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Abstract

New York does not allow municipalities to use zoning laws to discriminate on race or socioeconomic standing. Analysis of case law shows a trend of encouraging development of affordable housing, though New York does not expressly forbid exclusionary zoning.

Resource

HOW CAN A COMMUNITY CREATE AFFORDABLE HOUSING OPPORTUNITIES?

General Approach

Although the federal courts have determined that there is no individual constitutional right to housing, the New York appellate courts have softened this holding by finding that municipalities may not legitimately exercise their zoning authority to effectuate socioeconomic or racial discrimination. The utilization of municipal land use controls to illegally exclude certain classes of individuals from residing within a zoning community is commonly referred to as “exclusionary zoning”. Though New York courts have not gone as far as requiring municipalities to provide affordable housing to prevent exclusionary zoning, they have rendered decisions encouraging planning for affordable housing, and the legislature has taken steps to encourage such housing. Affordable housing is defined as housing that is developed through some combination of zoning incentives, cost-effective construction techniques, and governmental subsidies that can be rented or purchased by households who cannot afford market rate housing in the community. State statutes provide municipalities with a variety of mechanisms that can be used to encourage and provide desired affordable housing.

The inclusion of affordable housing in municipalities of New York State is mandated by the courts. In New York, the obligation not to exclude households in need of affordable housing means 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. A community is not specifically required to provide

low income housing. They simply must ensure that a “balanced, well ordered plan exists, and that regional needs are considered.” When a community fails to accommodate, through its zoning laws, the provision of such housing as required to meet proven regional housing needs, that community is said to practice exclusionary zoning.

Local governments receive their power to adopt zoning laws from the state. Under the state constitution, powers delegated to local governments are to be exercised in the interests of all the people of the state, not just those who reside in the community. Local governments are not authorized to exercise the delegated power to adopt zoning laws that exclude large segments of the population who may not be able to afford single-family homes on individual lots or other high-cost forms of housing permitted under the local zoning law.

It is considered an implied power of local governments to exercise their zoning authority in a way that encourages the provision of affordable housing. In addition, a state statute specifically authorizes cities, towns, and villages to provide zoning incentives, such as additional development density or waivers of specific zoning requirements, to developers in exchange for the provision of affordable housing. Both the Private Housing Finance Law and the Public Housing Law authorize localities to subsidize and facilitate the provision of low, moderate, and middle-housing in a variety of ways including the provision of land, operating subsidies, mortgage financing, and tax exemption.

Basic Considerations

Who?

Developers are given standing to challenge zoning laws 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. Town of New Castle*, 67 A.D.2d 506, 415 N.Y.S.2d 669 (2d Dep’t 1979). A locality that has been found zoned in an exclusionary fashion can be required by the court to amend its zoning laws to accommodate more affordable types of housing. This is one of the few instances in New York when the courts will direct a local legislature to take a particular action such as rezoning to accommodate a specific amount of affordable housing.

What?

When local zoning laws prevent lower income households from living in the community, those laws are called exclusionary zoning and can be declared unconstitutional by the courts. Zoning laws and other municipal actions that are aimed at providing housing for persons of limited income are called inclusionary zoning.

State statutes encourage local governments to adopt inclusionary programs regarding affordable housing. Localities have specific authority to provide zoning incentives, such as additional development density, to encourage private developers to set aside a percentage of residential units in a proposed development for affordable housing. Municipalities may abate local taxes, provide mortgage financing, acquire and dispose of property, and subsidize

and provide infrastructure for affordable housing built by private and non-profit corporations organized under state housing laws. Cities, towns, and villages are authorized to establish municipal housing authorities that can issue bonds and make land available, provide infrastructure, and subsidize the costs of operating the projects of their municipal housing authorities.

Most discussions of affordable housing refer to state and federal subsidy programs that define affordable housing as synonymous with “low-income housing.” The public housing programs and housing subsidy programs administered by the U.S. Department of Housing and Development and various state agencies have largely defined affordable housing in the public mind as high-rise rental housing for low-income families or publicly subsidized rural housing of a particular architectural design. There is, however, no standard definition of affordable housing that directs or binds a municipality that wishes to establish an inclusionary program or avoid a successful exclusionary zoning challenge. Localities may wish to encourage or assist either rental housing or housing that is for sale. Municipally encouraged or assisted affordable housing may be multi-family townhouses, garden apartments, attached low-rise units, single-family modular units, or any other housing type that can be affordably constructed. Local affordable housing initiatives can aim to serve any income group that is priced out of the local housing market.

