TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 7 | Number 1 Article 4

1990

Affordable Housing Forum

Richard F. Bellman

John M. Armentano

Alan Mallach

AFFORDABLE HOUSING FORUM

Richard F. Bellman*

Throughout the northeast region, exclusionary and abusive land use restrictions imposed by local municipalities have operated to stop construction of desperately needed housing for lower income persons.[1] There can be little doubt of this fact. As a result, housing developers and advocates have for years been looking to the courts in hope of securing remedies for this problem.[2] Unfortunately, in recent rulings, the New York courts have shown insufficient awareness of the pervasiveness of exclusionary zoning practices and have indicated a lack of willingness to deal adequately with this troubling problem.[3] Moreover, there has developed a very stark contrast between the approach taken by the New Jersey Courts to exclusionary zoning and that taken by the New York judiciary.[4]

First, it should be made clear that where municipalities set about to overtly and intentionally exclude low cost and subsidized housing, the New York courts can be expected to prevent

---

* Partner of Steel, Bellman and Ritz, P.C., New York, New York; B.A., University of Minnesota, 1959; LL.B., University of Minnesota Law School, 1962.

1. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (*Mount Laurel II*); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975) (*Mount Laurel I*); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

2. *See Mount Laurel II*, 92 N.J. 158, 456 A.2d 390; *Mount Laurel I*, 67 N.J. 151, 336 A.2d 713; Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265, 531 N.Y.S.2d 782 (1988); Suffolk Hous. Servs. v. Town of Brookhaven, 70 N.Y.2d 122, 511 N.E.2d 67, 517 N.Y.S.2d 924 (1987); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

3. *See* Suffolk Interreligious Coalition on Hous., Inc. v. Town of Brookhaven, N.Y.L.J., May 31, 1990, at 31, col.2 (Sup. Ct. Suffolk County); Kamhi v. Town of Yorktown, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989).

4. *Compare Mount Laurel I*, 67 N.J. 151, 336 A.2d 713 *and Mount Laurel II*, 92 N.J. 158, 456 A.2d 390 (municipality must accept their "fair share" of regional needs for low and moderate income housing) *with Berenson*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (municipality must consider the regional needs of low and moderate income housing).

such actions. Thus, if a community and its leaders are so foolish as to state that housing developments for poor people and minority people will be blocked because the community does not wish to house the type of people that would live in such projects, no doubt the courts will declare the actions violative of both state[5] and federal laws.[6]

Thus, for example, in the infamous Yonkers, New York litigation,[7] the federal government proved that Yonkers officials simply would not tolerate the introduction of low cost housing units, which would be, for the most part, housing for minority people, into white sections of Yonkers.[8] In the *Yonkers* case there was no serious disagreement but in light of the proof, Yonkers was violating federal civil rights laws.[9] The real significance of the *Yonkers* litigation turned on the nature of the remedy fashioned by the court and the imposition of a unique contempt holding against public officials.[10]

The *Yonkers* case turned on the issue of intentional racial discrimination.[11] Even absent an issue of race, in New York, town officials may not intentionally exclude lower cost housing just because local residents do not want the poor to reside in their community.[12] Perhaps this is because it is felt that the

---

5. *See* N.Y. CONST. art. I, § 11; N.Y. EXEC. LAW § 290 (McKinney 1982).

6. *See* Fair Housing Act of 1968, §§ 801, 804, 805, 42 U.S.C. §§ 3601, 3604, 3605 (1982); 42 U.S.C. §§ 1981, 1983 (1982).

7. United States v. City of Yonkers, 856 F.2d 444 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1339 (1989).

8. *Id.* at 447.

9. *Id.*

10. *Id.* at 450-52. In the *Yonkers* litigation, various political figures, as well as the City of Yonkers itself, were assessed fines for contempt of court for refusing to enact legislation to further construction of subsidized housing. *Id.*

> The contempt sanction against the City would be daily fines starting at $100 on August 2 and doubling in amount each day for continued noncompliance. The cumulative total of the fines against the City would exceed $10,000 by day 7, exceed $1 million by day 14, exceed $200 million by day 21, and exceed $26 billion by day 28.

Id. at 450.

11. *Id.* at 447.

12. Suffolk Hous. Servs. v. Town of Brookhaven, 70 N.Y.2d 122, 131, 511 N.E.2d 67, 70, 517 N.Y.S.2d 924, 927 (1987) (use of a regional approach to zoning is necessary to "counterbalanc[e] the tendency of local planning boards to insulate their communities from an influx of 'less desirable' residents").

less affluent would "not fit in." Under New York law, such intentional exclusionary behavior simply cannot be employed.[13] At least since the early 1970's, the New York Court of Appeals has instructed that, "we will not countenance . . . under any guise . . . community efforts at immunization or exclusion."[14] In the mid-1970's, when upholding a town's right to create special multi-family zoning classifications for the elderly, the court of appeals noted that such zoning was permissible only because it did not involve any invidious classifications such as "economic status."[15] Most recently, in *Suffolk Housing Services v. Town of Brookhaven*,[16] the court of appeals stated, "a municipality may not legitimately exercise its zoning power to effectuate socioeconomic or racial discrimination."[17]

The difficulty lies, therefore, not in cases where the intent to discriminate or exclude is present. Rather, the problem attends the situation where a community maintains exclusionary zoning provisions of the type that Alan Mallach spoke about.[18] Perhaps the most troubling area is where a community may permit construction of multi-family housing but on a selective basis. Local officials, typically, will pick and choose between applications for multi-family zoning, approving some of them and denying others. In that context, when an application to facilitate construction of subsidized housing is presented, town officials can reject the proposal, argue that multi-family applications are regularly turned down, and that the subsidized housing proposal has not been discriminated against. Assuming these local officials are reasonably sophisticated, and avoid overt exposure of their prejudices, it becomes extremely difficult to prove that a denial of a rezoning application was based on intentional discrimination.[19]

---

13. *Id.* at 129, 511 N.E.2d at 69, 517 N.Y.S.2d at 926.

14. Golden v. Planning Bd., 30 N.Y.2d 359, 378, 285 N.E.2d 291, 302, 334 N.Y.S.2d 138, 152 (1972).

15. Maldini v. Ambro, 36 N.Y.2d 481, 487-88, 330 N.E.2d 403, 407-08, 369 N.Y.S.2d 385, 391-92 (1975).

16. 70 N.Y.2d 122, 511 N.E.2d 67, 517 N.Y.S.2d 924 (1987).

17. *Id.* at 129, 511 N.E.2d at 69, 517 N.Y.S.2d at 926 (citations omitted).

18. *See* Mallach, *Affordable Housing Forum*, 7 TOURO L. REV. 183 (1990).

19. *Contra* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988), (plaintiff need not show that

Another common situation that arises in New York, and elsewhere, is a repeated pattern whereby municipalities will from time to time approve subsidized housing, but only when the proposed housing is slated for construction in a minority or poor community.[20] This is the situation exemplified by the Huntington, Long Island litigation,[21] where local officials in that community sought to defend their denial of a zoning application for a housing project in a white community by pointing to several subsidized housing projects that it had allowed for in the minority section of town.[22] Even when low income housing continually finds its way into the minority community, the developer challenging a denial of housing which would break down this segregative pattern faces an enormous problem if the required standard of proof is intent to discriminate.[23]

In *Suffolk Housing Services*, a case in which I represented the plaintiffs and John Armentano represented the Town of Brookhaven, the plaintiffs' goal was to secure a precedent which would enable low cost housing developers to break through the exclusionary zoning barriers.[24] The Town of Brookhaven is a large, diverse community which has a supply of multi-family housing, but which is overwhelmingly developed with single family homes. The evidence showed a dire need for low cost housing in this community, housing which all agreed is only economically feasible when built in a multi-family framework.[25] Multi-family housing in Brookhaven was approved on a discretionary basis upon application by develop-

---

the decision complained of was made with discriminatory intent), *reh'g denied*, 488 U.S. 1023 (1989) (*Huntington II*).

20. *See* Huntington Branch, NAACP v. Town of Huntington, 689 F.2d 391 (2d Cir. 1982) (determination that plaintiffs had standing), *cert. denied*, 460 U.S. 1069 (1983) (*Huntington I*); 844 F.2d 926 (2d Cir. 1988) (local zoning ordinance restricting private construction of multi-family housing to a large minority urban renewal area), *aff'd per curiam*, 488 U.S. 15 (1988) (*Huntington II*).

