of Educ.*,<sup>183</sup> where the court handed down an order that contained a Long-Term Housing Plan.<sup>184</sup>

While the AHO was initially enacted in response to a court order, it has since been amended and refined to more accurately reflect market needs and developer interest in constructing projects in Yonkers. Section 43-191 sets forth the purpose of the AHO and provides that all new multifamily housing developments must provide “assisted-housing” units not to exceed 20% of the constructed units.<sup>185</sup> The AHO must provide for units that are affordable to households earning between 50% and 120% of the New York Metropolitan Area median income and the units must represent a variety of sizes.<sup>186</sup> In addition to definite terms such as size and number, section 43-191 also announces goals for the City’s planning and zoning boards.<sup>187</sup> The existing zoning must be modified to allow for greater densities and the construction of units complying with the Plan.<sup>188</sup> It should focus on the East and Northwest areas of the City and must be flexible enough to disperse construction so that there is no particular concentration of the units in any part of the city and that they are not architecturally inconsistent with neighboring “market-rate” units.<sup>189</sup> Furthermore, section 43-191

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182. YONKERS, N.Y., ZONING CODE art. XV (2006), available at <http://cityofyonkers.com/> (follow “Publications” hyperlink; then follow “Yonkers City Code” hyperlink).

183. *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985).

184. For a thorough analysis of the housing crisis leading up to the litigation and the following order, see Schuk, *supra* note 59, at 324-64.

185. YONKERS, N.Y., ZONING CODE § 43-191 (2006), available at <http://cityofyonkers.com/> (follow “Publications” hyperlink; then follow “Yonkers City Code” hyperlink).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*



states that the units must remain affordable for the specified period of time under the Plan.<sup>190</sup>

Section 43-195 specifically provides that “[m]ultifamily housing developments *shall* be inclusionary developments containing a set-aside of assisted units equal to 20% of the maximum aggregate number of units authorized for construction in such developments . . . .”<sup>191</sup> However, subsection B states that in districts zoned for sixty units per acre or more, the set-aside can be reduced to a minimum of 10%.<sup>192</sup> In addition, the City limited the density bonuses that a developer might apply for in that same area to be not in excess of 50% of the permitted zoning.<sup>193</sup> In other words, the developer cannot simply use the set-aside requirements and available density bonuses to circumvent the AHO’s purpose and effect. Subsection C exempts any developments of less than ten units from inclusionary zoning, but notes that the provision may not be used by the developer as a means to avoid the inclusionary zoning requirements of developments of ten units or more.<sup>194</sup>

## 2. The Results:

According to the Housing Action Council, as of September 2005, there were only 47 units approved with another 100 units pending under the AHO.<sup>195</sup> The Council noted that the developers are working closely with the Yonkers Affordable Housing Department to comply with all aspects of the AHO.<sup>196</sup> The units are made up of the following development projects: River Club (35 units); Ridge Hill (200 units); Millennium Project (10 units); and 1465 Midland Ave (2 units).<sup>197</sup> The developers of the Ridge Hill project, Forest City Ratner, are still seeking final project approval and are considering an increase in the number of affordable units.<sup>198</sup> According to the Yonkers chapter of the

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190. *Id.*

191. *Id.* § 43-195(A) (emphasis added).

192. *Id.* § 43-195(B).

193. *Id.*

194. *Id.* § 43-195(C).

