

**Affordable Housing in the New York Courts:
A Case for Legislative Action**

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Introduction:

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. After a review of the affordable housing cases, this article reviews what other state legislatures have done in recent years, and proposes the adoption of a Local Housing Planning and Implementation Act.

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.¹ In *Dowsey v. Village of Kensington*, it found that the ordinance's purpose was to exclude apartment buildings.² 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*.³ 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."⁴

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.⁵ The group claimed that the town's modest provision for special permits for multifamily housing failed to meet the *Berenson* standard.⁶ In *Suffolk Housing Services v. Town of Brookhaven*, the court held that these permits were more than "a ruse to prevent the construction of multifamily housing."⁷ 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.

In 1996 *Gernatt Asphalt v. Town of Sardinia*,⁸ the Court of Appeals provided an excellent summary of the affordable housing doctrine in New York. It reads as follows:

Berenson involved an attack on an ordinance which prevented the construction of multifamily residences upon open and undeveloped land within the Town of New Castle at a time when no multifamily residences existed there. The primary

goal of a zoning ordinance, we said, is to provide for the development of a balanced, cohesive community which will make efficient use of the Town's available land. Thus, a community must consider regional needs and requirements when enacting a zoning ordinance. An ordinance shown to be enacted for an improper purpose or that has an exclusionary effect is invalid. A community may not use its police power to maintain the status quo by preventing members of lower and middle socioeconomic groups from establishing residency in the municipality.⁹

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.”¹⁰ 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 who 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.¹¹ 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*, the court declared the town's actions unconstitutionally exclusionary.¹² 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*."¹³ 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."¹⁴ 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."¹⁵

Another Westchester community lost an exclusionary zoning suit in *Continental Building v North Salem*.¹⁶ 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.”¹⁷ 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].”¹⁸ 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.¹⁹ 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*, 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.”²⁰ 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.²¹ 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.

Land Master v. Montgomery

On October 28, 2004, the Montgomery town board adopted Local Law 4 which deleted RA-1, RA-3, and RM-1 zoning districts from the town's zoning ordinance.²² It did this over the objection of the County Planning Department which stated that this amendment would "effectively eliminate the possibility of multi-family homes in the Town...." which "will significantly impact the Town's ability to address affordable housing needs...."²³

Petitioners Land Master and Roswind Farmland Corp had submitted two mixed-use development proposals in 2001 and 2002 for land located in the eliminated zoning districts. Both included provision for multi-family dwelling units and Land Master proposed reserving 10% of its units as affordable. In April of 2002, the town board established a special board to review its comprehensive plan and in May it imposed a moratorium on all residential developments proposing more than three residences. These actions halted the town planning board's review of the petitioners' projects and Local Law 4 prevented them altogether.

In this case, the respondent town did not contest the need for affordable housing.²⁴ Shortly after eliminating multi-family zoning from its zoning law, in fact, the town board created an Affordable Housing Committee. Its report, dated July 7, 2005, noted that the town had issued no building permits for multi-family housing since 1999 and that there was a need for from 688 to 1,010 affordable housing units in the Town. This need, no doubt, was exacerbated by the fact that the median sales price of single-family housing as reported by the New York State Association of Realtors increased an average of 15% annually between 2001 and 2005, from \$159,900 to \$317,600.

The court held that “Given these housing needs, the operative test becomes whether or not the zoning ordinances constitute a balanced and well-ordered plan for the community which adequately considers the acknowledged regional needs and requirements for affordable housing. The Court believes that the existing zoning structure fails this test.”²⁵ The court, finally, dismissed a variety of discretionary and “narrow” methods of providing smaller lots, adult communities, mobile home parks, and incentives as vesting almost total discretion in the town and creating “the illusion of affordable housing availability.”²⁶

The effect of the court’s holding is to restore the multi-family zones to the ordinance leaving the petitioners free to pursue their approvals and the town free to consider how to react to the court’s declaration of unconstitutionality. The court noted that, as happened in previous exclusionary zoning cases, the petitioners are entitled to an award of their attorneys’ fees.²⁷ After hearings on these fees in the *Triglia* and *Continental* cases, the towns were required to pay the petitioners over \$750,000 in attorney fees.