21. *See Huntington II*, 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988), *reh'g denied*, 488 U.S. 1023 (1989).

22. *Id.* at 932.

23. *Id.* at 933.

24. Suffolk Hous. Servs. v. Town of Brookhaven, 70 N.Y.2d 122, 128-29, 511 N.E.2d 67, 68-69, 517 N.Y.S.2d 924, 925 (1987).

25. Mallach, *Affordable Housing Forum*, 7 TOURO L. REV. 183 (1990).

ers.[26] The plaintiffs' principal claim was that the ordinance, in allowing this discretion to the Town, effectively foreclosed construction of low cost housing.[27]

The plaintiffs lost this case at the trial level and took the matter before the Appellate Division, Second Department.[28] The appellate division determined from the record that the Town officials, with popular support, had made every effort over the years to exclude low cost housing.[29] Nonetheless, the appellate division decided that under New York law, as it then stood, the court had to affirm the lower court's decision.[30] In doing so, the appellate division read an earlier New York State Court of Appeals ruling in *Berenson v. Town of New Castle*[31] in an extremely limited and questionable manner. In *Berenson*, the court of appeals had held that the Town of New Castle, which had excluded all low cost housing,[32] had an obligation to make sure that an adequate supply of housing was available to meet the needs of persons in the immediate community and in the region generally.[33] In *Suffolk Housing Services*, the appellate division read *Berenson* only to require the Town to permit an adequate supply of multi-family housing,[34] irrespective of the cost of that housing,[35] and not to impose any specific obligation with respect to low income multi-family housing.[36]

---

26. BROOKHAVEN, N.Y., CODE art. XXVIII, § 85-198.

27. *Suffolk Hous. Servs.*, 70 N.Y.2d at 128, 511 N.E.2d at 69, 517 N.Y.S.2d at 925 (1987).

28. Suffolk Hous. Servs. v. Town of Brookhaven, 109 A.D.2d 323, 491 N.Y.S.2d 396 (2d Dep't 1985).

29. *Id.* at 332, 491 N.Y.S.2d at 403.

30. *Id.* at 332-33, 491 N.Y.S.2d at 403. In terms of numbers, the appellate division reasoned: "Taking into account the number of housing units which the zoning ordinance makes possible and the number of people who could conceivably be housed therein, we must conclude that the ordinance, on its face, has given more than adequate consideration to the local and regional housing needs." *Id.* at 330, 491 N.Y.S.2d at 401.

31. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

32. *Id.* at 105, 341 N.E.2d at 239, 378 N.Y.S.2d at 676.

33. *Id.* at 111, 341 N.E.2d at 242-43, 378 N.Y.S.2d at 680-82. The plaintiffs met the first component of the two-part *Berenson* test, but failed the second component. *Suffold Hous. Serv.*, 109 A.D.2d at 329, 491 N.Y.S.2d at 400.

34. *Suffolk Hous. Servs.*, 109 A.D.2d at 331, 491 N.Y.S.2d at 402.

35. *Id.*

36. *Id.*

Thus, since Brookhaven had allowed construction of multi-family housing—while at the same time it excluded low cost housing—no finding of exclusionary zoning was warranted.[37]

The Second Department's ruling was truly astounding. It had seemed clear to the plaintiffs from the historical development of cases up to and including *Berenson*, that the New York Court of Appeals was addressing the housing needs of low income people, not simply the housing needs of people who preferred living in multi-family units. Nonetheless, the Second Department interpreted *Berenson* and its progeny differently. It noted that the Town of Brookhaven had enough multi-family housing[38] and, although the development of low cost housing was precluded, New York law was not violated.[39]

The New York State Court of Appeals then agreed to review the appellate division decision.[40] A setting was then in place for what should have established a precedent in New York on the issue of exclusionary zoning. Sensing the importance of the pending ruling, many towns throughout New York filed amicus briefs on behalf of the Town of Brookhaven.[41] On the other side, virtually every major civil rights organization in the country joined in amicus briefs in support of the plaintiffs'

---

37. The appellate division, in *Suffolk Hous. Servs.* stated: "Taking into account the number of housing units which the zoning ordinance makes possible and the number of people who could conceivably be housed therein, we must conclude that the ordinance, on its face, has given more than adequate consideration to local and regional housing needs." 109 A.D.2d at 330, 491 N.Y.S.2d at 401.

38. *Id.* at 330, 491 N.Y.S.2d at 401.

39. *Id.* at 333, 491 N.Y.S.2d at 403. The court felt plaintiffs did not overcome the presumption of constitutionality given to the zoning ordinance, in part because the town adduced evidence, though not compelling, it was at least rational. *Id.* at 332-33, 491 N.Y.S.2d at 403. The court additionally noted:

> [O]n the issue of causation, plaintiffs have failed to refute defendants' contention that economic conditions beyond the town's control are at least equally responsible for the present situation, and that, other factors remaining equal, the premapping of land within the town for multifamily usage would not significantly increase the supply of such housing.

Id.

40. Suffolk Hous. Servs. v. Town of Brookhaven, 70 N.Y.2d 122, 511 N.E.2d 67, 517 N.Y.S.2d 924 (1987).

41. *Id.* at 125-28, 511 N.E.2d at 68, 517 N.Y.S.2d at 924-25.

position and calling for a reversal of the appellate division ruling.[42]

In the court of appeals, the plaintiffs essentially sought a ruling which would pick up on that theme and, indeed, the drive of the New Jersey Supreme Court holding in the *Mount Laurel* litigation.[43] In *Mount Laurel*, the New Jersey court spoke eloquently to the evils of exclusionary zoning[44] and fashioned affirmative remedies for builders proposing to build low cost housing in suburban communities which had failed to meet a fair share of the state's need for low cost and subsidized housing.[45] The plaintiffs in *Suffolk Housing Services* were not so sanguine as to believe that the New York court would write a *Mount Laurel* ruling. Nonetheless, in light of the finding by the appellate division that the Town of Brookhaven had excluded low cost housing, it was hoped that our highest court would impose an obligation upon Brookhaven to facilitate, rather than impede, low cost housing proposals. Plaintiffs proposed that in cases where zoning was used to block low cost housing efforts and the Town in question was shown to have a low cost housing need, the burden would shift to the Town to justify the denial.[46] This would have reversed the usually heavy burden imposed on those challenging local zoning determinations.[47]

Chief Judge Wachtler wrote the court's decision.[48] Judge Wachtler first stated that it had been implicit in the court of

---

42. Amicus briefs were submitted on behalf of American Planning Association, Westchester Legal Services. Nassau County Village Officials Association, Town of Babylon, Town of Oyster Bay, Town of Nistayuna, and Housing Options Made Equal, Inc.. *Suffolk Hous. Servs.*, 70 N.Y.2d 122, 511 N.E.2d 67, 517 N.Y.S.2d 924 (1987).

43. *Mount Laurel I*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

44. *Mount Laurel II*, 92 N.J. at 208-11, 456 A.2d at 415-17.

45. *Id.* at 278-82, 456 A.2d at 452-53.

46. *Suffolk Hous. Serv.*, 70 N.Y.2d at 129-30, 511 N.E.2d at 69, 517 N.Y.S.2d at 926.

47. Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 347, 414 N.E.2d 680, 685, 434 N.Y.S.2d 180, 184-85 (1980) (as legislative acts, zoning ordinances carry a presumption of constitutionality).

