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## **Affordable Housing: A Case for State Legislative Action**

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**Abstract:** Efforts by municipalities to promote affordable housing have proven to be insufficient as evidenced by the skyrocketing real estate prices in the New York metropolitan area. Historically, New York courts have struggled with the affordable housing issue, often issuing inconsistent decisions on what types of local laws are unconstitutionally exclusionary. By utilizing other states' initiatives as a guide, New York can create a comprehensive affordable housing bill that will effectively provide for affordable housing and relieve some of the pressures on the judiciary caused by past ambiguous legislation.

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### **Introduction:**

In recent columns we have explored the rapid escalation in housing prices in the New York metropolitan area. We reported on the devastating effect that the shortage of workforce housing has on the region's economy and the lives of its workers. This article reviews the position of the New York courts on the obligation of local governments to zone for affordable housing and concludes that it is time for legislative action at the state level. Although municipalities are beginning to adopt inclusionary zoning ordinances, most are doing little to eliminate barriers to housing or stimulate needed production. Additional encouragement, guidance, and resources are needed to create an adequate supply of affordable housing.

### **New York Exclusionary Zoning Cases**

For over 75 years, New York courts have struggled to define the obligation of municipalities to accommodate affordable housing in their zoning ordinances. In 1931, the Court of Appeals invalidated a local zoning ordinance as "patently unreasonable" where only single-family housing was permitted. In *Dowsey v. Village of Kensington*, 257 N.Y. 221 (1931), it found that the ordinance's purpose

was to exclude apartment buildings. The implicit constitutional principle in this and subsequent cases is that local governments get their zoning authority from the state legislature and cannot use it in a way that discriminates against the people of the state who are in need of a place to live.

The exclusion of multifamily housing was fatal to the Town of New Castle's zoning law and invalidated by the Court of Appeals under standards articulated in *Berenson v. New Castle*, 38 N.Y.2d 102 (1975). The court ruled that "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." *Id.* at 110.

Those who celebrated the judicial vigor shown in the *Berenson* case were disappointed in 1985, when the Second Department Appellate Division insulated the Town of Brookhaven's zoning from attack by a housing advocacy group. It claimed that the town's modest provision for special permits for multifamily housing failed to meet the *Berenson* standard. In *Suffolk Housing Services v. Town of Brookhaven*, 109 A.D.2d 323 (2d Dept. 1985), the court held that these permits were more than "a ruse to prevent the construction of multifamily housing." *Id.* at 329. Although the town's zoning did not allow multifamily housing as of right, the court thought it sufficient that multifamily housing had been constructed in the past through the issuance of discretionary special permits.

### **The Burden of Proof Barrier**

In New York, developers are given standing to challenge zoning ordinances that exclude more affordable types of housing since their rights cannot "realistically be separated from the rights of...nonresidents, in search of a comfortable place to live." *Berenson v. New Castle*, on remand, 415 NYS2d 669 (1979). A locality that has been found zoned in an exclusionary fashion can be required by the court to amend its zoning ordinance to accommodate more affordable types of housing. Plaintiffs who challenge exclusionary zoning have to carry a heavy burden of proving all aspects of the *Berenson* standards: that local zoning does not meet the current and future housing needs of local residents and those in the region are in need of accommodations. In New York there is no agreed upon definition of the relevant region, no process for identifying regional housing needs, and no methodology for allocating that need to any given municipality. The cost and difficulty of carrying this burden of proof may explain why there has been very little litigation under *Berenson*, outside Westchester County.

How local and county efforts to define housing needs can help is evident in Westchester County where the county adopted a Fair Share Housing Plan, the

only county-wide housing plan of its type in the state. The plan included an allocation to each locality of its share of the 5,000 units of affordable housing that the county found were needed by the year 2000. The allocation for the Town of Cortlandt was 173 units. Despite this allocation, the Town of Cortlandt amended its zoning ordinance in 1993 to eliminate all multi-family housing as of right. Triglia, a developer, had applied to build 120 two-story multi-family units, 10 of which would be affordable to lower income families. This proposal had been approved by the town board prior to the 1993 amendments which prohibited any further processing of the plaintiff's application. Triglia then sued.