When?

When local legislators discover that municipal employees or volunteers, senior citizens, young families or other groups of households are having trouble locating affordable housing in the community, they may wish to take some action to encourage its development. Localities may want teachers in the local school system, municipal employees, police officers, and fire fighters to live in the community for a variety of reasons related to the public interest. In high cost areas, older residents who have lived in the community for decades and young adults who grew up in the community may not be able to locate affordable housing there and may be forced to move elsewhere. When communities in a region do not zone to include affordable housing, businesses can suffer from a lack of workers or be required to pay higher salaries to subsidize their commuting costs.

Why?

The purpose of encouraging housing for those in need of affordable homes is to provide housing for individuals and families that the community wishes to accommodate to create a more efficient, workable, and equitable community. Local governments are encouraged to include in their comprehensive plans the consideration of regional needs, including housing, and to respond to the present and future housing needs of the community, including affordable housing. The comprehensive planning studies of the community may identify a particular housing need for senior citizens, young families, or other special population group. Local governments in New York have used their zoning authority to encourage the development of housing for all types of households: senior citizens, middle-income families, homeless families, employees of the municipality, volunteer firemen, farm workers, and first-time homebuyers. Another purpose of providing affordable housing is to avoid costly

litigation attacking the community for exclusionary zoning practices that can result in court orders to rezone private land to accommodate a developer's affordable housing proposal.

How?

Localities can amend their zoning laws to include more affordable types of housing as permitted land uses in their zoning districts. These can include multi-family housing of a variety of types, factory constructed and modular homes, and clustered housing on smaller lots, with party walls and with other cost efficiencies. In addition, they can enact regulations that permit the use of accessory apartments. An accessory apartment is generally a self-contained apartment that is attached, or on the same property, as a single family dwelling. In order to qualify as accessory, a use must also be incidental and subordinate to the principal use. To be incidental, an accessory use must be reasonably related to the principal use. To be subordinate, the accessory use must be proportionately smaller than the principal use. An accessory use must also be customarily found in conjunction with its principal use. A use is customary if it commonly, habitually, and by long practice has been reasonably associated with a principal use. The policy objectives served by an ordinance that permits accessory apartments include creating a source of affordable housing for the individuals occupying the units, creating a source of revenue for existing homeowners, providing a more secure living environment for homeowners who are senior citizens and increasing property tax revenues from existing single-family neighborhoods. There are no state statutes which allow for accessory apartments but municipalities are permitted to add such a regulation to their municipal or zoning code as part of the police power. As long as the regulation promotes the public health, safety, morals, and general welfare, the regulation will generally be valid.

Alternatively, they can adopt an incentive zoning provision to achieve the housing objectives of the local comprehensive plan following the normal steps required for amending the zoning law. The particular zoning districts in which such incentives may be granted shall be designated by the amendments. A finding must be made that the additional development authorized by such incentives can be accommodated in those districts by the infrastructure and services available and without environmentally damaging consequences. 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 "housing for persons of low or moderate income." The zoning amendment must also set forth the procedure by which the incentives will be awarded including the review and approval process, the incentives that may be awarded, and the type of affordable housing to be provided in exchange for these incentives.

The New York Public Housing Law, adopted in 1926, was the first statute of its kind in the nation. The law established that the expenditure of public funds for the provision of housing for lower income households was a public purpose to which public funds could be dedicated. It authorized the formation of municipal housing authorities and empowered them to issue bonds to finance their projects, acquire land by condemnation, and abate local property taxes to reduce the operating costs of their housing. Municipal housing authorities have been able

to provide truly affordable housing for lower income households by entering into contracts with federal and state agencies to issue tax-exempt bonds and subsidize the costs of operation. The Public Housing Law specifically authorizes local governments to make land available to municipal housing authorities and to provide infrastructure and operating subsidies to their projects.

