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# The Tortured Reality of Suburban Exclusion: Zoning, Economics, and the Future of the Berenson Doctrine

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# The Tortured Reality of Suburban Exclusion: Zoning, Economics, and the Future of the *Berenson* Doctrine

Alan Mallach\*

## TABLE OF CONTENTS

I.	Introduction .....	38
II.	Zoning and Economic Reality in New York State Exclusionary Zoning Case Law .....	42
	A. Framing Public Policy: The <i>Berenson</i> De- cision .....	42
	B. Narrowing the Issues: <i>Kurzius</i> , <i>Blitz</i> and <i>North Shore Unitarian Universalist Soci- ety</i> .....	49
	C. <i>Suffolk Housing Services</i> : The End of the Road for <i>Berenson</i> ? .....	58
III.	Multi-family Housing and the Marketplace: Land Use Regulation in Economic Context ...	65
	A. The Changing Character of Multi-family Housing and the Changing Patterns of Ex- clusionary Zoning .....	65
	B. Housing Types, Housing Tenure and Housing Needs .....	75
IV.	Manipulating the Marketplace: The Effect of the Discretionary Land Use Regulatory System on Multi-family Housing .....	86

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A.	Community Gatekeepers and Multi-family Housing .....	87
B.	Municipal Discretion and Subsidized Housing .....	92
C.	The Discretionary Process and the Courts .....	99
V.	Toward Zoning to Meet Regional Housing Needs .....	104
A.	Ending the Pretense of Zoning Neutrality .....	104
B.	Using Inclusionary Zoning to Meet Regional Housing Needs .....	109
[1]	What is Inclusionary Zoning? .....	109
[2]	Inclusionary Zoning Works: the New Jersey Experience .....	114
C.	Inclusionary Zoning and the Future of Housing Opportunity in New York State ..	122
D.	Postscript .....	128

## I. Introduction

Those zoning regulations which are designed to exclude a substantial part of the regional population from potential residence in a community, or which have that effect, have been generally characterized as exclusionary zoning.<sup>1</sup> Thus defined, exclusionary zoning is the subject of nearly universal condemnation in American legal circles. State courts have held exclusionary ordinance provisions to be invalid.<sup>2</sup> A number of state

1. See generally R. Anderson, *New York Zoning Law and Practice* §§ 7.23-28 (2d ed. 1973) (for a New York perspective); M. Danielson, *The Politics of Exclusion* (1976) (especially ch. 3 "Zoning for Fewer People"); Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 *Syracuse L. Rev.* 509 (1971); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 *Stan. L. Rev.* 767 (1969).

2. While the leading states in this respect, beside New York, are New Jersey and Pennsylvania, the courts of a number of other states, including California, New Hampshire, Maine and Michigan, have taken strong positions in opposition to exclusionary zoning. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) (*Mount Laurel II*); *Soares v. Town of Atkinson*, 512 A.2d 436 (N.H. 1986) (Rockingham County trial court adopted, in essence, the advanced position of the New Jersey courts, enunciated in *Mount Laurel II*). See also Kopelman & Merriam, *Regional General Welfare: The End of a Trend?*, *Inst. on Plan., Zoning & Eminent Domain* 2-1 (1985); Mallach, *Exclusionary Zoning Litigation: Setting the Record Straight*, 9 *Real Est. L.J.* 275, 289-94 (1981).

legislatures have enacted statutes designed to prevent, or at least discourage, exclusionary land use policies by local government.<sup>3</sup> At the same time, a substantial body of legal commentary has emerged, of a tenor consistently antagonistic to the practice of exclusionary zoning.<sup>4</sup>

Although the term exclusionary zoning can arguably be applied to any zoning standard or practice of a restrictive nature, it has been most widely used to characterize those standards and practices which prevent regional housing needs from being met — particularly the housing needs of the region's low and moderate income population. Unlike most zoning controversies, which tend to affect little more than the pocketbooks of a handful of individuals, or the status of the single tract of land, exclusionary zoning issues directly affect the future character of communities and regions, as summarized in one melodramatic commentary:

The inevitable consequence of these efforts undertaken on behalf of the ideal suburban community has been that the promise of suburban life is not available to all. Suburban exclusion of low-cost housing . . . traps millions of Americans in deteriorating sections of the central city. Closing the door to suburban life after the more affluent and acceptable have passed the threshold has had the dual effect of stigmatizing the hard core urban poor as "undesirable" and denying them the opportunities necessary to escape the cycle of poverty encircling them. Metropolitan economic segregation obstructs access to quality schools, while ineffective metropolitan transit systems limit the potential employment market of inner city resi-

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3. See, e.g., Mass. Gen. Laws Ann. ch. 40B, §§ 20-23 (West 1969) (popularly called the "anti-snob zoning law"); Cal. Gov't Code §§ 65,580-65,589 (West 1980) (mandating municipal housing elements and providing for fair share allocation of housing obligations); N.J. Stat. Ann. §§ 52:27D-52:27D-329 (West 1986) (establishing an administrative procedure for determination of municipal fair share obligations and for certification of municipal housing plans for meeting fair share obligations).

4. See *supra* note 1. It should be noted that a number of respected commentators have broadened the critique to zoning itself, arguing, among other things, that unreasonable exclusion is intrinsic to the exercise of the zoning power. See, e.g., DeLogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 Maine L. Rev. 261 (1984); Krasnowiecki, *Abolish Zoning*, 31 Syracuse L. Rev. 719 (1980).

dents. Tragically, many of the urban poor also suffer isolation, and yet additional stigma, because of racial hostility. "[E]conomic-racial exclusion may well be called the racism of the seventies. Coupled with vestiges of the more open racism of the past, it furnishes an explanation for the picture portrayed by the census figures, an image of a suburban 'white noose' encircling a black inner city."<sup>5</sup>

The late Justice Hall, writing for the New Jersey Supreme Court in the seminal 1975 decision in *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*, characterized the issue as a matter of zoning "for the living welfare of people."<sup>6</sup>

The thrust of exclusionary zoning litigation has not been simply a matter of seeking the invalidation of specific zoning provisions per se. Rather, the litigation seeks the invalidation of zoning regulations that act as a barrier to the provision of housing opportunities commensurate with regional needs. It gradually became apparent, through a variety of different factual situations, that the invalidation of zoning provisions, in and of itself, would not bring about the housing opportunities needed. The attention of housing advocates has, inevitably, been increasingly directed toward the fashioning of remedies that would by necessity, reach beyond ordinance invalidation to address the substantive issue underlying the litigation.

The substantive issue underlying the course of exclusionary zoning litigation, and the manner of its resolution, were well-stated in the *Mount Laurel I* decision:

The legal question before us . . . is whether a developing municipality like Mount Laurel may validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby, as Mount Laurel has, exclude such people from living within its

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5. Note, *Developments in the Law — Zoning*, 91 Harv. L. Rev. 1427, 1626-28 (1978).