In *Triglia v. Town of Cortlandt*, Supreme Ct., Index No. 17976/96 (Sup. Ct. Westchester Co. Jan. 8, 1998), the court declared the town's actions unconstitutionally exclusionary. It noted that the town "has completely failed to allow feasible provision for affordable (high density) housing construction in the most likely manner calculated to achieve that goal (i.e. multi-family housing). By passing a zoning ordinance that completely omits affordable multi-family housing of any sort, the Town has either acted 'for an exclusionary purpose' or its actions have 'had an exclusionary effect' under *Berenson*." Referring directly to the county's allocation plan, the court noted that "Cortlandt still needs another [173] units to meet its affordable housing allocation in the next two years." *Id.* at 13. The court held "that passing a zoning ordinance that presently prohibits all multi-family housing...is calculated, directly or indirectly, to thwart the fulfillment of the [housing] need of the Town and region, presently and in the future."

Another Westchester community lost an exclusionary zoning suit in *Continental Building v North Salem*, 625 NYS 2d 700 (1995), app. dismissed 86 NY2d 818. The Appellate Division found that North Salem's zoning ordinance was unconstitutionally exclusionary under the *Berenson* requirement that local zoning "must adequately consider regional [housing] needs and requirements." The court held that a zoning ordinance "will be invalidated only if it is demonstrated that it actually was enacted for an improper purpose or if it was enacted without giving proper regard to local and regional housing needs and has an exclusionary effect. Once an exclusionary effect coupled with a failure to balance the local desires with housing needs has been proved, then the burden of otherwise justifying the ordinance shifts to the defendant [municipality]." *Id.* at 703 (citing *Robert E. Kurzius, Inc., v. Upper Brookville*, 51 NY2d 338 (1980)). Referencing the fact that the Town of North Salem had zoned less than one third of one percent of its land for multi-family housing as of right, the court found that the town's zoning failed to provide for affordable multi-family housing. Again, the existence of the county's housing plan was instrumental in assisting the plaintiff in carrying its burden of proof that this minimal provision for multifamily housing was inadequate given proven county-wide housing needs.

In *Blitz v New Castle*, 463 NYS2d 832 (1983), another in the line of *Berenson* cases, the Appellate Division held that Westchester County's plan, which was adopted by its legislature, "is presumptively valid and the evidence at

trial clearly established the rationality and soundness of that legislative finding.” The existence of this legislative housing plan, in other words, created a presumptively valid definition of regional housing need that relieved the burden of proof that had hobbled developer challenges in the past.

Outside Westchester County, exclusionary zoning cases have been less successful. See *Land.com v. Kleiner*, 815 N.Y.S.2d 234 (N.Y. App. Div. 2006). The traditional policy of the judiciary of deferring to the legislative acts of municipal governments effectively immunizes localities from exclusionary zoning attacks until the challenger proves affirmatively that the local zoning has an exclusionary effect. The critical importance of the Westchester County Fair Share Housing Plan is that it established a housing region (Westchester County), an overall housing need (50,000 residential units), a limited income housing need (5,000 by the year 2,000) and each municipality’s fair share of that lower income need (173 units in the case of Cortlandt). As a result, in both *Triglia* and *Continental*, the court had no trouble determining that the communities were exclusionarily zoned and shifting the burden of justifying the zoning to the municipal defendants.

### **The Need for Legislative Action**

The Court of Appeals in its 1975 *Berenson* decision appealed to the state legislature for help on the matter of affordable housing. “Zoning,” it wrote, “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.” The courts in New York have used impressive rhetoric regarding affordable housing: “What we will not countenance, then, under any guise, is community efforts at immunization or exclusion.” *Golden v. Ramapo*, 30 NY2d 359 (1972). When it is proved that local ordinances are exclusionary they have mandated the rezoning of the developer’s parcel. *Berenson*, 415 NYS2d 669.