48. *Suffolk Hous. Serv.*, 70 N.Y.2d at 128, 511 N.E.2d at 68, 517 N.Y.S.2d at 925.

appeals' rulings, that local governments could not "legitimately exercise zoning powers to effectuate socioeconomic or racial discrimination."[49] Notwithstanding this grandiose pronouncement, the court did not proceed to offer any relief to the plaintiffs.[50] Rather, the court looked to the trial court findings that the zoning ordinance had not deterred development of low cost housing;[51] developers themselves were not interested in such construction.[52] Judge Wachtler simply ignored the appellate division's finding that discrimination against low cost housing in the Town of Brookhaven had been pervasive. The silence in the opinion on this matter was particularly unsettling in light of the fact that this finding of fact had dominated the questions presented by the judges to the lawyers during oral argument.[53]

Judge Wachtler further stressed that zoning was a legislative task, not a judicial function.[54] He also focused on the fact that the plaintiffs—a civil rights organization and low income persons in need of housing—did not have the control of parcels of land and therefore were in no position to ask the court for relief which would lead to the actual construction of housing.[55] Without control of land, Judge Wachtler stated, the court of appeals was not prepared to address the issues of exclusionary zoning.[56]

Thus, after ten years of litigation, the New York Court of Appeals simply sidestepped ruling on a difficult social problem. Moreover, it imposed a serious impediment to future exclusionary zoning challenges by requiring plaintiffs to have control of

---

49. *Id.* at 129, 511 N.E.2d at 69, 517 N.Y.S.2d at 926 (citations omitted).

50. *Id.* at 131-32, 511 N.E.2d at 71, 517 N.Y.S.2d at 927.

51. *Id.* at 130, 511 N.E.2d at 70, 517 N.Y.S.2d at 926.

52. *Id.*

53. Mr. Bellman was one of the attorneys for the appellants, Suffolk Housing Services.

54. Suffolk Hous. Servs. v. Town of Brookhaven, 70 N.Y.2d 122, 130, 511 N.E.2d 67, 70, 517 N.Y.S.2d 924, 926 (1987) (citing Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 347, 414 N.E.2d 680, 684, 434 N.Y.S.2d 180, 184 (1980)); *see also* Berenson v. Town of New Castle, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 682 (1975).

55. *Suffolk Hous. Servs.*, 70 N.Y.2d at 130-31, 511 N.E.2d at 68, 517 N.Y.S.2d at 926.

56. *Id.*

land.[57] This directive is extremely problematic as most real estate developers are not interested in undertaking ten years of litigation over a single piece of property. By contrast, in *Mount Laurel II*, the New Jersey Supreme Court found it perfectly appropriate to fashion a judicial remedy dealing with statewide exclusionary zoning practices even though the plaintiffs in that case did not control land.[58]

The less than courageous ruling by the New York Court of Appeals represents a diametrically different approach than that adopted by the New Jersey court in *Mount Laurel II*, where the court stated:

> After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance . . . Mount Laurel is not alone; we believe that there is widespread non-compliance with the constitutional mandate with our original opinion in this case.
>
> To the best of our ability, we shall not allow it to continue. This Court is more firmly committed to the original *Mount Laurel* doctrine than ever, and we are determined, within appropriate judicial bounds, to make it work.[59]

In addition, the New Jersey Supreme Court held that a developer, when proposing construction of low cost housing in a town without an appropriate amount of low income or "fair share" housing, is entitled to a presumption that gives the developer a right to a building permit.[60] The *Mount Laurel II* ruling has led to the construction of thousands of units of low cost housing in New Jersey.[61]

---

57. *Id.*

58. Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 200-06, 456 A.2d 390, 411-13 (1983) (*Mount Laurel II*).

59. *Id.* at 198-99, 456 A.2d at 410.

60. *Id.* With respect to builders' remedies, the *Mount Laurel II* court held:

> [W]here a developer succeeds in *Mount Laurel* litigation and proposes a project providing a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning. We emphasize that the builder's remedy should not be denied solely because the municipality prefers some other location for lower income housing, even if it is in fact a better site.

Id. at 278, 456 A.2d at 452 (footnote omitted).

61. *See* Lamar, Mallach & Payne, *Mount Laurel At Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197, 1209 (1989). *See also*,

Unfortunately, given the lack of significant progress to date in the New York courts, we may have reached the time where a legislative remedy for the problem of the exclusionary zoning is the solution. To turn the tide in dealing with the problem of homelessness, any legislative zoning remedy necessarily must impose an obligation upon all municipalities to see that affordable, low cost housing can and will be built.

Garbarine, *In the Region: New Jersey: Bidding for Mount Laurel Transfer Funds*, N.Y. Times, Feb. 11, 1990, § 10, at 11, col. 1 (late ed.) (13,000 low and moderate income units have entered the development pipeline in the state of New Jersey).

John M. Armentano*

Because the impact of zoning on low-cost housing development involves various factors, including the power of local government to act, zoning is not the pervasive villain which thwarts the production of low cost and/or moderate housing. States have different constitutions as well as different high courts, resulting in different attitudes towards housing. In the State of New York, the power to zone stems from the state legislature[1] and from the state constitution.[2] The court of appeals has acknowledged that zoning is a legislative function[3] and, thus, the court has been careful because of constraints imposed by constitutional separation of power from forging into this arena.[4] Naturally, lower courts tend to follow the basic

---

* Partner of Farrell, Fritz, Caemmerer, Cleary, Barnosky & Armentano, P.C., Uniondale, N.Y.; A.B., Georgetown University, 1961; J.D., New York University School of Law, 1964.

1. Article 16 of the Town Law gives powers to the town to regulate zoning. N.Y. TOWN LAW §§ 261-284 (McKinney 1987 & Supp. 1990). The same broad powers are given to villages in § 7-700 of the Village Law, which contains similar text as § 261 of the Town Law:

> For the purpose of promoting the health, safety, morals of the general welfare of the community, the board of trustees of a village is hereby empowered, by local law, to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

N.Y. VILLAGE LAW §§ 7-700 to 7-742 (McKinney 1973 & Supp. 1990). If a city implements a zoning ordinance, it must be "in accord with a well considered plan." N.Y. GEN. CITY LAW § 20(25) (McKinney 1989).

2. N.Y. CONST., art. IX, § 2.

3. Suffolk Hous. Servs. v. Town of Brookhaven, 70 N.Y.2d 122, 130, 511 N.E.2d 67, 70, 517 N.Y.S.2d 924, 926 (1987); Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 347, 414 N.E.2d 680, 684, 434 N.Y.S.2d 180, 184, (1980); Berenson v. Town of New Castle, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 243, 378 N.Y.S.2d 672, 682 (1975) (*Berenson I*). In *Berenson I*, the court of appeals expressed its judicial reluctance to encroach on the legislative function of zoning by stating it would be "anomalous that a court should be required to perform the tasks of a regional planner." *Id.*

4. *Berenson I*, 38 N.Y.2d at 11-12, 341 N.E.2d at 243, 378 N.Y.S.2d at 682.

policy considerations that are enunciated by the higher tribunal so that a similar reluctance is found at the trial and appellate division level. Zoning power has to be exercised within the scope and limitations of the legislative grant and state constitution.[5] These legislative and constitutional precepts provide a starting point for an analysis of *Berenson v. City of New Castle*.[6]

In *Robert E. Kurzius, Inc.*,[7] plaintiff tried to have a five acre minimum lot zoning set aside as unconstitutional per se.[8] The case was ultimately lost in the court of appeals.[9] Other cases, such as *Suffolk Housing Services v. Town of Brookhaven*[10] and *Suffolk Interreligious Coalition on Housing Incorporated v. Town of Brookhaven*,[11] also provide insight into current zoning and low-cost housing issues. These illustrative cases, however, are not uncommon for the courts of Westchester County, New York.[12]

In New York, article nine of the state constitution grants the municipalities very strong home rule powers.[13] These home rule powers are respected by the courts and repeatedly upheld. For example, the recent case of *Kamhi v. Town of Yorktown*[14]

---

5. *See* Kamhi v. Planning Bd., 59 N.Y.2d 385, 389, 452 N.E.2d 1193, 1194, 465 N.Y.S.2d 865, 866 (1983) (without legislative authority, a zoning board's action will be ultra vires and void); Riegert Apartments Corp. v. Planning Bd., 57 N.Y.2d 206, 209, 441 N.E.2d 1076, 1077-78, 455 N.Y.S.2d 558, 559-60 (1982) (towns and municipalities can regulate land use through legislative grant); Golden v. Planning Bd., 30 N.Y.2d 359, 369-70, 285 N.E.2d 291, 296, 334 N.Y.S.2d 138, 145 (1972) (towns, cities, and villages have no inherent power to zone and restrict land use; the exercise of zoning power must be based on a legislative grant).

6. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

7. 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).

8. *Id.* at 342, 414 N.E.2d at 681, 434 N.Y.S.2d at 181.

9. *Id.* at 347, 414 N.E.2d at 685, 434 N.Y.S.2d at 185.