6. 67 N.J. 151, 188, 336 A.2d 713, 732 (1975) (*Mount Laurel I*).

confines because of the limited extent of their income and resources. . . .

We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor.<sup>7</sup>

The decision made it clear that the fundamental issue was housing opportunity for people otherwise excluded. Technical insufficiency of specific ordinance standards was not the issue. The opinion emphasized that appropriate variety and choice of housing through the municipality's land use regulations was no more than a means to that end.

A body of legal doctrine oriented toward achievement of a social or economic objective that has been established as a matter of public policy, whether with respect to school desegregation, employment discrimination, or exclusionary zoning, must, by necessity, address more than the technical features of the law at issue. It must operate with a clearheaded understanding of the extralegal issues which determine whether a legal ruling will accomplish its purpose. In the case of exclusionary zoning, the central extralegal dimensions are found in specific economic and social considerations: in the interplay between economic reality, social pressures, and the informal and largely discretionary system of local land use regulation which determines what housing will or will not be built in a community, and for whom housing opportunity will actually be provided. This complex interplay is amenable to resolution. Indeed, the experience in New Jersey since the 1983 decision in *Mount Laurel II*, demonstrates that the resolution lies within the means and resources available to both state judi-

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7. *Id.* at 173-74, 336 A.2d at 724. Although the question of fair share may be raised, it is not directly germane to the focus of this article and is, therefore, not examined here.

ciaries and legislatures seeking to address this issue.

The New York State judiciary has sought to address exclusionary zoning since the court of appeals first framed the problem in *Berenson v. Town of New Castle*,<sup>8</sup> in 1975. Part II of this article addresses the effect of a line of decisions, at the trial and appellate levels, which have not only failed to clarify the doctrine first enunciated in *Berenson*, but have gradually restructured it in such a way that today it appears to be in serious danger of disappearing entirely — not through explicit re-evaluation or reversal, but through a process of judicial erosion. The most significant element in the disintegration process has been the failure of the courts to address the interplay of the law with economic reality and the relationship of the formal to the informal, or discretionary, land use regulatory system. Recognition of these realities and a willingness to directly and explicitly address them must undergird serious analysis of the exclusionary zoning issue.

Parts III and IV of this article are devoted to an exposition of the relationship between zoning regulations and the administration of the zoning process on the one hand, and development of housing to meet regional needs, on the other hand. The final section, Part V, addresses the feasibility of framing land use control provisions which are responsive to the economic realities acting upon them and which affirmatively work to address the regional housing needs which were the subject of the *Berenson* and *Mount Laurel* cases.

## II. Zoning and Economic Reality in New York State Exclusionary Zoning Case Law

### A. *Framing Public Policy: The Berenson Decision*

The position of the New York State judiciary with respect to exclusionary zoning was first enunciated in the 1975 court of appeals decision in *Berenson*.<sup>9</sup> This decision was not a ruling on the merits of plaintiff's case, but, rather, a decision

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8. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

9. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

affirming the denial of summary judgment motions and remanding the case to the trial court for a plenary trial.<sup>10</sup> The court established a two-prong test for the validity of a municipal zoning ordinance:

The first branch of the test, then, is simply whether the board has provided a properly balanced and well ordered plan for the community . . . the court must ascertain what types of housing presently exist in New Castle, their quantity and quality, and whether this array adequately meets the present needs of the town. Also, it must be determined whether new construction is necessary to fulfill the future needs of New Castle residents, and if so, what forms the new developments ought to take.

Secondly, in enacting a zoning ordinance, consideration must be given to regional needs and requirements. It may be true, for example, that New Castle already has a sufficient number of multiple-dwelling units to satisfy both its present and future populations. However, residents of Westchester County, as well as the larger New York City metropolitan 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.<sup>11</sup>

The first prong is similar to traditional zoning cases although a modification of traditional practice lies in the provision addressing the future needs of households already resident in the community.<sup>12</sup>

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10. *Id.* at 102, 341 N.E.2d at 239, 378 N.Y.S.2d at 677.

11. *Id.* at 110, 341 N.E.2d at 249, 378 N.Y.S.2d at 680-81 (citation omitted).

12. This recognition of internally generated housing needs is comparable to the concept of "indigenous need" enunciated in *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 214-15, 456 A.2d 390, 418 (1983) (*Mount Laurel II*). It would appear to have been interpreted in much the same way by the appellate division in *Berenson v. Town of New Castle*, 67 A.D.2d 506, 519-20, 415 N.Y.S.2d 669, 677 (1979). It has been, however, largely ignored by the trial courts in subsequent zoning decisions. The issue of whether a municipality has an explicit responsibility to meet the housing needs of its present residents living in deficient housing, as clearly implied from *Berenson*, is far from a trivial matter. Most suburban

The more substantial departure from tradition was the court's adoption of the regional housing need standard as the second prong of the test.<sup>13</sup> At the same time, as if slightly intimidated by their own audacity, the court created a potential loophole in the doctrine, offering municipalities a means of escaping their regional obligations, by holding that

[w]hile regional needs are a valid consideration in zoning . . . a town need not permit a use solely for the sake of the people of the region if regional needs are presently provided for in an adequate manner. Thus, for example, if New Castle's neighbors supply enough multiple-dwelling units or land to build such units to satisfy New Castle's need as well as their own, there would be no obligation on New Castle's part to provide more, assuming there is no overriding regional need.<sup>14</sup>

This provision did not, in the final analysis, affect the outcome of the *Berenson* case, except with respect to its implications for the adoption of the "fair share" doctrine by the New York courts in subsequent litigation.<sup>15</sup>

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municipalities contain, at the very least, pockets of lower income populations, often living in severely substandard housing conditions, whose needs have rarely been addressed by those municipalities. This issue, independent of regional housing needs, was explicitly noted in *Mount Laurel II*, 92 N.J. at 214-15, 456 A.2d at 418.

13. It is worth noting that *Berenson* was foreshadowed, to a limited extent, by the New York Court of Appeals in *Golden v. Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), where, while upholding a complex growth management scheme enacted by the town, the court pointed out that "[w]hat we will not countenance, then, under any guise, is community efforts at immunization or exclusion." *Id.* at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152. This decision also focused to some extent on a municipality's obligations to share in the growth triggered by regional housing demands. *Id.* at 375, 379, 285 N.E.2d at 299-300, 302-03, 334 N.Y.S.2d at 149, 152-53. The general language of *Golden* notwithstanding, there is no question that the court of appeals fashioned a doctrine new to New York State law in *Berenson*; a doctrine, indeed, as pointed out by one leading commentator, directly grounded in the freshly minted *Mount Laurel I* decision. 3 N. Williams, *American Planning Law: Land Use and the Police Power* § 66.19 (1974 & Supp. 1982).

