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**Addressing Affordable Housing—Cases & Practical Solutions**

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**I. Introduction**

**A. What is affordable housing?**

1. **Old Notions Are No Longer Valid** - According recent news publications (The Times Herald

Record, August 11, 2006, and various websites including: [www.nyjobsources.com](http://www.nyjobsources.com) posted August 10, 2006), the average selling price for homes in the Hudson Valley in 2006 was as follows:

Dutchess County \$396,678  
Orange County \$329,900  
Putnam County \$395,750  
Rockland County \$522,500  
Ulster County \$250,000  
Westchester County \$662,000

It is becoming more and more evident that homeownership in many parts of New York State has become a luxury that is beyond the means of the middle and upper middle class.

2. **Housing Cost Burden (The 30% Rule)** - The general rule is that not more than 30% of a family's monthly income should be devoted to housing costs. Taking into account the recent selling prices listed, it becomes increasingly impossible for a teacher, who in New York State has average salary of \$55,000; a New York Firefighter (average salary of \$46,160); New York Police Officers

(average salary of \$34,970 to \$60,000) and/or Registered Nurse (average salary \$50,470) to

afford to live anywhere near the communities in which they work. Source: [www.payscale.com](http://www.payscale.com)

## **B. Why do we need it?**

1. Trend Towards Larger Lots = Bigger Homes, Higher Housing Costs and suburban sprawl  
  
resulting in disconnect with community and longer commutes to and from work
2. Volunteers, Teachers, Community Service Clubs - Where do they come from?
3. Seniors and Children - Where Are They Supposed To Go?

## **II. Overview of New York Law**

### **A. Statutory Considerations**

1. Municipal Home Rule Law § 10(1)(i).a. Provides authority for local governments to "adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property, affairs or government . . . ."
2. Zoning. Ultimate zoning power rests with the State. Town Law § 261, Village Law §37-700 and General City Law §20 grant this power to the respective municipal boards, but only inasmuch as such power is used for the "purposes of promoting the health, safety, morals, or the general welfare of the community."
3. Comprehensive Planning. The content of any comprehensive plan may include, consideration of; "Existing housing resources and future housing needs, including affordable housing" Town Law §272-a(3)(h), Village Law §7-722(3)(h), General City Law §28-a(4)(h).

## **B. Historical Considerations**

1. *Dowsey v. Village of Kensington*, 257 N.Y. 221 (1931) - Court of Appeals holds village zoning regulations "patently unreasonable" where entire village was zoned for single-family residences and "the village zoning ordinance has been framed for the purpose of excluding [apartment] buildings from the village in order to preserve it as a secluded quiet community of one-family detached homes."
2. *Fox Meadow Estates v. Village of Scarsdale*, 233 A.D. 250 (2d Dep't 1931) - Court upheld Village zoning where multi-family housing was restricted to only those areas around train stations and remainder of village was single-family residential.

## **C. Berenson and the Two-Pronged Test**

1. *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (1975) - In the leading New York State case on affordable housing, the Court of Appeals declared unconstitutional a town zoning ordinance that failed to permit multi-family housing in any of its twelve zoning districts. In so holding, the court established a two-pronged test for the validity of a zoning ordinance excluding multi-family housing as a permitted use. The first prong involves a review of the municipality's existing housing to determine whether the types of housing present, "adequately meet the present needs of the town. Also, it must be determined whether new construction is necessary to fulfill the future needs of the [town] residents, and if so, what forms the development ought to take." The second prong recognizes that local zoning often has substantial implications beyond the boundaries of the municipality, and requires that consideration be given to the regional needs as well. Where residents of the region "may be searching for multiple-family housing in the area to be near their

employment or for a variety of other social and economic reasons . . . 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."

#### **D. Recent Decisions**

1. 208 East 30th Street Corp. v. Town of North Salem, 89 A.D.2d 851(2d Dep't 1982) - Appellate Division upheld Supreme Court decision that Town zoning failed to meet either its local or regional housing needs. The zoning was declared unconstitutional, and the town was ordered to rezone plaintiff's property to allow for multi-family use.
2. Suffolk Housing Services v. Town of Brookhaven, 109 A.d.2d 323 (2d Dep't 1985) - A Town of Brookhaven zoning law, which failed to allow multi-family housing in any zoning district as of right, but rather required all such housing to obtain a special use permit, was upheld by the Appellate Division after a challenge by an affordable housing advocacy group. In finding the law constitutional, the court reasoned that, unlike Berenson, the Brookhaven law did provide for multi-family housing albeit via special permit, and that the Town had, in fact, issued such special use permits in sufficient numbers. The Court interpreted Berensen as only requiring that a municipality provide a wide array of housing types without addressing the affordability of such housing types.
3. Continental Building Co., Inc. v. Town of North Salem, 211 A.D.2d 88 (3rd Dep't 1995) - Five years after losing the 208 East 30th Street Corp. case noted above, the Town amended their zoning to again reduce the number of lots available for multi-family development. The court noted

that "a municipality may not legitimately exercise its zoning power to effectuate socioeconomic or racial discrimination. . . .Therefore, a zoning ordinance will be invalidated if it was enacted with an exclusionary purpose, or it ignores regional needs and has an unjustifiably exclusionary effect." In declaring the Town's zoning unconstitutional, the court found that plaintiff had presented "compelling evidence that the net result of the zoning ordinance [was] a scheme of large-lot single-family residential development . . . the ultimate consequence [of which] . . . is that only upper-income families can reasonably be expected to purchase residences and live in the town, to the exclusion of all others." Here the Court explicitly stated that "any contention that Berensen and its progeny eschew any requirement of affordability is simply wrong."