10. 70 N.Y.2d 122, 511 N.E.2d 67, 517 N.Y.S.2d 924 (1987) (plaintiffs did not affirmatively show that town caused housing shortage; court would not undertake legislative task as a regional planner by rezoning vacant residential land).

11. N.Y.L.J., May 31, 1990, at 31, col. 2 (Sup. Ct. Suffolk County, May 18, 1990).

12. *See, e.g.*, Continental Bldg. Co. v. Town of North Salem, N.Y.L.J., July 5, 1990, at 31, col. 2 (Sup. Ct. Westchester County, July 3, 1990).

13. N.Y. CONST., art. IX § 2. This section embodies the Home Rule Powers of Local Governments and Statute of Local Governments. *Id.*

14. 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 238 (1989).

specifically goes through the basis for home rule power,[15] and the local law power of municipalities,[16] and traces the history and origin of these powers.[17]

The New York backdrop is different from that of other states, such as New Jersey.[18] Therefore, zoning situations require analysis in terms of the state constitution and the federal Constitution. The federal Constitutional aspect is not complex.[19] It has been interpreted by the United States Supreme Court to mean that neither the fifth nor the fourteenth amendments create a constitutional right to housing.[20]

In *Lindsey v. Normet*, the United States Supreme Court specifically said that "[a]bsent constitutional mandate, the assurance of adequate housing . . . [is a] legislative function."[21] Thus, there is no federal constitutional right to zoning for low-cost housing. But when analyzing zoning, which by its very nature is restrictive, one becomes cognizant that zoning could be used and not perverted to accomplish illegal and unconstitutional acts. An example would be exclusions based on economics or race.[22] Clearly, such zoning is unconstitutional but, under traditional analysis, proof of such exclusion must be beyond a reasonable doubt.[23]

In 1975, the court of appeals broke new ground when it set forth a now famous two-prong test.[24] The court stated that a

---

15. *Id.* at 428-29, 547 N.E.2d at 348-49, 548 N.Y.S.2d at 146-47 (citing N.Y. CONST., art. IX § 2). *See* N.Y. MUN. HOME RULE § 10(1)(ii) (McKinney 1982).

16. Kamhi v. Planning Bd., 59 N.Y.2d 385, 428-30, 547 N.E.2d 346, 348-49, 548 N.Y.S.2d 144, 146-47 (1989).

17. *Id.*

18. *See infra* note 43 and accompanying text.

19. *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972).

20. *Id.* at 73-74.

21. *Id.* at 74.

22. *See* Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 133, 527 N.E.2d 265, 271, 531 N.Y.S.2d 782, 788 (1988); Berenson v. Town of New Castle, 38 N.Y.2d 102, 106, 341 N.E.2d 236, 239, 378 N.Y.S.2d 672, 677 (1975) (*Berenson I*).

23. *Asian Americans*, 72 N.Y.2d at 131, 527 N.E.2d at 270, 531 N.Y.S.2d at 787 (1988); Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 344, 414 N.E.2d 680, 682-83, 434 N.Y.S.2d 180, 182 (1980).

24. *See Berenson I*, N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672. "The first branch of the test . . . is simply whether the board has provided a properly balanced and well ordered plan for the community." *Id.* at 110, 341 N.E.2d at 242, 378

municipality can zone, restrict, or use its power within the general police power to aid communities in achieving a balanced housing environment.[25] However, when there is a need for a particular type of housing in a community or region, a town or village may not employ exclusionary practices. In addition to the constitutional power of our communities to zone, there is the strong admonition of the courts that you may tread not on people's constitutional rights by using the zoning power to exclude.[26] Hence, it becomes clear that proof, which must reach a quantum of beyond a reasonable doubt, is necessary before a local zoning regulation may be overturned. The court of appeals' decisions[27] reflect this delicate balance in terms of separation of powers, legislative prerogative, and the extent of judicial intrusion into "local matters."[28] In *Berenson*, the court took a *regional* approach for the first time when it forged the two-prong test.[29]

Although some aspects of zoning are not firmly established, the *Berenson* case does require that the zoning ordinance not be used as an obstacle to housing.[30] After *Berenson* was re-

---

N.Y.S.2d at 680. "The second branch of the test is whether the town board, in excluding new multiple housing within its township, considered the needs of the region as well as the town for such housing." *Id.* at 111, 341 N.E.2d at 243, 378 N.Y.S.2d at 681.

25. *Id.* at 107-09, 341 N.E.2d at 240-41, 378 N.Y.S.2d at 678-69. In determining the validity of a zoning ordinance, the court stated that it must bear in mind the overall goals of zoning ordinances. More specifically, the court stated "[t]he 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 available land." *Id.* at 109, 341 N.E.2d at 241, 378 N.Y.S.2d at 680 (citation omitted).

26. Kamhi v. Planning Bd., 74 N.Y.2d 423, 429, 547 N.E.2d 346, 348, 548 N.Y.S.2d 144, 146 (1989); Suffolk Hous. Servs. v. Town of Brookhaven, 70 N.Y.2d 122, 129, 511 N.E.2d 67, 69, 517 N.Y.S.2d 924, 925-26 (1987), Golden v. Planning Bd., 30 N.Y.2d 359, 378, 285 N.E.2d 291, 302, 334 N.Y.S.2d 138, 152 (1972).

27. *Kamhi*, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 238; *Suffolk Hous. Servs.*, 70 N.Y.2d 122, 511 N.E.2d 67, 517 N.Y.S.2d 924; *Golden*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 135.

28. *Id.*

29. *Berenson I*, 38 N.Y.2d 102, 110-11, 341 N.E.2d 236, 242-43, 378 N.Y.S.2d 672, 680-81. *See supra* note 24.

30. *Id.* at 38 N.Y.2d at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 680. Whether a zoning ordinance will be an impermissible obstacle to housing development depends on the circumstances: "While it may be impermissible in an undeveloped community to prevent entirely the construction of multiple-family residences any-

manded back for trial by the court of appeals, the trial judge required that the Town of New Castle construct thirty-five hundred units of multi-family housing.[31] The appellate division struck down this "fair share" obligation and said "the use of a 'fair share' goal has never been judicially approved in the context of the housing needs of the population at large."[32] But the court said that multi-family housing was required.[33] Yet, when multi-family housing finally was built, it cost $375,000 - $400,000. The *Berenson* case, however, laid down some initial ground rules, including the admonition that the zoning authority must take the regional housing needs into consideration when excerising the zoning power.[34]

Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville[35] noted that zoning power cannot be used to ex-

---

where in the locality, it is perfectly acceptable to limit new construction of such buildings where such units already exist." *Id.* (citations omitted).

31. Berenson v. Town of New Castle, 67 A.D.2d 506, 512-13, 415 N.Y.S.2d 669, 673 (2d Dep't 1979): This was the second appeal of the *Berenson* case. The first appeal, giving rise to the court of appeals decision, was on a motion for summary judgment in a declaratory judgment action to have the Town of New Castle zoning ordinance declared unconstitutional. *Berenson I*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672. The court of appeals announced its two-part test to determine the constitutionality of a zoning ordinance. *Supra* note 24. The special term of supreme court then concluded the zoning ordinance was invalid because it did not adequately provide for multi-family housing. *Berenson II*, 67 A.D. at 512, 415 N.Y.S.2d at 673. Initially, the zoning ordinance totally excluded multi-family housing. *Id.* at 507, 415 N.Y.S.2d at 670. The Town of New Castle conceded this was improper, and therefore amended the ordinance to permit 100-150 units of multi-family housing. *Id.* at 507-08, 415 N.Y.S.2d at 670. The second appeal arose after allegations that the zoning ordinance, as amended, was unconstitutional because it did not make adequate provision for multi-family housing. *Id.* at 508, 415 N.Y.S.2d at 670.

32. *Berenson II*, 67 A.D.2d at 521, 415 N.Y.S.2d at 678. The appellate division dispensed with the notion that the court of appeals on the prior appeal implied that a "fair share" requirement was intended: "We do not perceive that the court intended that a finding of unreasonableness, i.e., that there was an *unmet* local or regional need for multi-family housing which the town had ignored by excluding such housing, would authorize the court to go even further and remedy the deficiency by specific judicial fiat." *Id.* at 522, 415 N.Y.S.2d at 679.