Courts Call for Legislative Action

Both *Land Master* and *Triglia* confirm the housing crisis in the New York Metropolitan area and remind the state legislature of the need to guide local governments in providing an adequate stock of housing for the workforce and other households of moderate income. *Triglia* and *Land Master* build on the seminal 1975 Court of Appeals decision, *Berenson v. New Castle*.²⁸ In *Berenson*, the court noted: “Zoning 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.”²⁹ 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.”³⁰ When it is proved that local ordinances are exclusionary they have mandated the rezoning of the developer’s parcel.³¹ This extreme remedy, necessitated by the importance of affordable housing, puts both the court and the municipality in an uncomfortable position. Courts seldom and reluctantly require that local legislative bodies take specific legislative actions. Legislators, in turn, do not like to be told by judges how to exercise their legislative prerogatives. Since it is unlikely that the combination of reluctant judges and reluctant local legislators will lead to effective and comprehensive solutions to a growing need for affordable housing, it is appropriate for the state legislature to exhibit leadership on this important economic and social issue.

State law encourages localities to adopt comprehensive plans, but does not require them to do so.³² These provisions also encourage localities to include housing components in their plans detailing existing and future housing needs, including affordable housing. Finally, these provisions of state land use enabling law encourage local comprehensive laws to consider regional needs.

Local governments need help doing what case law requires, and state statutes urge them to do. They need help 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 best practices for producing affordable housing, local governments are unlikely to act effectively.

The current state of judicial doctrine in New York severely disadvantages local governments. The lack of definition of regional needs and the failure to identify local responsibility provide no guidance to towns, villages, and cities regarding the appropriate course of action. This combined with the builders' remedy of the *Berenson* cases leads to ad hoc results: an "anti-planning" approach, satisfactory to no one. State law needs to be amended to encourage well-planned comprehensive zoning and to properly guide municipal planning.

What Other State Legislatures Have Done

Other state legislatures have taken effective steps in the direction of providing help and guidance to their local governments. The following review of legislative

activity in other states provides a valuable menu of options for our state lawmakers to consider.

Needs Identification

The New Jersey Fair Housing Act of 1985³³ requires municipalities to fulfill a proportionate share of regional low and moderate income housing needs. An oversight committee formed by the Act, the Council on Affordable Housing (COAH), assesses current and future regional needs and is also responsible for ensuring municipal compliance. Each municipality must include a housing element in its land use plan that addresses its “fair-share requirement” within the guidelines set out by COAH.³⁴ 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.³⁵ 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. In California, the Department of Housing and Community Development determines “the existing and projected need for housing for each region.”³⁶

Comprehensive Plan Component

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 for households at all economic levels.³⁷ Comprehensive plans in Maine must provide for the development of affordable housing for low- and

moderate-income households.³⁸ The Maine State Housing Authority provides technical assistance and information to assist in the development of provisions that effectively address the shortage of affordable housing. Municipalities are given the authority to develop regional comprehensive plans with neighboring municipalities. The Idaho Code directs as part of the duties of the planning commission that different housing types be incorporated into the master plan including a provision for low cost conventional housing.³⁹ In addition, the plan should include an analysis of housing conditions and needs. Section 25 of the Illinois Planning and Technical Assistance Act provides grant money as an incentive to municipalities for affordable housing planning.⁴⁰ Delaware, Nevada, Tennessee, and California all require that local governments include a housing element in the comprehensive plan.⁴¹

Other Techniques

Property Tax Breaks

The Maryland legislature enables municipalities to provide real property tax exemptions when the real property is used for affordable housing and other requirements under the statute are met.⁴²

Conveying Public Lands

Arizona counties are authorized to sell, lease, convey, or otherwise dispose of real property at less than fair market value without holding an auction if the land will be used for housing for low-income households.⁴³ North Carolina counties may convey property to a public or private entity if the property will be used to provide affordable housing to persons of low or moderate income and covenants or conditions are included that assure

this limitation.⁴⁴ Under the New Mexico Affordable Housing Act, municipalities and counties may donate land or buildings to provide affordable housing and are authorized to pay for the infrastructure necessary to support such projects.⁴⁵ In Nevada, a non-profit organization may submit an application to the governing body of a city for conveyance of a property owned by the city to develop affordable housing for families residing in that city.⁴⁶ If the governing body approves such conveyance without consideration it must enter into an agreement with the non-profit organization requiring such organization to provide affordable housing for at least 50 years.