Other state legislatures have taken effective steps in this direction. Nebraska statutes charge its Department of Economic Development with the task of creating a comprehensive housing affordability strategy for the state, including the identification of housing needs. The strategy describes how local land use controls affect the return on residential investment and define the role of local governments in implementing the state’s housing policy. NEB. REV. STAT. § 81-1281 (2006). Arizona state law requires municipalities to include a housing element in their comprehensive land use plans. These housing plans must identify and analyze housing needs and provide for housing needed by households at all economic levels. ARIZ. REV. STAT. § 9-461.05 (2006). State law in Massachusetts establishes a Housing Appeals Committee to which developers of affordable housing can appeal local denials of their housing proposals. MASS. GEN. LAWS § ch. 40B, §§ 20-23 (2006). The statute requires that the denial be

vacated if the Committee finds that it was not reasonable and not consistent with local needs.

In New Jersey the Fair Housing Act of 1985 (N.J. STAT. ANN §§ 52:27 D-301-329) established the Council on Affordable Housing (COAH) to implement the statute's fair share plan based on an extensive state-wide housing study and allocation formula. In Connecticut, the state legislature adopted the Affordable Housing Land Use Appeals Act of 1990 which requires that a locality that denies a developer's affordable housing proposal must show that the denial was "necessary to protect substantial public interests in health, safety....and such public interests clearly outweigh the need for affordable housing." CONN. GEN. STAT. § 8-30g.

Local governments need help in understanding the importance of an adequate housing stock for workers, the relationship between workforce housing and a viable regional economy, and how to do a better job of comprehensive residential planning and regulation. Without information on housing needs, the regional economy, and effective laws and programs for workforce housing, local governments are unlikely to become part of the solution to the growing crises in affordable housing in some parts of the Empire State.

New York's signature approach to land use control is to delegate that responsibility to local governments, provide them with ample power to meet local needs, guide them in exercising that power, and penalize them only when overriding state interests are prejudiced by local inaction. Elements of the housing laws adopted in other states can be adapted to the New York approach; a Local Housing Planning and Implementation Act should be adopted to guide municipalities in meeting local housing needs as part of a sound regional economic plan. Where localities fail to act, developers of affordable housing can use established regional housing needs to carry the burden of proving that localities are exclusionarily zoned. This prospect, by itself, will provide a powerful reason for local governments to act.

The Act should designate a state agency to identify high cost housing regions, conduct regional housing need studies, make housing data available to localities for their consideration, and to coordinate the provision of technical and financial assistance to localities within those regions. Existing laws and programs include a full tool kit of techniques for implementing a local inclusionary housing program; many local officials simply are unfamiliar with them. Land use techniques include housing elements of local comprehensive plans, inclusionary zoning requirements, bonus-density incentive zoning, streamlined approvals, and exemptions from fees and technical requirements. Financial tools include income tax credits, property and sales tax exemptions, direct subsidies, the provision of supportive infrastructure, and the donation, or low cost sale, of municipally owned land. A variety of not-for-profit and limited-profit companies can be

created to serve as intermediaries between local governments and private sector developers.

Localities that adopt effective plans and initiate recommended strategies to meet regional needs can be provided incentives such as enhanced eligibility for much desired transportation, water, sewer, open space, and other discretionary state funding. Communities that do not respond risk *Berenson*-style lawsuits where developers are able to show that local zoning fails to accommodate established regional housing needs.

Providing housing need data, technical resources, and financial assistance creates important incentives for effective local action. Local housing planning by itself will increase local awareness of the impact of current laws on housing costs, of the economic and other reasons for creating affordable housing, and the availability of numerous techniques that localities can use to create housing needed by young families, workers, the elderly and other in search of housing in the region.