33. The court gave the Town board six months to correct the deficiency in the zoning ordinance and ordered that the board rezone plaintiffs' property for multi-family use. *Id.* at 524, 415 N.Y.S.2d at 680.

34. *Berenson I*, 38 N.Y.2d at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.

35. 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1980).

clude,[36] but it also demonstrates that the problem of zoning and multi-family housing arises frequently.[37]

Perhaps the answer lies with the original sources of the power to zone, the constitution, and state legislature. The Supreme Court of the United States, in *Lindsey v. Normet*,[38] said that the *legislature* is the source that communities should look to for producing housing.[39] Article eighteen of the New York Constitution specifically authorizes the *legislature* to provide for low-rent housing for persons of low income, as defined by the law.[40] By comparison, the constitution of the State of New Jersey does not have this authorization. Though the New York Legislature has utilized this power, it has not done so recently. The New York Court of Appeals has clearly held that the state legislature may create a body that can override local zoning and it has done so in the past.[41]

In connection with a discussion of *Berenson v. Town of New Castle*[42] and *Southern Burlington County NAACP v. Township of Mount Laurel*,[43] one must discuss *Asian Americans for Equality v. Koch*.[44] *Koch* was decided in 1988 by the New York State Court of Appeals, and it contained an excellent discussion of the general zoning principles, as well as discussion of the relationship between the *Berenson* and *Mount Laurel* decisions. The court specifically noted that, in prior decisions, it did not compel the cities or municipalities to facilitate the develop-

36. *Id.* "A zoning ordinance will be invalidated on both constitutional and State statutory grounds if it was enacted with an exclusionary purpose, or it ignores regional needs and has an unjustifiably exclusionary effect." *Id.* at 343, 414 N.E.2d at 682, 434 N.Y.S.2d at 182.

37. *Id.* at 344, 414 N.E.2d at 683, 434 N.Y.S.2d at 183.

38. 405 U.S. 56 (1972).

39. *Id.* at 74.

40. N.Y. CONST., art. XVIII, § 1.

41. Floyd v. New York State Urban Dev. Corp., 33 N.Y.2d 1, 6, 300 N.E.2d 704, 706, 347 N.Y.S.2d 161, 163-64 (1973).

42. *Berenson I*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975); *Berenson II*, 67 A.D.2d 506, 415 N.Y.S.2d 669 (2d Dep't 1979).

43. Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (*Mount Laurel II*); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975) (*Mount Laurel I*).

44. 72 N.Y.2d 121, 527 N.E.2d 265, 531 N.Y.S.2d 782 (1988).

ment of housing, specifically low-income housing.[45] Furthermore, the court stated that a zoning plan is valid if the municipality provides an array of opportunities for housing facilities.[46]

In *Koch*, the court of appeals again refused to adopt the New Jersey *Mount Laurel*[47] approach, and it seems that it will never adopt it. The court of appeals also had opportunity to consider the *Mount Laurel* approach in *Suffolk Housing Services v. Town of Brookhaven*,[48] and, again, refused to adopt it.[49] Perhaps *Suffolk Housing* was the wrong case to support adoption of the *Mount Laurel* approach. In *Suffolk Housing*, there was no application for a particular site. Rather, the case

---

45. *Id.* at 136, 527 N.E.2d at 273, 531 N.Y.S.2d at 790.

46. *Id.* "Constitutional principles are not necessarily offended if one or several uses are not included in a particular area or district of the community as long as adequate provision is made to accommodate the needs of the community and the region generally." *Id.* at 133-34, 527 N.E.2d at 272, 531 N.Y.S.2d at 789 (citation omitted).

47. The plaintiffs in *Asian Americans* sought an order to compel the City of New York to provide low-cost housing. *Id.* at 126, 527 N.E.2d at 267, 531 N.Y.S.2d at 784. Such mandatory relief is the type fashioned by the *Mount Laurel* decisions.

Mount Laurel I created a rule that required zoning ordinances to adequately provide for a *fair share* of housing to meet the housing needs of low and moderate income people. *Mount Laurel I*, 67 N.J. at 172-74, 336 A.2d at 724-25 (1975). *Mount Laurel II* arose eight years after *Mount Laurel I*, and because of the lack of implementation of the mandate of *Mount Laurel I*, the New Jersey Supreme Court imposed an affirmative obligation upon municipalities to create low and moderate income housing. *Mount Laurel II*, 92 N.J. at 219-22, 456 A.2d at 421-22 (1983). This affirmative obligation consisted of incentive zoning, mandatory set-asides, and builders' remedies. *Id.* at 214-19, 456 A.2d at 443, 452. The court of appeals rejected the *Mount Laurel* and *Berenson* arguments offered by the plaintiffs by distinguishing those cases from *Koch*, in that the former cases "examined the limits expanding suburban communities could impose on the type of growth within their boundaries . . . [while the latter case] concern[ed] a densely developed area in New York City with substantial low-cost housing . . . ." *Asian Americans*, 72 N.Y.2d at 135, 527 N.E.2d at 273, 531 N.Y.S.2d at 790. For a comparison of the *Berenson* and *Mount Laurel* approaches to remedying exclusionary zoning practices, *see generally*, Nolon, *A Comparative Analysis of New Jersey's* Mount Laurel *Cases with the* Berenson *Cases in New York*, 4 PACE ENVTL. L. REV. 3 (1986).

48. 70 N.Y. 122, 511 N.E.2d 67, 517 N.Y.S.2d 924 (1987).

49. *Id.* at 130-31, 511 N.E.2d at 70-71, 517 N.Y.S.2d at 927. In refusing to adopt the New Jersey *Mount Laurel* approach, the court of appeals stated: "In sum, plaintiffs in this case propose no solution short of drastic, essentially legislative intervention by the judiciary." *Id.* at 131, 511 N.E.2d at 71, 517 N.Y.S.2d at 927 (citations omitted).

was just an attack on zoning ordinances.[50] Moreover, the challenge involved the wrong town because multi-family housing did exist there.[51] Since the town had accessory apartments and ample multi-family units, equity did not cry out against it. The *Koch* case, which was on a smaller level in New York City, goes directly to the question of proof. It is fair to say that the law in this state provides that you may not use zoning to exclude; exclusion must be proven, beyond a reasonable doubt, and must be proven with respect to a particular parcel or a particular application.

In New Jersey, after *Mount Laurel II*, the legislature passed the Fair Housing Act[52] and took the *Mount Laurel* situation out of the courts. This result exemplifies the separation of powers and its effects. In *Mount Laurel II*, the New Jersey Supreme Court took a broad leap because it felt that its mandates from *Mount Laurel I* were going unheeded.[53] The New Jersey Legislature was once again addressing the tension between low-cost housing and restrictive zoning.

In New Jersey, there is a statewide plan on land use, generated at the state level, by an advisory group to the legislature.[54] However, the New York Constitution does not contemplate such a body. While New Jersey sees fit to paint with the broader brush, as is their right, the New York Constitution grants zoning power at every level.[55] While New York does not have a statewide plan of land use, its constitution does provide for the state legislature to act if the need for low cost rental housing is not being met.[56] Clearly, each state approaches the problem differently; The people speaking through their basic document approach it differently.

---

50. *Id.*

51. *Id.* at 128-29, 511 N.E.2d at 69-70, 517 N.Y.S 2d at 925-26.

52. N.J. STAT. ANN. § 55:14A-7.5 (West 1989).

53. Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 198-200, 456 A.2d 390, 410 (1983) (*Mount Laurel II*).

54. N.J. STAT. ANN. §§ 40:55-1.4 & 1.10 (West 1990).

55. N.Y. GEN. CITY LAW § 30-a art. 3 (McKinney 1989).

56. N.Y. CONST. art. XVIII, § 2.

Rental housing is on the decline in the rest of the country as well because of the 1986 changes in the tax laws.[57] These changes have had a significant detrimental effect on the production of rental housing.[58] The lack of production of rental housing is a deep concern that many towns are trying to rectify.[59] The *Koch* case is indicative of what actions are being implemented by various towns and cities today.[60] Although *Koch* addresses many different issues, it unequivocally approves the concept of incentive zoning as a device to foster low-cost housing.[61]

Incentive zoning really is a *Mount Laurel* concept. Incentives can be used to produce affordable housing. The effectiveness of incentives depends upon the tension between the economics of the market place and the municipality which creates the incentive oriented zoning. Certain towns on Long Island, for example Brookhaven, fast-track applications for affordable housing. The slower normal process of approval is overridden for an earlier approval. That is an incentive for producing affordable housing. Incentive oriented zoning is being employed by towns such as Babylon, Brookhaven, and Huntington where local laws now permit construction of accessory apartments and owner-occupied apartments in one-family houses.[62]

These changes in local zoning laws are occurring all over Long Island for several reasons. Primarily, they produce the rental units at the single family house level thereby maintain-

---

57. Reductions in the availability of the use of tax shelters and passive income loss deductions. Internal Revenue Code, 26 U.S.C. § 469 (1988).