Private developers and non-profit organizations are authorized to organize state-regulated housing companies under various articles of the Private Housing Finance Law, adopted originally in 1955. As amended, this law allows a variety of such companies to be created and municipalities to assist their projects by abating property taxes, acquiring and disposing of real property, and providing direct financial subsidies and supportive infrastructure.

Fundamental Choices

Local officials sometimes resist taking action to provide affordable housing because of the great demand in their regions for it. They fear that if their community sponsors or encourages affordable housing they will be inundated with households excluded from other communities that do not provide affordable housing. Statutes in New York encourage local governments to enter into intermunicipal agreements or to work with their county governments to insure that the provision of affordable housing is done equitably so that each community provides its fair share of the area's housing need.

Plaintiffs attacking exclusionary zoning have great difficulty carrying the burden of proving that a municipality's zoning law does not meet its fair share of regional housing needs. In the absence of a governmentally sanctioned area-wide housing needs study, plaintiffs must bear the burden of proving that there is an unmet 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 need is that of lower income people? How does one prove that other municipalities in the region have not zoned to meet the housing needs of these lower income families? 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.

Legal Foundation

The authority of localities to provide zoning incentives to developers in exchange for housing for low and moderate-income households is found in Town Law § 261-b, Village Law § 7-703, and General City Law § 81-d.

The authority of municipal housing authorities, and of local governments to assist their projects, is contained in the various articles of the New York Public Housing Law.

The authority of private and non-profit developers to form state-regulated housing companies, and of local governments to assist their projects, is found in several articles of the New York Private Housing Finance Law.

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. Planning Board of the Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

In *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975), a landowner attacked as exclusionary a suburban town’s zoning law that contained no provision for the development of multi-family housing in any zoning district in the jurisdiction. The Court of Appeals found the Town’s law to be exclusionary, stating that “[t]he primary goal of a zoning law must be to provide for the development of a balanced, cohesive community which will make efficient use of the town’s available land.” The court held that “in enacting a zoning law, consideration must be given to regional [housing] needs and requirements” and that “[t]here must be a balancing of the local desire to maintain the [s]tatus quo within the community and the greater public interest that regional needs must be met.” The court also appealed to the state legislature for help on this matter, noting that “[z]oning . . . 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 *Berenson* issue returned to the Court of Appeals in *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville*, 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1980). The Village of Upper Brookville appealed a lower court ruling that its five-acre minimum lot size for single-family residences was invalid under *Berenson*. The Court of Appeals sustained the zoning in the absence of any showing that the Village had failed to consider regional housing needs and that such needs were unsatisfied. The court held that there was no evidence that the zoning law was enacted with an “exclusionary purpose,” implying that a showing of such a purpose would be an additional rationale for finding a zoning law unconstitutionally exclusionary.

In *Allen v. Town of North Hempstead*, 103 A.D.2d 144, 478 N.Y.S.2d 919 (2d Dep’t 1984), a durational residency requirement imposed as a condition to qualifying for residence in housing developed in a Golden Age Residency zoning district in North Hempstead was found to violate the *Berenson* tests. The court determined that the requirement was enacted with

an exclusionary purpose and that the Town had failed to consider regional housing needs. The court wrote that “[t]he durational residence requirement at bar has a more direct exclusionary effect on nonresidents like plaintiffs than the almost total exclusion of multi-family housing held to be unconstitutional by this court [in *Berenson*].” Here, ample proof of the need for affordable housing of senior citizens in surrounding communities was placed on the record.

An amendment to New York City’s zoning resolution, which sought to reverse Chinatown’s badly deteriorated state, was found to be invalid under *Berenson* in *Asian Americans for Equality v. Koch*, 72 N.Y.2d 121, 527 N.E.2d 265, 531 N.Y.S.2d 782 (1988). The amendment allowed construction at greater than usual densities on the condition that the developer provide certain amenities to the community such as community facilities, subsidized units for low-income families, or the rehabilitation of some existing substandard residential structures. The plaintiffs claimed that the amendment’s incentives failed to provide sufficient low-income housing to satisfy the region’s needs and thus amounted to unconstitutional exclusionary zoning.

