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Affordable Housing: State Lacks Definition of Need and Municipal Responsibility

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Abstract: New York case law has created an obligation for communities to provide low-income housing in order to meet regional needs. The courts have found exclusionary zoning to be an unconstitutional practice, and may require communities to amend zoning ordinances that act in an exclusionary manner. The burden for plaintiffs to prove an ordinance is unconstitutionally exclusionary has been greatly impacted by the existence of regional housing studies. However, legislative progress in New York continues to lag behind surrounding states, as New Jersey and Connecticut legislatures have put statutory components in place to ease burden of proof in challenges to exclusionary zoning challenges.

Introduction

For over 20 years, courts in New York have struggled to define the obligation of municipalities to accommodate affordable housing in their zoning ordinances. As early as 1975, the Court of Appeals held 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....In 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.” (*Berenson v. New Castle*, 38 N.Y.2d 102 (1975))

In New York, this obligation has come to mean that communities may not 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. 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. This is one of the few contexts in which New York courts will issue a writ of mandamus directing legislative bodies to take particular actions.

Triglia v. Town of Cortlandt

The most recent case involving a developer's challenge to an exclusionary zoning ordinance is *Triglia v. Town of Cortlandt*. (Supreme Ct., Westchester County, Index No. 17976/96, filed 1/8/98) In 1993, the town amended its zoning ordinance to eliminate all multi-family housing as of right in the community. The plaintiff 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.

The court, in declaring the Town's actions unconstitutionally exclusionary, 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*." The court ordered the defendant municipality to present to it "such amendments to the Zoning Ordinance as may allow for multi-housing zones in the Town of Cortlandt for the Court's inspection...."

Westchester County Fair Share Housing Plan

In assessing whether the zoning ordinance of the Town of Cortlandt properly considered regional housing needs, the Court referenced the Westchester County Fair Share Housing Plan, the only county-wide housing plan in the State of New York. The plan includes 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. That plan specified that the Town of Cortlandt's share of the county housing need was 173 residential units.

Plaintiffs attacking exclusionary zoning in the past have had great difficulty carrying the burden of proving that a municipality's zoning ordinance did not meet its fair share of regional housing needs. Because of this allocation plan, however, the court was able to determine that the Town's actions failed to consider regional housing needs. Referring directly to the County's allocation plan, the court noted that "Cortlandt still needs another 137 units to meet its affordable housing allocation in the next two years." 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."

Continental Building Company v North Salem

The courts were previously heard from on the topic of exclusionary zoning in *Continental Building v North Salem*, (625 NYS 2d 700 (1995), app. dismissed 86 NY2d 818). In that case, the Appellate Division affirmed the Supreme Court's decision 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, challenged as exclusionary, "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]." Citing *Kurzius v Upper Brookville* (51 NY2d 338).

North Salem is, like the Town of Cortlandt, located in Westchester County. At the time of the litigation regarding the Continental Building Company's site, the county had a Residential Development Policy that established a county-wide need of 50,000 additional housing units. Based on this evidence of regional housing need, and 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 a county housing plan was instrumental in assisting the plaintiff in carrying its burden of proof and prevailing in an exclusionary zoning case.

In *Blitz v New Castle* (463 NYS2d 832 (1983)), another in the line of *Berenson* cases, the Appellate Division held that the county's legislatively adopted Residential Development Policy "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.

The Importance of Housing Needs Studies

Outside Westchester County, exclusionary zoning cases have been less successful. In the absence of a governmentally sanctioned regional housing needs study, plaintiffs must bear the burden of proving that there is a regional housing need and that the defendant municipality has not accommodated its fair share of the need. This imposes an onerous burden on plaintiffs. What is the region for the purpose of establishing housing need? What housing need exists? How accurate and credible is the data used to prove that need? What percentage of this defines the housing needs of lower income people? How does one prove

that other municipalities in the region have not zoned to meet these needs? What number of lower income residences represents the municipality's fair share of the regional need? How can the plaintiff demonstrate that the local zoning does not accommodate that number of lower income people?

Until the challenger has borne the burden of proving that the local zoning has failed to consider regional needs, defined in this way, and that it has an exclusionary effect, the municipality needs to prove nothing. 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 establishes a housing region (Westchester County), an overall housing need (50,000 residential units), a lower 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 Building*, the court had no trouble determining that the communities were exclusionarily zoned and in shifting the burden of justifying the zoning to the municipal defendants.

Comparing New Jersey and Connecticut Law

In both New Jersey and Connecticut, statutory mechanisms have been created by the state legislature to remove this serious burden of proof barrier to exclusionary zoning challenges. In New Jersey, the legislature adopted the Fair Housing Act of 1985 to provide for the development of low and moderate income housing under local zoning. (N.J. Stat. Ann §§ 52:27 D-301-329) It 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. COAH determines the fair share of each locality and reviews and certifies local fair share housing plans. Such plans are prepared and submitted by municipalities throughout the state. If a local government fails to submit such a plan, or if the plan does not merit COAH certification, the locality is particularly vulnerable to developer challenges. If a developer of affordable housing is denied approval to build in a locality without a certified plan, the court is likely to mandate the rezoning of the developer's land to a higher density allowing the construction of affordable housing.

In Connecticut, the state legislature adopted the Affordable Housing Land Use Appeals Act of 1990 which expressly reverses the burden of proof when a municipality denies a developer's application to construct affordable housing. (Conn. Gen. Stat. § 8-30g) Under the Act, a municipality that denies a developer's application to construct affordable housing carries the burden of proving that its action is justified by showing that it was "necessary to protect substantial public interests in health, safety....and such public interests clearly outweigh the need for affordable housing." Connecticut communities in which at

least 10% of the housing stock is affordable to low and moderate income families are exempt from the application of this burden shifting statute.

The Response of the New York Legislature

While Connecticut and New Jersey have recognized the exclusionary effects of local zoning ordinances and provided effective remedies for developers wishing to challenge them, the New York legislative response has been limited and ineffective. In 1992, the state legislature amended the law to allow local governments to award zoning incentives to land developers who provide any of a wide variety of public amenities, including affordable housing. (Town Law § 261-b, Village Law § 7-703 and General City Law § 81-d.)

This amendment codifies the implied authority of local governments to provide zoning bonuses to developers in exchange for their provision of public benefits. The incentives can include waivers of all zoning requirements including “density, area, height, open space, use, or other provisions....” These waivers may be awarded in exchange for the provision of “community benefits” including “open space, housing for persons of low or moderate income, parks, elder care, day care or other specific physical, social or cultural amenities, or cash in lieu thereof, of benefit to the residents of the community....”

There are very few reported instances in which this incentive zoning authority has been used to provide for low and moderate income housing. Meanwhile, the Connecticut and New Jersey statutory programs have generated a significant amount of construction.

Conclusion

The courts in New York have exhibited a forceful judicial policy regarding affordable housing: “What we will not countenance, then, under any guise, is community efforts at immunization or exclusion.” (*Golden v. Ramapo*, 30 NY2d359 (1972)). They have, with equal vigor, mandated rezoning when it is proved that local ordinances are exclusionary. What is missing in New York, outside Westchester County, is a reliable definition of housing need and municipal responsibility regarding that need. In both New Jersey and Connecticut, the legislature has filled that critical gap.

The Court of Appeals in the first *Berenson* decision in 1975 appealed to the state legislature for help on this matter. “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.”