58. *See* Rose & O'Neil, *The Impact of the Tax Reform Act of 1986 on Rents and Property Values*, 15 J. REAL EST. TAX'N 145 (1987).

59. *See* TOWN OF LEWISBORO, N.Y., ZONING ORDINANCE ch. 324.16, §§ 324.161-324.18 (1989); TOWN OF BROOKHAVEN, N.Y. CODE ch. 85, art. VIII, §§ 85-53 & 85-54 (1987); *see infra* note 63 and accompanying text.

60. Asian Americans for Equality v. Koch, 72 N.Y.2d 121, 127-28, 527 N.E.2d 265, 268, 531 N.Y.S.2d 782, 785 (1988).

61. *Id.* at 136, 527 N.E.2d at 273, 531 N.Y.S.2d at 790. The court of appeals stated that the New York City government was trying to use incentive zoning in a manner conducive "to provide realistic housing opportunities which includ[ed] new apartments for the poor." *Id.* at 136, 527 N.E.2d at 273, 531 N.Y.S.2d at 790.

62. TOWN OF BABYLON, N.Y., CODE, ch. 213, art. VIII, §§ 213-71.1, 213-86, 213-101 (1983); TOWN OF BROOKHAVEN, N.Y., CODE, ch. 85, art. IX, § 85-56 (1987); TOWN OF HUNTINGTON, N.Y., CODE, ch. 198, art. III, § 198-19(B) (1978).

ing the character of suburban development. Brookhaven has over one thousand of these apartments. This seems to be one of the ways in which towns are attempting to come to terms with the conflict between less expensive housing and restrictive zoning. Many towns see the handwriting on the wall; it is time for a new era of housing development. Other examples of this new era can be seen in the Town of Lewisboro, Westchester County, which has an affordable ordinance.[63] Planning boards are beginning to encourage the development of useful ordinances.

The housing picture, therefore, is not totally bleak. The New York Constitution and the United States Supreme Court envision it as a legislative process which seems to be approaching the issue differently in different communities.[64]

63. TOWN OF LEWISBORO, N.Y., ZONING ORDINANCE, ch. 324.16, §§ 324.161-324.18 (1989).

64. *See* N.Y. CONST. art. IX § 2; Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15 (1988); Lindsey v. Normet, 405 U.S. 56 (1972).

Alan Mallach*

The relationship between low-cost or affordable housing and restrictive zoning primarily raises two issues: the lack of availability of housing affordable to lower income households and the manner in which zoning affects the availability of low-cost housing.

The shortage of such housing is indisputable although many people may be unfamiliar with all of its dimensions. That there is a severe crisis in affordable housing is readily apparent from the presence of hundreds of thousands, if not millions, of homeless people on our nation's streets.[1] The problem is also evidenced by the even larger number of people who double up in order to have shelter. Low income families commonly spend fifty percent or more of their gross income for rent while living in badly overcrowded or physically substandard conditions.[2] Many large families with children are sharing hotel or motel rooms.[3] These are only the most extreme manifestations of the lack of low-cost housing.

---

* Director of Housing and Development, City of Trenton, N.J.; B.A. (Sociology) Yale University 1966; Member, American Institute of Certified Planners.

1. Estimates of the actual number of homeless individuals in the United States vary widely. *See* U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, A REPORT TO THE SECRETARY ON THE HOMELESS AND EMERGENCY SHELTERS, in HOUSING THE HOMELESS 127 (J. Erickson & C. Wilhelm eds. 1986). Some individuals believe "that the national total is as high as two or three million persons, . . . [but] lower estimates, such as 250,000 to 500,000, have also been given." *Id.* at 129. *See also* Schmitt, *Suburbs Wrestle with Steep Rise in the Homeless*, N.Y. Times, Dec. 26, 1988, at 1, col. 1 ("officials and advocates for the homeless agree that the outlook for controlling the crisis is bleak without broad initiatives to build new low-income housing").

2. D. SCHWARTZ, R. FERLAUTO & D. HOFFMAN, A NEW HOUSING POLICY FOR AMERICA 21 (1988) [hereinafter SCHWARTZ]. *See also* Peach, *Housing: Unavailable, Unaffordable and Indecent*, MORTGAGE BANKING, Sept. 1987, at 82, 92.

3. *See* Roberts, *Old Hotel Does Import Business in the Homeless*, N.Y. Times, Apr. 28, 1988, at B1(L), col. 1; Rimer, *Families Placed in Welfare Hotel with Lead Peril*, N.Y. Times, Nov. 7, 1989, at B5(L), col. 1; Rimer, *Rats, Leaks, Crackheads and All, Apartments Beat Welfare Hotels*, N.Y. Times, July 2, 1989, § 1, at 1, col. 5; *see also* Robbins, *New York's Homeless Families*, in HOUSING THE HOMELESS 31, 36.

The crisis in affordable housing for the poor, and sometimes for the struggling middle class, is not only an urban problem. It also exists within the suburbs.[4] Thus, zoning becomes directly relevant when addressing the problem of low-cost housing in suburban environments. With median house prices approaching $200,000 in the New York Metropolitan area,[5] the overwhelming majority of young families cannot afford even to think about buying a home.[6]

The percentage of American families who own their own home, after rising steadily from 1945 to 1980, has been declining ever since.[7] The drop has been most dramatic among families headed by individuals under forty.[8] Statistics also indicate that the number of people in their twenties and thirties living with their parents has increased by approximately one-third in the last fifteen years.[9] One byproduct of this trend is that suburban employers in New York and New Jersey are having greater difficulty attracting a labor force.[10] This crisis in suburbia is closely linked to another phenomenon sometimes referred to as the "feminization of poverty;" a disproportionate number of the victims of the affordable housing crisis are single women, particularly divorced or separated women with children.[11]

---

4. *See* Schmitt, *supra* note 1.

5. Lueck, *Buyers Hang Back in Muddled Market*, N.Y. Times, Jan. 28, 1990, § 10 (Real Estate), at 1, col. 2 (although median house prices in the New York region had fallen from $198,000 in 1988 to $182,000 in 1990, the median family income in the region was less than half the amount needed to qualify for the mortgages necessary to purchase those homes).

6. *Id.*

7. SCHWARTZ, *supra* note 2, at 6-7.

8. *Id.* at 7.

9. Cowan, *'Parenthood II': The Nest Won't Stay Empty*, N.Y. Times, Mar. 12, 1989, § 1, at 1, col. 1.

10. *See* Schwartz, *Affordable Housing: A Necessity both for People and for Business*, N.Y. Times, Feb. 12, 1989, § 12, at 24, col. 1 (shortage of affordable housing in the New York and northern New Jersey regional economy is severely curtailing employers' ability to attract and retain a work force); *See also* Schmidt, *Urban Jobless Joined to Suburban Jobs*, N.Y. Times, Oct. 25, 1989, at A16, col. 1 (explaining that the same problem exists in suburban areas of Chicago, St. Louis, Boston, and other cities).

11. *See* Hirsch, *Income Deeming in the AFDC Program: Using Dual Track Family Law to Make Poor Women Poorer*, 16 N.Y.U. REV. L. & SOC. CHANGE,

In New Jersey, many of the prospective occupants of recently constructed affordable suburban housing are individuals who are presently living with their parents.[12] Among applicants for units, it is not unusual to find single women with children currently occupying the family room in their parent's suburban home.[13] As our economy has been reoriented to require two incomes for economic survival, families with only one income, particularly those where the head of the family is a woman, are increasingly disadvantaged.[14]

Much of the United States, particularly locales such as the New York metropolitan area,[15] are in the grip of a housing crisis that is probably more acute in many respects than in any other time in recent American history. It is analogous to the severe lack of decent housing in the 19th Century, the untamed age of the old law tenement building.[16]

There is an important connection between this crisis and restrictive or exclusionary zoning. That is not to suggest that zoning is the sole or perhaps even the principal cause of the affordable housing crisis. It plays, however, a very significant causal role within the total picture. To understand this connection requires an analysis of the nature of zoning.