Defining “community” as New York City in its entirety, the Court of Appeals noted that *Berenson* did not require that each zone within a community be balanced. The court further noted that it is constitutional to exclude specific uses in a particular area so long as the regional and community needs are provided for elsewhere. The court reasoned that New York City had no affirmative duty to provide for an array of uses on a neighborhood-by-neighborhood basis because its residential stock contained much low-income housing. The court explained, “[i]n our prior decisions we have not compelled the City to facilitate the development of housing specifically affordable to lower income households; a zoning plan is valid if the municipality provides an array of opportunities for housing facilities.”

In *Continental Building Co. v. North Salem*, 211 A.D.2d 88, 625 N.Y.S.2d 700 (3d Dep’t 1995), the Appellate Division affirmed that North Salem’s zoning law was unconstitutionally exclusionary under the *Berenson* requirement that local zoning “must adequately consider regional [housing] needs and requirements.” The court held that a zoning law, 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 law shifts to the defendant [municipality].”

The North Salem decision expressed what had been implied by the Court of Appeals in its 1975 *Berenson* decision: the New York exclusionary zoning cases are concerned with the exclusion of a particular socioeconomic group, low and moderate income families, and it is their rights that the developer represents when attacking the exclusion of and adequate supply of multi-family housing from the local zoning law. Clearly, local zoning authority delegated by the state legislature may not be used to exclude a significant percentage of the population of the state, i.e., low and moderate income citizens. It is the health, safety, and welfare of the people of the state, not of the individual locality, that justifies the exercise of local police power authority such as zoning.

A developer challenged the Town's zoning law as exclusionary in *Triglia v. Town of Cortlandt*, N.Y.L.J., Jan. 21, 1998, at 31 (Sup. Ct. Westchester County Jan. 8, 1998). In 1993, the town amended its zoning law 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. The Town Board had approved this proposal, but after the 1993 amendments, it refused to take any further action regarding the plaintiff's application.

The court, in ruling 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 law that completely omits any affordable multi-family housing of any sort of more than four units, 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 within four months of the decision, "such amendment to the Zoning Law as may allow for multi-family housing zones in the Town of Cortlandt for the Court's inspection upon failure of which the Zoning Ordinance shall be deemed annulled and set aside."

Approaches in Other States

In both New Jersey and Connecticut, statutory mechanisms have been created by the state legislature to remove the serious burden of proof that is placed on those who challenge the zoning law as exclusionary. In New Jersey, the legislature adopted the Fair Housing Act of 1985 to provide for the development of low and moderate income 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. The 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 property 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.

References

See John R. Nolon, *Well Grounded* (1999).

See Julie M. Solinsky, *Affordable Housing Law in New York, New Jersey and Connecticut*, available at <http://www.law.pace.edu/landuse/afford.htm> (last visited Oct. 16, 2000).

RE: Affordable housing – other states law

Chicago: “New Homes for Chicago”: this program provides incentives to developers and home buyers. For developers, the incentives include: 1) giving city-owned vacant lots to developers for the lowest price possible, 2) a waiver of the building permit and utility connection fees, 3) a \$10,000.00 subsidy per home, 4) zero percent interest on construction loans, and 5) grants for developers building senior or family buildings for low-to-moderate income renters. *Chicago Housing Authority*, available at www.cha.org

Seattle: “House Key Program”: provides incentives to buyers who purchase houses in a targeted area. The purchasers would receive low interest rates. In order to qualify, the purchaser must: 1) buying in a targeted area or be a first time homeowner, 2) meeting income limits, and 3) attending a home buyer education seminar. Additionally, a teacher or administrator in the K-12 levels receive lower down payment requirements.