4. Triglia v. Town of Cortlandt, Index No. 17976/96 (Sup. Ct. Westchester Co. 1/8/98) - Upon challenge by a developer, the court declared the Town's zoning law unconstitutional, noting 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.."

Summary - Although there appears to be a split between the 2nd and 3rd Dept. based on the decisions in the Suffolk Housing Services v. Town of Brookhaven and Continental Building Co., Inc. v. Town of North Salem, a possible way to reconcile these holdings is the fact that Continental Building case was decided in 1995 when the housing affordability problem was much more widespread than in 1982 when the Town

of Brookhaven case was decided. This theory is supported by the fact that the 1998 Westchester Supreme Court, which is located within the 2nd Dept. in the case of Triglia v. Town of Cortlandt, specifically addressed the affordability of housing in declaring a zoning law unconstitutional following the reasoning in the Continental Building case.

#### **E. Other Northeast Jurisdictions**

1. New Jersey a. The Mt. Laurel Decisions - Like New York, New Jersey municipalities have struggled with the idea that affordable housing is required of any legitimate zoning regulation. In the Mount Laurel cases (South Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975)(Mt. Laurel I); and South Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983)(Mt. Laurel II)) the New Jersey Supreme Court went beyond Berenson in holding that all New Jersey municipalities have an affirmative obligation to provide zoning for high density, low and moderate income housing. b. New Jersey Fair Housing Act, N.J. STAT. ANN. § 52:27D-301-329 - Following the courts ruling in Mt. Laurel II, the New Jersey Legislature adopted a comprehensive plan to ensure that each municipality would provide for its fair share of affordable housing. In so doing, the Act created the New Jersey Council on Affordable Housing which has been assigned the task of calculating and assigning each communities required share. See, N.J. STAT. ANN. § 52:27D-307.
2. Connecticut a. Affordable Housing Appeals Land Use Appeals Act of 1990, CONN. GEN. STAT. § 8-30g - The Connecticut Act provides an applicant, who has be denied a permit for construction of affordable housing units, with an as-of-right appeal to the State's Superior Court for a hearing

in front one of a limited number of specially appointed judges. The Act further creates a public policy presumption in favor of affordable housing, and thus, unlike traditional appeals, places the burden on the municipality to justify and defend its denial of the application.

3. Massachusetts a. In any community where affordable housing fails to comprise at least ten percent of the existing housing stock, any applicant who has been denied a permit to construct an affordable housing project may file an as-of-right appeal to the State Housing Appeals Committee, which may override the local denial. See, MASS. GEN. LAWS ch. 40B §§ 20 - 23.

#### **F. Other Notable Jurisdictions**

1. California a. Every local government unit in California is required to enact a comprehensive 5-year land use plan, and to update said plan every five years. Included in the plan is a required housing element wherein the locality must provide for the development of housing for low and moderate incomes in accordance with a numerical needs apportionment generated by the California Department of Housing and Community Development (HCB). See, CAL. GOV'T CODE §§ 65583-84.
2. Montgomery County, Maryland a. County zoning ordinance requires large subdivisions to provide at least fifteen percent of all new units to be Moderately Priced Dwelling Units that are mixed in among, and indistinguishable on the outside from, the market rate units. See, Montgomery County Department of Housing and Community Affairs, Moderately priced Dwelling Unit Program, available at <http://www.montgomerycountymd.gov>

### III. Strategies For A Successful Community Growth Plan

- A. Provide for an “array of housing units” of varying densities within your community.
- B. Include a long-term plan to improve and enhance infrastructure in your Comprehensive Plan.
  - 1. Do you have adequate central sewer service available to accommodate growth?
  - 2. Do you have adequate central water service available to accommodate growth?
  - 3. What traffic improvements are necessary to accommodate growth?
- C. Provide for inclusionary zoning with your code requiring a set aside of a percentage of homes to be workforce housing.

#### 1. Examples

- a. Town of East Fishkill
- b. City of New Rochelle
- c. Town of Wawayanda (Floating Zone Concept)

See Pace University Law School Land Use Center web site for additional examples and analysis

[www.landuse.law.pace.edu](http://www.landuse.law.pace.edu)

- 2. Note that just because a municipality mandates a set aside for affordable housing does not mean it has provided the required array of housing.
- 3. Create preferences for volunteer emergency services, police, school teachers.
  - a. Be careful on durational requirements. See *Allen v. Town of North Hempstead*, 103 AD2d 144 (2d Dept 1974)

- D.** Incorporate zoning tools authorized by New York State Law into your code.
  - 1. Incentive zoning NY Town Law §261-b, NY Village Law § 7-703, General City Law §81-d
  - 2. Transfer of development rights, NY Town Law §261-a, NY Village Law §7-701, General City Law §20-f
  - 3. Clustering NY Town Law §278, NY Village Law §7-738, General City Law §37
  
- E.** Intermunicipal Cooperation
  - 1. Annexation policies between Towns and Villages
    - a. Example: Town and Village of Warwick
  
- F.** Use SEQRA Pro-actively.
  - 1. Use Comprehensive Plan as a GEIS to designate areas to accommodate affordable/  
  
workforce housing and set environmental standards, that if met, will not require additional  
  
SEQR analysis.
  
- G.** Educate constituency on the benefits of providing housing for workforce.
  - 1. Entices ratepayers – “Homes are where jobs sleep at night”.
  - 2. Supports community, volunteer fire, ambulance, etc.
  - 3. Creates consumers for local businesses.
  
- H.** Lobby State government to revise methods for raising school taxes.