Zoning is inherently a process of exclusion. The nature of zoning is to exclude from entire communities or from districts within those communities certain property uses which are con-

---

713, 737 (1987). This author notes that impoverishment of women, specifically divorcees, widows, and unmarried mothers, has increased dramatically since the early 1960's, and that this increase has been especially acute for minority women and children. *Id.*; *see also* Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 826-27 (1989).

12. Lamar, Mallach & Payne, *Mount Laurel at Work: Affordable Housing in New Jersey*, 41 RUTGERS L. REV. 1197, 1253 (1989) (citing survey of selected affordable housing developments in which 24% of occupants had previously lived with parents or other family members).

13. This observation is based upon the author's personal involvement with the Bedminster Hills Housing Corporation since 1984. The corporation has marketed over 600 affordable housing units in the affluent community of Bedminster Hills, New Jersey.

14. *See* Hirsch, *supra* note 11, at 737.

15. *See* Schwartz, *supra* note 10, at 24.

16. DeForest & Veiller, *The Tenement House Problem*, in THE TENEMENT HOUSE PROBLEM 3-5 (R. DeForest & L. Veiller eds. 1903).

sidered inappropriate to the community as a whole, incompatible with existing uses, or undesirable for other reasons. In many cases, this process of exclusion is legitimate and reasonable; in other cases, it is not. One of the key areas where zoning has been most assiduously used and promoted as a means of exclusion is with respect to housing types considered socially, economically, or for some other fashion undesirable.[17]

Another essential element of zoning is that it is inextricably interwoven with the cost of producing housing. Zoning ordinances which explicitly mandate that housing units sell for a certain minimum cost have been attempted, but have quickly been invalidated by courts as being impermissible.[18] Such an outcome would seem perfectly obvious; more common, however, is the creation of zoning ordinances that are inherently cost generating, but not explicitly so.[19] By definition, the larger the lot on which the zoning ordinance requires you to build, the more expensive it will be to build on that lot. The typical zoning ordinance requires that each house be provided with a certain minimum amount of frontage along a public street.[20] The greater the frontage along the public street required in a zoning ordinance, the more expensive the house will be to build, and the more expensive it will be to provide the site improvements needed.

---

17. For an extensive discussion of this issue, see M. DANIELSON, THE POLITICS OF EXCLUSION 51-78 (1976) [hereinafter DANIELSON]. Specifically, Mr. Danielson states that "[o]f the various zoning controls employed . . . the most effective is prohibition of [undesired] multiple dwellings." *Id.* at 52.

18. *See, e.g.*, County Comm'rs of Anne Arundel County v. Ward, 186 Md. 330, 340, 46 A.2d 684, 688 (1946) (zoning regulation requiring minimum housing costs was viewed suspiciously by the court); *cf.* Cassell v. Lexington Township Bd. of Zoning Appeals, 163 Ohio St. 340, 127 N.E.2d 11 (1955) (act of commission, to deny building permit because cost and nature of buildings would tend to decrease nearby property values, was arbitrary).

19. *See* DANIELSON, *supra* note 17, at 74-78 (explaining that low cost housing is often excluded through enactment of local ordinances and building codes which limit the acreage available for development of residential housing; require that only large lots be used for such purposes and place minimum area requirements on residential units).

20. The Town of Huntington, for example, has a minimum lot frontage requirement of forty feet for one and two family dwellings. TOWN OF HUNTINGTON, N.Y., CODE ch. 198, art. IX, § 198-55 (1978).

One form of zoning that has come under particular attack is zoning that regulates the minimum square footage of houses that may be built in each zone without reference to any particular standard of health, safety, or general welfare.[21] Several courts, and most recently, the Connecticut Supreme Court,[22] have struck down these types of ordinances.[23] There is no doubt that minimum square footage ordinances, when the minimum requirement exceeds generally accepted health and safety standards, are enacted for the purpose of assuring that the houses in a given neighborhood will not fall below a particular threshold homing cost level.[24] These ordinances are widespread although their patent lack of connection to any rational planning standards makes it easier for them to be struck down by the courts than is the case with other zoning provisions that wear at least a fig leaf of a rational planning basis.

Aside from the generation of unnecessary housing costs, zoning's most powerful exclusionary impact lies in the way a system of differential treatment of single-family and multi-family housing has emerged.[25] Again, this is an issue in suburban areas, where the dream of a house with a yard still represents the norm of social value and land use regulation.

Today, affordable housing and multi-family housing have become virtually synonymous. For a host of reasons, it has become too expensive to produce single-family detached housing that will be affordable by more than a small part of the population.[26] Furthermore, to the extent that federal or state hous-

---

21. *See infra* notes 22-25 and accompanying text.

22. Builders Serv. Corp. v. Planning & Zoning Comm'n of E. Hampton, 208 Conn. 267, 306, 545 A.2d 530, 550 (1988) ("East Hampton's minimum floor area requirements . . . are not rationally related to the legitimate objectives of zoning, including the promotion of health, safety, and general welfare").

23. *See, e.g.*, Home Builders League of S. Jersey, Inc. v. Township of Berlin, 157 N.J. Super. 586, 601-02, 385 A.2d 295, 303 (1978) (minimum floor space requirements advanced no proper zoning purpose and were an arbitrary exercise of municipal power), *aff'd*, 81 N.J. 127, 405 A.2d 381 (1979).

24. *Id.*, 157 N.J. at 601-02, 385 A.2d at 303.

25. *See* M. DANIELSON, *supra* note 17, at 52-62. *See also* COUNTY & MUN. GOV'T STUDY COMM'N, HOUS. & SUBURBS: FISCAL AND SOCIAL IMPACTS OF MULTI-FAMILY DEV. 104-15 (1974) [hereinafter HOUS. & SUBURBS].

26. Single family detached housing, as a general proposition, is substantially more expensive to produce than multifamily housing on a per square foot basis; not

ing subsidy programs exist, they cannot be used to create single-family housing, but only multi-family housing.[27] Thus, to the extent that a zoning ordinance makes it more difficult to develop multi-family housing, that ordinance inherently discriminates against the provision of low cost or affordable housing.

There is hardly a suburban or rural zoning ordinance, at least in the northeastern United States, that does severely limit opportunities for multi-family development,[28] thereby having an exclusionary effect on affordable housing.[29] In New York State and elsewhere, it is common practice for a municipality to enact a zoning map showing which parcels of land have been zoned for what uses. A tract zoned explicitly for a particular use is referred to as having that use available as of right. Typically, in New York State, when looking at a zoning map, one sees land zoned for single-family houses, shopping centers, office parks, industrial parks, and any number of other uses as of right, but one does not see land zoned for multi-family housing.[30]

To build multi-family housing, a would-be developer must petition for an amendment to the zoning ordinance.[31] That process provides the municipality with effectively unlimited discretion to impose whatever standards and conditions it sees fit

---

only is the cost of construction itself higher, because of the absence of various economies available in sharing of walls, utility systems, and the like, but the cost of land and site improvements (sidewalks, utility lines, etc.) is significantly higher.

27. Although housing subsidy programs rarely limit their use to multi-family buildings, the result of the cost constraints affecting the programs and the great cost differential between housing types has the practical effect of doing so. *Cf.* DANIELSON, *supra* note 17, at 79-85 (explaining community hostility toward multi-family "developments" and "projects" engendered by federally subsidized programs).

28. *See* Baar, *Would the Abolition of Rent Controls Restore a Free Market?*, 54 BROOKLYN L. REV. 1231, 1237 (1989) (discussing the use of zoning to exclude multi-family rental housing in New York, Georgia & New Jersey).

29. Mallach, *The Tortured Reality of Suburban Exclusion: Zoning, Economics, and the Future of the Berenson Doctrine*, 4 PACE ENVTL. L. REV. 37, 86-92 (1986); *see* HOUS. & SUBURBS, *supra* note 25, at 105 (survey of 17 of New Jersey's 21 municipal zoning ordinances indicated that only one-half of one percent of vacant developable land was zoned for multi-family use).