California: This program provides density bonuses to developers who build affordable housing. For example, an ordinance in Montgomery county requires developers of fifty or more units of housing to make 12.5% to 15% of them affordable. In return, density bonuses of up to 22% are given to the developer. This is not optional; it is requirement for all developers who build 50 or more residential units. The county then controls the sale price of the units for 10 years and the rental price for 20 years. www.state.ca.us

Boulder, Colorado: The Housing Authority of the City of Boulder (HACB) takes vacant lots that already have major infrastructure in place. They then solicit donations of labor and materials. Bank One supports the projects by providing tax-exempt construction loans and low-interest mortgages for residents. To cut costs of development further, the communities share common driveways and common lawn areas. www.uli.org

Portland, Oregon: The Portland Housing Authority redevelops brownfield sites into affordable housing. The “Pearl Court Apartments” were build on an abandoned railway yard. The Housing Authority issued tax exempt bonds for cleanup of the site and the Portland Development Commission used low interest loans for construction. Due to the brownfield contamination, the city was eligible for federal grants.

In Florida, the State Housing Initiative Program (SHIP) encourages municipalities to create and preserve affordable housing.ⁱ SHIP funds available for this year are approximately \$127

million. Specifically, SHIP was created to “provide funds to counties and municipalities to create a local housing partnership.”ⁱⁱ In order to receive funding from SHIP, the municipality must submit a local housing assistance plan, which describes its strategies for creating and preserving affordable housing.ⁱⁱⁱ The municipality must also amend its local zoning regulations to allow for implementation of the housing plan.^{iv} The municipality must also create a local housing trust fund and create an affordable housing advisory committee prior to receiving funding.^v The municipality may allocate its funds to: implement its housing strategies, provide a local matching share to federal and state grants, and fund emergency repairs.^{vi}

In Gadsden County, the SHIP funds have been used to demolish existing structures and rebuild homes.^{vii} Additionally, the county has provided funds to volunteer groups, who will use the funds to purchase materials for the repair of low income housing.^{viii}

In California, Napa County has used its home rule authority to adopt local regulations for affordable housing.^{ix} These regulations require that “at least ten percent of all new dwelling units in a residential project constructed in the county be affordable.”^x Non-residential projects must pay a fee, which is to be placed in a housing fund.^{xi} The fee is based upon the square footage to be constructed.^{xii} The housing fund can be used to construct, rehabilitate, or subsidize low income housing.^{xiii}

This housing, which is required to be affordable, is highly regulated and “affordable” is defined by the local code. For example, “affordable sales price” is defined as follows: “A maximum purchase price shall be considered affordable only if each monthly payment is equal to or less than 1/12 of 30% of the targeted population’s yearly income.”^{xiv}

In Boston, affordable housing is created through the Home Again Program, which provides low income housing that is constructed on city-owned vacant land.^{xv} Typically, 100% of all the housing created under this program is sold to those with incomes less than 80% of the median income, as defined by HUD.^{xvi} The program donates city-owned vacant land, or sells it for a low price, to developers who agree to construct only affordable housing on it.^{xvii} Boston has another innovative program called the Ten Most Wanted. This program targets and shuts down buildings which have become locations of serious illegal activity.^{xviii} The buildings are confiscated by the city and rehabilitated into affordable housing.^{xix}

In Nebraska, the Nebraska Affordable Housing Trust Fund provides funding to eligible municipalities every year for six years.^{xx} The municipalities may use the funds to construct ownership and rental housing, rehabilitate older housing, provide infrastructure on raw land to decrease the cost of new development, and to subsidize first-time homebuying.^{xxi} The eligibility of the municipality is determined by population, median income, and unemployment rates.^{xxii}

iFlorida Housing Authority, available at <http://www.florida housing.org>, last visited 4/15/02.

iiFLA. CODE ANN. 420.9072 (2000).

iii FLA. CODE ANN. 420.9072(2)(a).

ivId.

vFLA. CODE ANN. 420.9072(2)(b).

viId.

viiThe Florida Divison of Housing and Community Development, *available at* <http://www.dca.state.fl.us>, *last visited* 4/15/02.

viiiId.

ixSee Napa County Code 15.60.010.

x Napa County Code 15.60.130.

xi Napa County Code 15.60.080.

xii Id.

xiii 15.60.040.

xiv 15.60.010.

xv City of Boston, *available at* <http://www.boston.gov>, *last visited* 3/30/02.

xviId.

xvii Id.

xviiiId.

xixId.

xx Nebraska Affordable Housing Trust Fund, *available at* <http://www.nifa.org>, last visited 4/02/02.

xxiId.

xxiiId.