195. HOUSING DESKBOOK, *supra* note 15, at ch. 3.

196. *Id.*

197. *Id.*

198. Michael Gannon, *Ridge Hill Compromise Seen Near*, THE JOURNAL NEWS (Westchester, N.Y.), Oct. 6, 2005, at 8A.

NAACP, the developer may provide 20% of the rentals and 10% of the condominiums as affordable housing.<sup>199</sup>

## V. Analysis and Conclusion

Based on the varying success of the ordinances described above, it appears that a generic inclusionary ordinance with mandatory set-aside provisions will not be sufficient to make a marked difference in the availability of affordable housing. True success is contingent upon providing flexibility to developers and options within the ordinance. Although developers may have an obligation to provide affordable units, the burden should not be placed squarely on their shoulders without factoring in the importance of realizing an economic return on the project. There are two main themes that rise from an analysis of the above mentioned ordinances: (1) mandatory set-asides work best when they are coupled with options for satisfying the requirements through means other than strict on-site construction and with density rewards for a developer's increase in the number of units built; and (2) regardless of the time and effort taken to craft an ordinance, it will not be successful unless the municipality's culture (both public and private) welcomes and encourages the benefits of a diverse housing market.

Bedford's ordinance serves as an ideal example of a well thought out and carefully drafted inclusionary program. It places the burden of developing affordable units on private developers, but at the same time gives them the opportunity to realize an economic return through the density bonuses and alternatives to onsite construction. In addition, the ordinance applies to a range of zoning districts and targets seniors as well as an economically diverse population. In contrast, the Somer's inclusionary zoning ordinance appears well drafted on its face, but fails because the provisions apply to a small, isolated area of the town and it lacks community support.

The White Plains ordinance serves as a good example of success stemming from market conditions and community sentiment. Revitalization and redevelopment of downtown White

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199. *Id.*

Plains brought with it a housing boom.<sup>200</sup> The rise of housing conditions in White Plains is reflected in the political arena. In the 2005 mayoral election, affordable housing issues rose to the forefront of the candidates' platforms.<sup>201</sup> Both candidates agreed that the City should seize the favorable market to create more housing, but not surprisingly, they differed over the means to achieve that end.<sup>202</sup> The incumbent candidate, Mayor Joseph M. Delfino, supported the current ordinance with a 6% set-aside and the buy-out options.<sup>203</sup> His challenger, Dennis Power, supported an increase to a 15% set-aside requirement and an entire repeal of the off-site construction options.<sup>204</sup> While Power's proposed changes were perceived as too drastic by some,<sup>205</sup> he made a critical point that underlies the success and failure of any mandatory set-aside. In essence, he argued that the increased burden placed on developers would not drive them away from the City.<sup>206</sup> Because the City offers so many opportunities for developers to make a profit, it is a good environment for them and they are less likely to seek development in other neighboring municipalities. White Plains has "the ability to extract more [from developers]."<sup>207</sup>

The importance of a supportive public and private community is illustrated in a comparison of Somers to White Plains. While White Plains mayoral candidates battled about how high each believed the mandatory set-aside should be, Somers seems reluctant to face the issue head-on. The Town appears satisfied with addressing affordable housing on paper rather than in substance. Perhaps, due to its rural setting and being removed from the pressures of lower Westchester County, Somers has not taken its regional obligations seriously. Although the town enacted an ordinance, any such zoning ordinance will be ineffective if it does not engender support from the elected officials.

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200. Keith Eddings, *Housing Initiative Divides Rivals*, THE JOURNAL NEWS (Westchester, N.Y.), Oct. 14, 2005, at 1A.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

While originating from a court ordered mandate, the Yonkers' program is another example of a well drafted ordinance, with community support behind it. However, the long-term success of the program will depend on the City's redevelopment projects. An increase in the economic viability of the City should bring with it a housing boom, as in White Plains, and the ability of developers to more readily incorporate affordable units within their projects on a profitable basis. In addition, the number of affordable units built in Yonkers not directly attributable to the inclusionary zoning ordinance suggests that other factors are at work; and that perhaps developers need not bear the sole burden of housing the low and moderate income population.<sup>208</sup>

Whether through mandatory set-asides alone or a combination of tools, it cannot be denied that the municipalities of Westchester County have a long way to go in order to reach the County's 2015 affordable housing goal.<sup>209</sup>

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208. See *supra* note 53 and accompanying text.

209. See *supra* note 52 and accompanying text.