Trust Funds

Tennessee local governments are authorized to establish housing trust funds to provide affordable housing for low-income persons.⁴⁷

Cluster Development

In Maine, municipalities are given the express authority to employ cluster zoning and explicitly encouraged to use it in conjunction with the development of affordable housing.⁴⁸

Advisory Board

Colorado law authorizes and encourages local governments to establish affordable housing dwelling unit advisory boards.⁴⁹ The board “shall address the housing needs of low- and moderate-income persons, promote a full range of housing choices, and develop effective policies to encourage the construction and continued existence of affordable housing.”⁵⁰ Ohio amended its Constitution to include the “availability of adequate housing” as a legitimate “public purpose.”⁵¹ One of the prerequisites for local

governments engaging in housing activities is the establishment of a housing advisory board.⁵²

Technical Assistance

Illinois adopted the Local Planning and Technical Assistance Act 2002.⁵³ The law's purpose is to provide technical assistance to encourage comprehensive planning, promote the use of model ordinances, and to support planning efforts in communities with limited funds.⁵⁴ The Department of Commerce and Community Affairs is authorized to provide technical assistance grants to local governmental units to "develop, update, administer, and implement comprehensive plans, subsidiary plans, land development regulations...that promote and encourage the principles of comprehensive planning."⁵⁵

Appeals of Denials of Below Market Housing Projects

Several states, including Oregon, Massachusetts, Illinois and Connecticut, have state statutory guidance for appeals of denials of below market housing projects. 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."⁵⁶ State law in Massachusetts establishes a Housing Appeals Committee to which developers of affordable housing can appeal local denials of their housing proposals.⁵⁷ The statute requires that the denial be vacated if the Committee finds that it

was not reasonable and not consistent with local needs. Under the Commonwealth's Low and Moderate Income Housing Law, certain entities who wish to build affordable housing may follow a streamlined application process.

The Illinois Affordable Housing Planning and Appeals Act seeks to "encourage counties and municipalities to incorporate affordable housing within their housing stock sufficient to meet the needs of their county or community."⁵⁸ The Act also allows developers to seek relief where local ordinances would otherwise prevent the development of low- and moderate-income housing, except in the case of "non-appealable local government requirements" that are essential to safeguard public welfare and safety. Furthermore, all "non-exempt" local governments (e.g., less than 10 percent of total housing dedicated to affordable housing) must develop an "affordable housing plan" that identifies the percentage of locally available affordable housing; designates lands appropriate for the development of affordable housing; and identifies goals, objectives, incentives, and other means that may be employed to comply with the Act.

The Local Housing Planning and Implementation Act

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 regional housing needs established under this Act 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 and to avoid judicial intervention into their affairs.

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 adding housing components to local comprehensive plans, mandatory 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 publicly 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 and create partnerships that lead to affordable housing development.

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.

¹ *Dowsey v. Village of Kensington*, 177 N.E. 427 (N.Y. 1931).

² *Id.*

³ 341 N.E.2d 236 (N.Y. 1975).

⁴ *Id.* at 242.

⁵ *Suffolk Housing Services v. Town of Brookhaven*, 491 N.Y.S.2d 396 (N.Y. App. Div. 1985).

⁶ *Id.*

⁷ *Id.* at 401.

⁸ 664 N.E.2d 1226 (N.Y. 1996).

⁹ *Id.* at 1235 (citing *Berenson*, 341 N.E.2d 236; *Robert E. Kurzius, Inc. v. Incorporated Vil. of Upper Brookville*, 414 N.E.2d 680, 684 (N.Y. 1980), 345, cert. denied 450 U.S. 1042,; *Asian Ams. for Equality v. Koch*, 527 N.E.2d 265, 272-73 (N.Y. 1988); 1 *Anderson*, *New York Zoning* § 8.01.).

¹⁰ *Berenson v. New Castle*, on remand, 415 N.Y.S.2d 669, 675 (N.Y. App. Div. 1979).