14. *Berenson*, 38 N.Y.2d at 109, 341 N.E.2d at 241, 378 N.Y.S.2d at 681.

15. See *Suffolk Hous. Servs. v. Town of Brookhaven*, 109 A.D.2d 323, 491 N.Y.S.2d 396 (1985). It has, however, significantly affected the outcome of at least one other exclusionary zoning case, where it was applied by the Appellate Division, Second Department, in particularly outrageous fashion. See *North Shore Unitarian*

On remand, the trial court found the New Castle zoning ordinance failed both prongs of the *Berenson* test. Consequently, the trial court ordered the town to amend its zoning ordinance to permit the construction of at least three thousand five hundred units of multi-family housing by December 31, 1987 (ten years from the trial judgment) and grant the rezoning of plaintiff's property at a density of eight units per acre.<sup>16</sup> The trial judgment was appealed by the town. The decision of the appellate division was handed down in April, 1979.<sup>17</sup>

While affirming the trial court's findings with respect to the inadequacies of the New Castle zoning ordinance, and ordering plaintiff's land rezoned for multi-family housing at an unspecified density,<sup>18</sup> the appellate division took strong issue with the trial court's application of the fair share principle to the case; that is, the establishment of a numerical goal for the construction of multi-family housing in the municipality. In so doing, the appellate court relied heavily on its own assessment of the lack of substance to the fair share evidence presented at trial, characterizing it as "highly abstract and speculative,"<sup>19</sup> and on the similar conclusions of the New Jersey Supreme Court with respect to fair share in the 1977 *Oakwood at Madison v. Township of Madison* decision.<sup>20</sup> More substantially, the court pointed out the fallacy of a fair share number derived from the housing needs of the population as a whole rather than a number based on the needs of the specific needs of the lower income population, noting that

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Universalist Soc'y v. Village of Upper Brookville, 110 A.D.2d 123, 493 N.Y.S.2d 768 (1985).

16. *Berenson v. Town of New Castle*, Index No. 4239/73 (N.Y. Sup. Ct. Dec. 6, 1977). This opinion is discussed at length in N. Williams, *supra* note 13. An edited version of the opinion appears in D. Mandelker & R. Cunningham, *Planning and Control of Land Development* 554-62 (1979).

17. *Berenson v. Town of New Castle*, 67 A.D.2d 506, 415 N.Y.S.2d 669 (1979).

18. *Id.* at 523-24, 415 N.Y.S.2d at 680. The appellate division, however, reversed on the specific density awarded by the trial court and referred the matter to the town board to be considered as a part of the rezoning application to be filed for the site. The density for the site was set eventually at three units per acre.

19. *Id.* at 520, 415 N.Y.S.2d at 678.

20. 72 N.J. 481, 371 A.2d 1192 (1977).

The court apparently failed to appreciate that the figure itself was referable to the housing market in general, both as to income groups and the type of housing (single or multi-family) to be provided, and was not directly referable to the needs of the low income groups with which the court was primarily concerned. . . . Special Term's judgment cannot and does not insure that any of the multi-family units to be constructed will be anything other than luxury condominiums, with which the market may already be saturated.<sup>21</sup>

The court's economic reasoning appears unsound, in that it is difficult to imagine a rational developer continuing to build additional luxury condominiums in a saturated market. The court, however, clearly understood the distinction between multi-family housing generally and housing which meets the needs of the lower income population in particular.

In an important passage, the appellate division concluded that, in any event, economic conditions would make it impossible to meet those needs, at least to any significant extent:

The town's contention that multi-family rental housing (the type most affordable by persons of low and moderate income) cannot be constructed today even *with* governmental subsidies unless the land is publicly owned or figured at zero cost is not without some merit, especially if we are talking about providing lower income housing in sizable quantities.<sup>22</sup>

This is an unfortunate, and erroneous, conclusion. It appears that the court may have uncritically accepted extremely doubtful testimony. Indeed, the town's contention, far from having merit, was patently self-serving, and factually incorrect at two levels. First, all governmental housing subsidy programs have been based on the premise that, as a general rule, units would be built on privately owned land acquired for that purpose, and, therefore, would include the cost of land acqui-

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21. *Berenson*, 67 A.D.2d at 520-21, 415 N.Y.S.2d at 678.

22. *Id.* at 521, 415 N.Y.S.2d at 678.

sition as a permissible element in total project cost.<sup>23</sup> Second, the court appears to have confused multi-family rental housing generally, much of which is constructed without subsidy, with subsidized housing. One need not, however, fault the court too severely for accepting the town's contention, particularly in view of the not dissimilar, although considerably less far-reaching, conclusions reached in the *Madison* decision, a decision on which the appellate division heavily relied.<sup>24</sup>

In the final analysis, the appellate division found the application of the fair share principle was precluded as a matter of law and that, aside from the general lack of authority for such a far-reaching step,

[i]n holding that New Castle could validly exclude multi-family housing if its neighboring communities provided a sufficient number of such units, or the land upon which they could be built, to satisfy their own, New Castle's, and the regional needs, the Court of Appeals impliedly held that New Castle per se did not have to bear any 'fair share' of any such housing burden.<sup>25</sup>

Although this conclusion is hardly dictated by the earlier language of the court of appeals, it is not an entirely illogical re-

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23. This is not to suggest that subsidized housing projects can sustain unlimited land acquisition costs. Indeed, on many occasions would-be developers of subsidized projects in suburban areas, even where suitable zoning exists, find themselves at a serious disadvantage compared to developers of market housing, because the cost constraints of the program will not allow them to pay what may well be the market value of the land. It should be noted, however, that under the 1974 Federal Community Development Block Grant Program, 42 U.S.C.A. §§ 5301-5320 (West 1983), presumably known to the experts in the *Berenson* case, federal funds are available to local governments for a wide variety of activities in support of lower income housing generally, one of which is the acquisition of privately owned land for development of lower income housing. See H. Franklin, D. Falk & A. Levin, In-Zoning: A Guide for Policy Makers on Inclusionary Land Use Programs 59-69, 181-82 (1974); Suburban Action Inst., Housing Choice: A Handbook for Suburban Officials, Non-Profit Organizations, Community Groups and Consumers 36-53 (undated) (prepared by M. Brooks). This handbook includes specific examples of successful land acquisition programs.

24. See *Berenson*, 67 A.D.2d 506, 415 N.Y.S.2d 669; *Oakwood at Madison v. Township of Madison*, 72 N.J. 481, 510-14, 371 A.2d 1192, 1206-08 (1977).