30. *See* Baar, *supra* note 28, at 1237.

31. *See, e.g.* N.Y. TOWN LAW § 264 (McKinney 1987); N.Y. GEN. CITY LAW § 83 (McKinney 1989).

before it grants a rezoning for multi-family housing, or for that matter, to deny the application on such grounds as it deems applicable.[32] One effect of this discretion is that, municipalities are more likely to approve projects if they are presented as condominiums rather than rental projects.[33] They tend to approve projects that are made up of small units, such as one bedroom apartments, rather than larger units for families with children.[34] Municipalities also tend either to impose unreasonable standards or deny outright projects that are proposed to accommodate low or moderate income households.[35]

The zoning power is being used, not as a land use planning technique, but as a socio-economic device, where certain individuals, acting as community gatekeepers,[36] decide on the basis of social criteria who belongs in the community and who does not.[37] This practice is widespread and has been documented in government reports[38] and court cases[39] for at least twenty

---

32. *See* M. DANIELSON, *supra* note 17, at 73 (stating that processing "development requests through petitions for rezoning or special exemptions . . . greatly enhances the discretion of local government"). *But cf.* McMinn v. Town of Oyster Bay, 105 A.D.2d 46, 53, 482 N.Y.S.2d 773, 779 (2d Dep't 1984) ("Broad as it is, municipal zoning power is not without limits.").

33. *See* Mallach, *supra* note 29, at 69-70.

34. *Cf. id.* at 82-83 (it is a general practice for municipalities to exclude the development of dwellings containing two or more bedrooms). *See generally* HOUS. & SUBURBS, *supra* note 25, at 109 (in New Jersey the scarcity of three bedroom apartments is inconsistent with the market demand for such units).

35. *See* Mallach, *supra* note 29, at 94-96; DANIELSON, *supra* note 17, at 94-96.

36. The "gatekeeper" characterization was first used in HOUS. & SUBURBS, *supra* note 25, at xiv. *See* M. DANIELSON, *supra* note 17, at 52.

37. C. PERIN, EVERYTHING IN ITS PLACE, SOCIAL ORDER AND LAND USE IN AMERICA 85 (1977).

38. The exclusionary nature of zoning regulations was discussed in some detail in the report U.S. NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY (1968). *See generally* C. PERIN, EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA (1977).

39. A social dimension has been present in zoning, particularly with respect to the status of multi-family housing, since the earliest days of Euclid v. Ambler Realty Co., 272 U.S. 365, 394-95 (1926) (Court notes that under certain circumstances apartment houses, in and of themselves, may be nuisances).

years,[40] if not longer. In spite of years of attack, this practice still continues throughout most of the United States.

Lower income households are considered undesirable, especially by communities dominated by those who see themselves as having escaped from the city. Those who have escaped wish to prevent "the city" from following them. Zoning has become the weapon to achieve that result. In a recent conversation with a Long Island business executive, speaking of the housing efforts of a public and private partnership aimed at providing affordable housing on Long Island, the executive candidly stated that the partnership had decided not to attempt to do anything about housing for the poor because it would be politically impossible. Their focus, instead, would be modest single family housing for the struggling middle class home buyer, an objective more likely to be politically feasible. In this climate, zoning becomes the device by which barriers are established to perpetrate exclusion, and prevent development of housing that would be affordable by lower income people.

I do not mean to suggest, and this is a very important point, that removing zoning barriers in and of themselves will create large amounts of affordable housing for low income people.[41] Lions do not voluntarily lie down with lambs. Zoning is a necessary, but not sufficient, condition to the creation of affordable housing. If it is impossible to develop multi-family housing under reasonable conditions and with reasonable standards, then affordable housing will certainly not come into being. If the zoning barriers are removed, however, there are additional obstacles that must be overcome if housing is going to be produced which would be affordable to lower income people.[42]

Not all multi-family housing is affordable rental housing. In fact, in 1975, the New York Court of Appeals handed down

---

40. *See, e.g.*, Kaufman v. Planning & Zoning Comm'n of Fairmont, 298 S.E.2d 148, 157 (W. Va. 1982) (court reversed zoning commission's denial of development of low income housing, finding it an attempt to "plan 'out' persons of low income").

41. *See* M. DANIELSON, *supra* note 17, at 79.

42. Not least are the difficulties posed by the near-total absence of housing subsidy funds from any level of government. This point was stressed by the New Jersey Supreme Court in Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 262-65, 456 A.2d 390, 443-45 (1983) (*Mount Laurel II*).

what was considered at the time a landmark decision, *Berenson v. Town of New Castle*.[43] Couched in strong language noting the need to provide housing for all, including the poor, the Court of Appeals enunciated a two part test to assess the validity of a zoning ordinance.[44] As a result of that ruling, after a certain amount of wrangling, the Town of New Castle did rezone land for multi-family housing at a density of three units to a gross acre.[45] This is a very low density for multi-family housing, but it was perfectly acceptable to the owners of the land because they never had even the slightest intention of building low income housing.

On the land that the town rezoned, a very expensive condominium development, which as far back as 1985 was already selling for well over $200,000 a unit, was built.[46] Not one unit has been built in the Town of New Castle that can be bought or rented by someone who is not highly affluent. The *Berenson* assumption, that the removal of zoning barriers would somehow automatically create more affordable housing, has turned out to be pathetically false from the standpoint of meeting the housing needs of the poor.

I would like to briefly contrast that with the *Southern Burlington County, NAACP v. Township of Mount Laurel*[47] decision in New Jersey that took place at about the same time as *Berenson*. In the second round of that case in 1983,[48] the New Jersey Supreme Court, seeking to focus directly on the objec-

---

43. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

44. *Id.* at 110-11, 341 N.E.2d at 242-43, 378 N.Y.S.2d at 680-81. In this action to declare a zoning ordinance invalid under the United States Constitution, the New York State Court of Appeals enunciated a two part test. It instructed that on remand the trial court must first determine "whether the [town] board ha[d] provided a properly balanced and well ordered plan for the community," and second, "whether the town board [had] . . . considered the needs of the region as well as the town for such housing." *Id.*

45. *See* Mallach, *supra* note 29, at 44 n.18.

46. *Id.* at 49 n.29.

47. 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975) (*Mount Laurel I*).

48. Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (*Mount Laurel II*). For a synopsis of the *Mount Laurel I* and *Mount Laurel II* decisions, see Armentano, Affordable Housing Forum, 7 TOURO L. REV., 173, n.27 (1990).

tive of meeting lower income housing needs, stated that it was not enough to remove zoning barriers; each municipality must have a strategy in place, explicitly and affirmatively designed to address the community's fair share of lower income housing needs.[49]

The New Jersey Supreme Court has received more than its share of criticism over the *Mount Laurel* decision, and there is no doubt that the decision raises serious questions about the role of the judiciary vis-a-vis the political process, as well as a host of other issues relating to zoning and affordable housing. In the short time since the *Mount Laurel II* decision, however, over 13,000 low and moderate income units have entered the development pipeline in the state of New Jersey without any contribution from federal housing subsidies;[50] all are directly attributable to the impact of *Mount Laurel*. Despite its difficulties, the outcome of *Mount Laurel* has been on target as far as addressing lower income housing needs.[51]

There is a central relationship between exclusionary zoning and the shortage of low cost housing, a relationship which sensible, humane public policy demands that we address. If we do not, we will continue to institutionalize a regulatory scheme that prevents this country from even beginning to meet the housing needs of its less affluent citizens, or from even beginning to address the pattern of economic and racial segregation that blights our metropolitan areas.

---

49. *Mount Laurel II*, 92 N.J. at 217, 456 A.2d at 419. Furthermore, the court held that a good faith attempt to provide low and moderate cost housing would not be satisfactory; rather, the attempt at providing housing had to "be the substantial equivalent of the fair share." *Id.* It noted that the fair share was composed of both moderate and low income unit construction and that both should be included "in such proportion as reflects consideration of all relevant factors, including the proportion of low and moderate income housing that make up the regional need." *Id.*

50. Lamar, Mallach & Payne, *Mount Laurel At Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197, 1209-10 (1989).

51. *Id.*