¹¹ *Triglia v. Town of Cortlandt*, Supreme Ct., Index No. 17976/96 (Sup. Ct. Westchester Co. Jan. 8, 1998).

¹² *Id.*

¹³ *Id.* at 13.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 625 N.Y.S.2d 700 (N.Y. App. Div. 1995), app. dismissed 86 N.Y.2d 818.

¹⁷ *Id.* at 703.

¹⁸ *Id.* (citing *Robert E. Kurzius, Inc.*, 414 N.E.2d 680).

¹⁹ *Id.*

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- ²⁰ *Blitz v New Castle*, 463 N.Y.S. 2d 832, 835 (N.Y. App. Div. 1983).
- ²¹ See *Land.com v. Kleiner*, 815 N.Y.S.2d 234 (N.Y. App. Div. 2006).
- ²² *Land Master Montg I, LLC v. Town of Montgomery*, 821 N.Y.S.2d 432, 2006 NY Slip Op 26367 (N.Y. Sup. Ct. 2006).
- ²³ *Land Master Montg I, LLC*, 2006 NY Slip Op 26367, at *4. (quoting Orange County Planning Department Report, October 19, 2004).
- ²⁴ *Id.* at *4.
- ²⁵ *Id.* at *6.
- ²⁶ *Id.* at *7.
- ²⁷ *Id.* at *10 (citing *Continental Building Co. v. Town of North Salem*, 625 N.Y.S.2d 700, 704-05 (N.Y. App. Div. 1995); 42 USC § 1988).
- ²⁸ *Berenson*, 341 N.E.2d 236.
- ²⁹ *Id.* at 243.
- ³⁰ *Golden v. Ramapo*, 285 N.E.2d 291, 301 (N.Y. 1972).
- ³¹ *Berenson*, 415 N.Y.S.2d 669.
- ³² See N.Y. TOWN LAW 272-a; N.Y. VILLAGE LAW 7-722; N.Y. GENERAL CITY LAW 28-a.
- ³³ N.J. STAT. ANN. §§ 52:27 D-301-329.
- ³⁴ N.J. STAT. ANN. § 52:27D-301.
- ³⁵ NEB. REV. STAT. § 81-1281.
- ³⁶ CAL. GOV. CODE § 65584.
- ³⁷ ARIZ. REV. STAT. § 9-461.05.
- ³⁸ ME. REV. STAT. ANN. tit. 30, § 4752.
- ³⁹ IDAHO CODE § 67-6508(l).
- ⁴⁰ 20 ILL. COMP. STAT. ANN. 662/25.
- ⁴¹ DEL. CODE ANN. tit. 22 § 702; NEV. REV. STAT. ANN. §§ 278.230 & 278.250; TENN. CODE ANN. § 6-58-107; CAL. GOV. CODE § 65583.
- ⁴² MD. CODE ANN. TAX-PROP. § 7-506.1.
- ⁴³ ARIZ. REV. STAT. § 11-251.10.
- ⁴⁴ N.C. GEN. STAT. § 153A-378.
- ⁴⁵ N.M. STAT. ANN. § 6-27-5.
- ⁴⁶ NEV. REV. STAT. ANN. § 268.058.
- ⁴⁷ TENN. CODE ANN. § 7-8-101 & § 13-23-501.
- ⁴⁸ ME. REV. STAT. ANN. tit. 30-A, § 4326.
- ⁴⁹ COLO. REV. STAT. § 29-26-101.
- ⁵⁰ *Id.*
- ⁵¹ Ohio Const. art. VIII, § 16.
- ⁵² OHIO REV. CODE ANN. § 176.04.
- ⁵³ 20 ILL. COMP. STAT. ANN. 662.
- ⁵⁴ 20 ILL. COMP. STAT. ANN. 662/5.
- ⁵⁵ 20 ILL. COMP. STAT. ANN. 662/15.
- ⁵⁶ Conn. GEN. STAT. § 8-30g.
- ⁵⁷ MASS. GEN. LAWS § ch. 40B, §§ 20-23.
- ⁵⁸ 310 ILL. COMP. STAT. ANN. 67.