25. *Berenson*, 67 A.D.2d at 522, 415 N.Y.S.2d at 679.

sponse to that court's language. The appellate division, however, did not address the question of how it practically could be determined whether the neighboring communities were indeed providing a sufficient number of units to satisfy regional needs, unless some type of fair share approach was implemented. Indeed, the general language calling for the courts to "assess the reasonableness of what the locality has done,"<sup>26</sup> provides no guidance concerning how a court is even to begin to evaluate whether a municipality is in compliance with the *Berenson* doctrine.

One major problem with adjudicating the *Berenson* case, pointed out at some length by the appellate division, is the fundamental incongruity of a case brought by a developer seeking to construct expensive condominium units hinging on the question of whether the municipal zoning ordinance adequately provides for regional housing needs, particularly those of low and moderate income households. There is no question that the appellate division saw the case in those terms. The court went to great lengths to distinguish *Berenson* from those suits brought by would-be developers of multi-family housing in which no more than "competing *parochial* interests" were involved.<sup>27</sup> Even if the court had been presented with evidence suggesting there were practical means toward providing lower income housing, there was no plaintiff in the case seeking a remedy directed at meeting low and moderate income housing needs.

Thus, once *Berenson* was assured of his rezoning, the case was effectively over. Although, in ordering the town to remedy its zoning deficiencies, the appellate division provided that the trial court would retain jurisdiction "for the purpose of allowing the plaintiffs to challenge the sufficiency of any amended ordinance by supplemental pleadings."<sup>28</sup> There was not a single plaintiff in the case who could have been expected to challenge any ordinance deficiencies other than those af-

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26. *Id.* at 522, 415 N.Y.S.2d at 679 (citing *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)).

27. *Berenson*, 67 A.D.2d at 515, 415 N.Y.S.2d at 674.

28. *Id.* at 523, 415 N.Y.S.2d at 679.

fecting the Berenson tract, or, including Berenson himself, who would have had standing to do so. No further litigation took place in this matter.<sup>29</sup>

The amended New Castle zoning ordinance was upheld in the face of a subsequent challenge. Once again, the plaintiff was a landowner whose fundamental interests did not extend beyond his holdings. *Blitz v. Town of New Castle*,<sup>30</sup> had some modest significance, as it was one of a small number of cases decided by the New York courts between 1979 and 1985 which applied the *Berenson* standards, and in the process substantially narrowed what had appeared, in 1975, to be the salient holdings of the New York Court of Appeals.

#### B. *Narrowing the Issues: Kurzius, Blitz and North Shore Unitarian Universalist Society*

Unlike the 1975 *Mount Laurel I* decision in New Jersey, which triggered a substantial flow of exclusionary zoning cases during the following few years, the New York Court of Appeals *Berenson* decision of the same year generated only a trickle of subsequent cases seeking to apply that doctrine to other communities. During the ten year period between the court of appeals decision in *Berenson* and the recent decision of the appellate division in *Suffolk Housing Services v. Town of Brookhaven*,<sup>31</sup> only four cases seeking to apply the *Berenson* doctrine were reported, one of which dealt with issues

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29. In 1985, an article in the New York Times, announcing at long last that development had begun on the Berenson tract, noted that:

Although the intention of the original suit, initiated by Mitchell Berenson, was to open the town to lower and middle income residents, subsequent multi-family development in Chappaqua has produced relatively expensive condominiums. The new community, to be known as Old Farms at Chappaqua, is no exception. Prices will range from \$183,000 to \$290,000 for the one, two, and three bedroom town houses.

N.Y. Times, Apr. 15, 1985, § 8 (Real Estate), at 1. As we have seen, of course the intention of the Berenson suit was not to create opportunities for the lower- and middle-income residents. The issue of low- and moderate-income housing needs was, arguably, no more than a means by which Berenson was able to create a more favorable legal climate for the multi-family rezoning he sought, for the ultimate purpose of constructing expensive condominium units.

30. 94 A.D.2d 92, 463 N.Y.S.2d 832 (1983).

31. 109 A.D.2d 323, 491 N.Y.S.2d 396 (1985).

largely unrelated to exclusionary zoning.<sup>32</sup> Furthermore, not one of the three remaining zoning cases was a particularly good vehicle through which to expand or refine the *Berenson* doctrine. Each of the three cases nevertheless represented a step in a process by which the New York judiciary appeared to distance itself from any serious effort to grapple with the substantive implications of *Berenson*. The court seemed eager to seize upon any available pretext to avoid engaging with the issues of regional housing needs and the obligations of local government in the exercise of their land use powers.

*Robert E. Kurzius, Inc. v. Village of Upper Brookville*<sup>33</sup> was brought by a landowner seeking to have his holdings rezoned from five-acre to two-acre lots.<sup>34</sup> Although plaintiff was successful in the appellate division, that decision was reversed by the court of appeals. *Berenson* was regularly invoked by all parties to this case, but it was hardly a serious *Berenson* case. As the court of appeals noted:

Plaintiffs have not demonstrated that . . . pressing regional needs were ignored in formulating the ordinance. There was no proof that persons of low or moderate incomes were foreclosed from housing in the region because of an unavailability of properly zoned land. In fact, there was no showing of need in the village for lots of less than

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32. The fourth reported case grounded in *Berenson* is *Allen v. North Hempstead*, 103 A.D.2d 144, 478 N.Y.S.2d 919 (1984), in which a zoning ordinance provision which imposed a durational residency requirement as a condition for occupying senior citizen housing built under the ordinance was struck down as being in violation of the *Berenson* doctrine. There have been a number of unreported trial decisions in matters brought by developers. One, which may well be the only such case outside the Town of New Castle in which a plaintiff has succeeded in having the *Berenson* doctrine applied, is *208 E. 30th St. Corp. v. North Salem*, 88 A.D.2d 281, 452 N.Y.S.2d 902 (1982) (ruling on appeal of certain narrow procedural issues arising from this decision). Another, *Froelich v. Town of Huntington*, No. 82/7008 (N.Y. Sup. Ct. Dec. 27, 1983), resulted in the landowner succeeding in part on other grounds, but losing on his *Berenson* claims. It would appear with respect to *Froelich*, as has been true in other cases, that the *Berenson* claim was included largely to add weight to the landowner's conventional arguments, in this case relating largely to a taking claim, rather than as a central element of the case.

33. 67 A.D.2d 70, 414 N.Y.S.2d 573 (1979), *rev'd*, 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1980), *cert. denied*, 450 U.S. 1042 (1981).

34. *See Kurzius*, 67 A.D.2d at 71-75, 414 N.Y.S.2d at 574-75.

five acres.<sup>35</sup>

While the absence of an affirmative housing case suggests that *Kurzius* fails to represent a true *Berenson* case, the court of appeals holding is indicative of a position unsympathetic to plaintiffs challenging local zoning ordinances on exclusionary grounds. The court's characterization of the need issue is one dimensional. Its comment that "there was no showing of need . . . for lots of less than five acres"<sup>36</sup> is both unnecessary and inconsistent with common sense.<sup>37</sup> The comment implicitly embodies a proposition with significant implications, namely, that in order to prevail plaintiff would not only have to prove a generalized unmet housing need but also a highly specific need for precisely the housing he would be providing — in *Kurzius*, houses on two acre rather than five acre lots. This proposition places plaintiffs in a difficult, perhaps impossible,

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35. *Kurzius*, 51 N.Y.2d at 346, 414 N.E.2d at 684, 434 N.Y.S.2d at 184 (citation omitted). Apparently, there was no trial testimony on any of these points, plaintiff relying entirely on testimony that the Upper Brookville zoning ordinance had been enacted with exclusionary intent — a contention accepted by the appellate division, but rejected by the court of appeals. This is a particularly troubling aspect of the court of appeals decision. The appellate division went to considerable lengths to support its conclusion that the enactment of the ordinance had been with exclusionary purpose. See *Kurzius*, 67 A.D.2d at 71-73, 78-79, 414 N.Y.S.2d at 574-75, 578-79. This aspect of the record was casually dismissed by the court of appeals, which concluded that "[t]he record shows clearly that the purpose of the ordinance was to preserve the open-space areas of the village, which may be a legitimate goal of multiacre zoning." *Kurzius*, 51 N.Y.2d at 346, 414 N.E. at 684, 434 N.Y.S.2d at 184. This decision has been severely criticized by one commentator, who has pointed out the extent to which it "suggests the ease with which a community might disguise its discriminatory intent in euphemistic references to 'open space zoning'." Mayo, *Land Use Control*, 33 Syracuse L. Rev. 401, 409-10 (1982). Plaintiff's failure to present a substantive housing case prompted T. Mayo to note that "to ensure success in exclusionary zoning litigation, the elements of the *Berenson* case may not merely be invoked." *Id.* at 408.

36. *Kurzius*, 51 N.Y.2d at 346, 414 N.E.2d at 684, 434 N.Y.S.2d at 184.

37. It should be stressed that the author is not suggesting, in the absence of a record below, that the court of appeals should have found a particular housing need in the Village of Upper Brookville. Common sense suggests, however, that in all but the most unusual community there is some need for housing more modest than that which can be built on a five acre lot, a point which the court could have acknowledged without having to modify its conclusions with regard to the specific claim made by plaintiffs. Alternatively, it would not have been inappropriate for the court to remand the case for a new hearing, in which plaintiffs would have the opportunity to present factual testimony on regional housing needs.

position when trying to establish a winning *Berenson* case.

Shortly after the decision in *Kurzius* a second challenge to the zoning of Upper Brookville was made in *North Shore Unitarian Universalist Society v. Village of Upper Brookville*.<sup>38</sup> Plaintiff in this case, a religious establishment, was seeking to construct congregate living facilities for elderly members of the society,<sup>39</sup> on a site reasonably accessible to the church as well as within a rural setting.<sup>40</sup> After losing in the trial court in 1983,<sup>41</sup> plaintiff appealed. Judgment affirming the trial court ruling was handed down by the Appellate Division, Second Department, in 1985.

In *North Shore*, plaintiff relied heavily on the evidence of a substantial and quantified regional need for multi-family housing identified in the Nassau-Suffolk Comprehensive Development Plan,<sup>42</sup> as well as evidence of a general but not specifically quantified need for senior citizen housing.<sup>43</sup> The village argued that a variety of regional planning studies had found that in order to preserve open space and significant water resources, future development in the village should be at very low densities.<sup>44</sup> In finding for the village, the appellate

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38. No. 10982/80 (N.Y. Sup. Ct. Sept. 28, 1983), *aff'd*, 110 A.D.2d 123, 493 N.Y.S.2d 564 (1985).

39. Congregate living facilities for senior citizens are those which provide, in addition to independent living quarters, common dining facilities and supportive health services.

40. *North Shore Unitarian Universalist Soc'y v. Village of Upper Brookville*, No. 10982/80 at 7 (N.Y. Sup. Ct. Sept. 28, 1983).

41. The trial decision in this case was characterized by a nearly total absence of either legal reasoning or analysis of the issues one would expect to be addressed under the *Berenson* doctrine. Instead, the decision was grounded primarily on the apparent conviction of the court that the site proposed by the church was unsuitable for the proposed use by virtue of its remoteness from existing community and commercial facilities. *Id.* at 8-10. On that basis the court concluded "with regard for the established need for senior citizen housing, Defendant's ordinance is reasonable in that Defendant lacks the type of attributes and facilities which are peculiarly necessary for the elderly." *Id.* at 10-11. Given the difficulty of acquiring sites at reasonable cost for such purposes, a legal requirement that any site must be of outstanding suitability to pass muster simply imposes yet another unreasonable hurdle on any plaintiff seeking the opportunity to build in an unsupportive municipality.

42. Prepared by the Nassau-Suffolk Regional Planning Board (1969).

43. *North Shore Unitarian Universalist Soc'y v. Village of Upper Brookville*, No. 10982/80 at 4 (N.Y. Sup. Ct. Sept. 28, 1983).

44. See *North Shore Unitarian Universalist Soc'y v. Village of Upper Brookville*,

division gave great weight to the regional studies<sup>45</sup> and, addressing the second prong of the *Berenson* doctrine, found that the need for sixty-two thousand five hundred multi-family units in Nassau County had already been met:

A planning coordinator for the Long Island Regional Planning Board testified that if the sites [outside the Village of Upper Brookville] shown on the Plan were used at the recommended densities, the creation of the 62,500 units could be accomplished. Accordingly, the record shows that the village zoning ordinance serves a regional need for open space and water preservation, and that the regional need for multi-unit housing is supplied by other areas in the county. Thus, the burden of proof on the second prong of the *Berenson* test has not been met.<sup>46</sup>

In reaching this conclusion, however, the court was forced to apply a complex and tortured reasoning process, which is significant in view of its potential implications for future exclusionary zoning litigation. Acknowledging that the needed number of multi-family units had not been constructed and that the regional housing needs had not in actuality been met, the court made two points. First, “[z]oning ordinances will go no further than determining what *may* or *may not be built*;

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110 A.D.2d 123, 127, 493 N.Y.S.2d 564, 567 (1985).

45. An example of the misuse of such studies by the court appears in the statement “[t]he village also lies in an area designated as Zone One by a water management study, which recommends one dwelling unit or less per acre to protect the groundwater from future pollutant loadings.” *Id.* at 127, 493 N.Y.S.2d at 567. The study referenced by the court is the Long Island Regional Plan. Bd., *Long Island Comprehensive Waste Treatment Management Plan*, (1978). A reading of that document establishes: (1) Zone One, rather than encompassing a small and tightly defined area, encompasses more than half of Nassau County and a substantial part of Western Suffolk County, most of which is already developed at densities greater than one unit per acre, *id.* at 45; (2) similar or more stringent density recommendations are made in the report for all other areas on Long Island not already sewered, *id.* at 163-67; (3) these recommendations are clearly applicable only to *unsewered* development, using septic systems, rather than development that would either connect to an existing system, or construct a project sewerage treatment facility, *id.* Thus, the interpretation of this document by the court, if generally applied, would effectively bar all multi-family development from virtually all parts of Long Island.

46. *North Shore*, 110 A.D.2d at 127, 493 N.Y.S.2d at 567.

market forces will decide what will actually be built, in the absence of government subsidies.”<sup>47</sup> Second, “a requirement that those seeking to build either multi-family housing or age restricted multi-family housing must first seek a permit to do so does not destroy the presumptive validity of zoning ordinances which do not premap to provide for such housing.”<sup>48</sup> This reasoning expands the *Berenson* loophole to the point where almost any exclusionary municipality can easily argue that regional housing needs are being adequately met elsewhere. The court specifically held that neither proof of the existence of multi-family units nor proof that suitably zoned land in neighboring municipalities exists is needed for this conclusion to be reached. All that is necessary is the theoretical possibility that developers could apply for their land to be rezoned for multi-family use.<sup>49</sup>

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47. *Id.* at 128, 493 N.Y.S.2d at 567 (quoting *Blitz v. Town of New Castle*, 94 A.D.2d 92, 99, 463 N.Y.S.2d 832, 836 (1983)).

48. *North Shore*, 110 A.D.2d at 128, 493 N.Y.S.2d at 567.

49. Indeed, the possibility is no more than theoretical, since it is unlikely in the extreme that adequate suitable sites remain in the areas designated for potential multi-family rezoning in the Comprehensive Development Plan. In a more recent study of vacant land, a figure of 17,319 vacant acres is given for Nassau County. Long Island Regional Plan. Bd., Land-Use-1981, at 10 [hereinafter Land-Use-1981]. This figure clearly is inconsistent with the conclusion of the 1969 Comprehensive Development Plan that there “are less than 15,000 acres of vacant land in all of Nassau County,” quoted in *North Shore*, 110 A.D.2d at 126, 493 N.Y.S.2d at 566. Most of the apparent discrepancy is attributable to a change in practice. The earlier study counted large estates as residential land in their entirety, while the later analysis assigned the building to a portion of such property, considering the balance to be vacant. See Land Use - 1981, *supra*. This is a more realistic approach. Of the 17,300 vacant acres thus identified, however, over 10,400, or roughly sixty percent, are in the north shore area in which Upper Brookville is located. A review of the land use maps for Nassau County suggests that no more than a handful of small, scattered, vacant sites exist today (or existed at the time of trial) within the centers and corridors designated as appropriate in 1969 for multi-family development by the Comprehensive Development Plan. It is not clear whether testimony on any of these issues was presented by either party at trial. If such testimony was given, its presence is not reflected in the opinion of the court. Furthermore, the regional plan has no legal status with respect to the land use decisions of local government. The fact that a site is designated for multi-family use on the Nassau-Suffolk Comprehensive Development Plan does not carry with it the slightest inference that the municipality within which it is located will even entertain, let alone grant, a proposal for rezoning. Interestingly, this question has arisen in a case tried in May 1985, and awaiting decision in federal court, *NAACP v. Town of Huntington*, 81 CV. 0541 (ILG) (E.D.N.Y. May 28, 1985).

The use of regional plans by the courts in these cases is troubling. In *North Shore*, the appellate division supported its reliance on the Nassau-Suffolk Comprehensive Development Plan with references to the Regional Development Guide of the Tristate Regional Planning Commission, a highly generalized document issued by a body which had been dissolved a number of years prior to the decision. In the *Blitz* appellate division decision, in which the validity of New Castle's post-*Berenson* zoning ordinance was affirmed, the court placed heavy reliance on a housing policy document prepared by an unspecified "blue ribbon committee" of private citizens on behalf of the County of Westchester.<sup>50</sup> This document is powerless to bind local governments. At best it is of no more than a quasi-governmental character.

The *Berenson* court made a strong plea for regional planning of a particular order:

[I]t 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. While the people of New Castle may fervently desire to be left alone by the forces of change, the ultimate determination is not solely theirs. Whether New Castle should be permitted to exclude high density residential development depends on the facts and circumstances present in the town and the community at large. *Until the day comes where regional, rather than local, governmental units can make such determinations, the courts must assess the reasonableness of what the lo-*

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(decision pending). The issue in the case was the denial by the town of a request for multi-family rezoning of a site owned by a nonprofit sponsor, where the objective of the sponsor was to construct subsidized housing under the then active federal Section 8 program (Housing and Community Development Act, 42 U.S.C. § 1437(f) (1982)). Although the site was designated for high density development in the Nassau-Suffolk Comprehensive Development Plan, defendants took the position that that designation is irrelevant, and that the low-density designation in the town master plan (1964) is the only relevant planning standard. See Plaintiffs' Proposed Findings of Fact, at 56-57, Huntington Branch, NAACP v. Town of Huntington, No. 81 CV. 0541 (ILG), (submitted July 31, 1985).

50. *Blitz v. Town of New Castle*, 94 A.D.2d 92, 97, 463 N.Y.S.2d 832, 835 (1983).

cality has done.<sup>51</sup>

This passage leaves little doubt that the court of appeals was seeking the enactment of legislation that would provide for rational decision making at a regional level, not merely the preparation of toothless advisory and exhortative reports. There have been no statutory enactments since *Berenson* to that end. The legislative authorization for the plans relied upon by the appellate division in *North Shore*, such as it was, was in place long before the *Berenson* decision. By relying so heavily on regional studies, the appellate division is promoting the patently unsound doctrine that these documents have some direct and significant relationship to the local land use regulatory process. The court is evading its judicial responsibilities and perpetuating an image of the land use regulatory process wildly at variance with reality.

Even more troubling, however, is the judicial view of the relationship between zoning and development that emerges in these decisions. The courts see zoning as a passive and narrowly technical procedure.<sup>52</sup> While they recognize that a failure to zone for multi-family housing (by which they appear to mean the utter absence of such a zoning text in the ordinance) is a barrier to construction of such housing, the recognition of the relationship between zoning and development goes no further. The courts have assumed a series of idealized relationships: once the appropriate text has been placed in the ordinance, to the extent market conditions alone dictate, multi-family development will follow; should governmental subsidies be available subsidized housing will follow; regional housing needs will be met, or not met, on the basis of the workings of market forces and the availability of subsidies. This view distorts the relationship between zoning and development at sev-

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51. *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).

52. As the appellate division held in *Blitz*, "zoning ordinances will go no further than determining what *may* or *may not be built*; market forces will decide what will actually be built in the absence of government subsidies." *Blitz*, 94 A.D.2d at 99, 463 N.Y.S.2d at 836, *quoted in* *North Shore Unitarian Universalist Soc'y v. Village of Upper Brookville*, 110 A.D.2d 123, 128, 493 N.Y.S.2d 564, 567 (1985).

eral levels. Where the zoning process is highly discretionary, as is the case whenever multi-family districts are not mapped but rezoned only on application of a landowner, the market can easily be thwarted and manipulated by the exercise of governmental discretion. Even where vacant land is zoned for multi-family development prior to any application, the conditions imposed by the ordinance can still affect the nature of development in ways that would not be the outcome of market factors. The effect on the likelihood of subsidized housing being constructed is even greater. By seeing the development of lower income housing as a simple matter of the application of governmental subsidies to a neutral zoning ordinance two essential elements are ignored. The extent to which the zoning process can impede the provision of lower income housing, even where subsidies are available, is the first element. The second is the extent, in the absence of governmental subsidies, that zoning can affirmatively help to bring about the provision of low and moderate income housing.

It is arguable that, at least in 1975, the provision of lower income housing was of some concern to the New York courts, and that initially the *Berenson* decision was generally interpreted in that light. Thus, the manner in which zoning affects lower income housing, over and above its effect on multi-family housing in general, would appear to be of some legal significance. It is clearly of social and economic significance because there is no question that it is, as the appellate division acknowledged in *Blitz*, the most pressing housing need.<sup>53</sup> Furthermore, to a far greater extent than with respect to market housing, both the zoning provisions themselves and the manner in which they are administered can either impede or facilitate the development of lower income housing. The experience in New Jersey since *Mount Laurel II* has demonstrated that carefully crafted zoning provisions can lead to substantial

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53. *Blitz*, 94 A.D.2d at 99, 463 N.Y.S.2d at 836 (referring to *Berenson v. Town of New Castle*, 67 A.D.2d 506, 519-21, 415 N.Y.S.2d, 669, 677-78 (1979)). There is substantial literature documenting the extent to which housing needs are particularly severe among lower income households. See, e.g., Report of the President's Comm'n on Housing 3-11 (W.F. McKenna, chair 1982).

amounts of lower income housing being produced even in the absence of governmental subsidies. This is in dramatic contrast to the assumptions embodied in the pessimistic dicta found in the New York decisions.

C. *Suffolk Housing Services: The End of the Road for Berenson?*

With respect to addressing the underlying issue of regional housing needs, particularly those of lower income households, the cases discussed above were deficient in one particular aspect, namely, the character and the concerns of the parties bringing the litigation. In *Berenson*, *Blitz* and *Kurzius*, plaintiffs were landowners whose motivation for litigating was first and foremost to bring about a substantial increase in the value of their land. In *Berenson*, plaintiffs presented extensive trial testimony on the relevant social issues. Those issues were not addressed at all in *Kurzius*, and only minimally in *Blitz*. The plaintiff in *North Shore* was a legitimate nonprofit entity, but its concerns were still of a special and parochial nature with little relevance to broader housing needs.<sup>54</sup> None of these cases, therefore, offered any serious direction regarding the question of how regional housing needs were to be most effectively reflected in municipal land use regulation. In essence, the issue of regional housing needs was no more than a means by which plaintiffs could obtain the site-specific relief they were seeking. In that respect, Mitchell Berenson was successful, but his successors, Robert Kurzius, Joseph Blitz and the North Shore Unitarian Universalist Society were not.

The first *Berenson* case to address regional housing needs as the central element of the case was *Suffolk Housing Ser-*

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54. The nature of the North Shore Unitarian Universalist Society's goals with respect to the proposed housing was highly specific: to provide housing exclusively for elderly members of the congregation (who were, by and large, relatively affluent) in reasonable proximity to the church and in a rural setting. Given this, the trial court reasonably concluded that "senior citizen housing [of the sort proposed by the plaintiff] is not a 'need' in the sense that it is not particularly utilitarian in social and economic terms." *North Shore Unitarian Universalist Soc'y v. Inc. Village of Upper Brookville*, No. 10982/80 at 11 (N.Y. Sup. Ct. Sept. 28, 1983).

*vices v. Town of Brookhaven*, a case brought by a coalition of low income individuals and organizations concerned with lower income housing needs against a rapidly growing suburban town in Suffolk County on Long Island. As is typical of such cases, it had a lengthy history. First brought in 1976, it withstood a challenge to plaintiffs' standing, in an important decision by special term,<sup>55</sup> affirmed by the appellate division in 1978.<sup>56</sup> The case was tried in 1980 and a decision was rendered for the Town of Brookhaven in the fall of 1982.<sup>57</sup> The appellate division affirmed the trial decision in an opinion handed down in July 1985.<sup>58</sup> As of this writing, the court of appeals has granted a motion for leave to appeal submitted by the plaintiffs.<sup>59</sup>

The Town of Brookhaven, reputedly the largest town in the United States, has an area of three hundred forty square miles,<sup>60</sup> which is substantially larger than the entire land area of New York City,<sup>61</sup> and is roughly three quarters of the area of Westchester County, in which the Town of New Castle is located.<sup>62</sup> Brookhaven has experienced rapid suburban growth during recent decades. Its population in 1980 was 364,812.<sup>63</sup>

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55. Suffolk Hous. Servs. v. Town of Brookhaven, 91 Misc.2d 80, 397 N.Y.S.2d 302 (N.Y. Sup. Ct. 1977).

56. Suffolk Hous. Servs. v. Town of Brookhaven, 63 A.D.2d 731 405 N.Y.S.2d 302 (1978).

57. Suffolk Hous. Servs. v. Town of Brookhaven, No. 75-20017 (N.Y. Sup. Ct. Sept. 17, 1982).

58. Suffolk Hous. Servs. v. Town of Brookhaven, 109 A.D.2d 323, 491 N.Y.S.2d 396 (1985).

59. Suffolk Hous. Servs. v. Town of Brookhaven (July 1, 1986) (order granting leave to appeal). It is interesting to note that a number of diverse organizations joined in the appeal as *amicus curiae*, including the American Planning Association, the NAACP Legal Defense and Educational Fund, Inc., the American Jewish Congress, and a number of Long Island religious and civic organizations.

60. Plaintiff's Post-Trial Memorandum at 5, Suffolk Hous. Serv. v. Town of Brookhaven, No. 75-20017 (N.Y. Sup. Ct. Sept. 17, 1982) [hereinafter Memorandum].

61. The land area of New York City (five boroughs) is approximately three hundred square miles. Nelson A. Rockefeller Inst. of Gov't, 1984-1985 New York State Statistical Yearbook 16 (1985).

62. The land area of Westchester County is approximately four hundred thirty-eight square miles. *Id.*

63. 34 U.S. Dep't of Commerce, Bureau of the Census, 1980 Census of Population: General Population Characteristics, 34-19 (1982).

The population of the town, while substantial, was distributed over a large area. As a result, development patterns in the town were typically those of low density single-family housing, interspersed with highway-oriented shopping strips, and nearly half of the town was either still vacant or in agricultural use.<sup>64</sup> Only 3.3% of the town population was black,<sup>65</sup> the greater part of whom were concentrated in two small enclaves of heavily minority character.<sup>66</sup>

In contrast to *Berenson*, plaintiffs in *Suffolk Housing Services* did not allege that multi-family housing was completely barred from the Town of Brookhaven, but, rather, that "it is so restricted as to exclude the poor and racial minorities."<sup>67</sup> While a variety of exclusionary practices were alleged as the basis for that conclusion, the central issue was the manner in which the approval took place, on those occasions that multi-family development was approved by the town. Specifically, although Brookhaven has created a number of multi-family zoning districts within its zoning ordinance,<sup>68</sup> it has followed an explicit practice of refraining from mapping any vacant land for any of these multi-family zones. Instead, land is only designated for multi-family use on petition for rezoning by a developer or landowner.<sup>69</sup> Such a rezoning can only take place after an extensive and largely duplicative review by both the town planning board and the town board.<sup>70</sup> Thus, there is no opportunity to develop multi-family housing as of right. Development can only take place as a result of favorable exercise of discretion by the municipal governing body. Although there are certain generalized planning criteria for the applica-

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64. Land Use - 1981, *supra* note 49, at 21.

65. 34 U.S. Dep't of Commerce, Bureau of the Census, 1980 Census of Population: General Population Characteristics, 34-40 (1982).

66. Memorandum, *supra* note 60, at 17-18.

67. See *Suffolk Hous. Servs. v. Town of Brookhaven*, 91 Misc.2d 80, 81, 397 N.Y.S.2d 302, 305 (1977).

68. *Suffolk Hous. Servs. v. Town of Brookhaven*, No. 75-20017 at 13-15 (N.Y. Sup. Ct. Sept. 17, 1982).

69. Defendant's Brief After Trial at 31-32, *Suffolk Hous. Servs. v. Town of Brookhaven*, No. 75-20017 (N.Y. Sup. Ct. Sept. 17, 1982).

70. See *infra* notes 144-45 and accompanying text.

tion of these multi-family zones written in the ordinance,<sup>71</sup> they are vague and have no binding effect on the determination of the town board. Similarly, the town board is not bound by the recommendation of the planning board. Indeed, those recommendations have been ignored as often as they have been accepted.<sup>72</sup>

This process, plaintiffs alleged, was at the core of a body of practices which had a chilling effect on development of multi-family housing generally, which resulted in developments being approved subject to the imposition of unreasonable or exclusionary conditions not set forth in the ordinance but imposed as covenants and which effectively discouraged development of subsidized housing for low and moderate income households.<sup>73</sup>

The town asserted that such a discretionary approach to multi-family zoning was standard governmental practice, rather than a local aberration.<sup>74</sup> A further, and more important contention was noted by plaintiffs in a post-trial memorandum:

In the course of the trial, the defendants pressed this Court to adopt a narrow reading of *Berenson*. The defendants suggested that the Court look only to whether Brookhaven provided a variety of zoning classifications and not whether the Town permitted housing types responsive to the needs of low and moderate income persons. Brookhaven argues that if it has made possible through its zoning housing in a multi-family form, it has met its *Berenson* obligation even if the housing developed is extremely costly and beyond the means of low and moderate income persons. As long as the Town rezones for multi-family use, the fact [that] it excludes subsidized apartments or requires developers to market multi-family units in a condominium-sale fashion rather than by rental

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71. Town of Brookhaven, N.Y. Zoning Ordinance §§ 85-53A, 85-54 (1976).

72. Trial testimony of Janet Hanson, *Suffolk Hous. Servs. v. Town of Brookhaven*, No. 75-20017 (N.Y. Sup. Ct. Sept. 17, 1982) (as recalled by the author).

73. See Memorandum, *supra* note 60, at 66-76.

74. *Suffolk Hous. Servs. v. Town of Brookhaven*, No. 75-20017 at 8 & 15 (N.Y. Sup. Ct. Sept. 17, 1982).

is, in the defendants' view, irrelevant.<sup>75</sup>

Thus, the issue of the nature of the *Berenson* doctrine was clearly posed. Plaintiffs argued that

Under the *Berenson* doctrine, a municipality must show that its zoning does in fact provide housing opportunities for low and moderate income persons. The *Berenson* goal is not simply the creation of brick and board structures which bear no relevance to the housing needs of the excluded classes. A town simply cannot claim compliance on the basis that it rezones for multi-family construction when the developments are for the wealthy, while at the same time that town refuses to rezone for low income multi-family subsidized developments.<sup>76</sup>

While the trial court found for the defendants, the issue was not seriously addressed in that decision. The trial court seemed largely persuaded by the arguments made by one of the town's expert witnesses that such discretionary zoning was common practice and that, in any event, zoning had no more than a minimal effect on housing costs.<sup>77</sup> As a result, the court summarily rejected plaintiffs' contentions regarding the effect of the town's practices on multi-family development generally and the housing needs of lower income families particularly.<sup>78</sup>

The appellate division, however, found for defendants while largely accepting plaintiffs' contentions. In essence, the court found that such claims, whether or not true, were irrelevant to the application of the *Berenson* doctrine. First, the court sought to establish whether the Brookhaven zoning or-

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75. Memorandum, *supra* note 60, at 58.

76. *Id.*

77. *Suffolk Hous. Serv. v. Town of Brookhaven*, No. 75-20017 at 15 (N.Y. Sup. Ct. Sept. 17, 1982).

78. *Id.* at 16-18. The trial court did note that

[O]ne area that disturbs this Court is the defendants' apparent reluctance to utilize the various Federal and State subsidy programs that are available to supplement the development of low cost housing. . . . The defendants' policies in this area are under continuing judicial scrutiny, and what is constitutional now may be found to be unconstitutional in the future.

*Id.* at 18.

dinance was facially valid. The court concluded it was on the basis of three separate but related tests:

(1) The language of the ordinance "clearly allows for a wide variety of different types and densities of residential housing;"<sup>79</sup>

(2) The fact that some projects were approved under the various multi-family zoning categories is adequate to "show that the special permit procedure has not been employed as a ruse to *prevent* the construction of multi-family housing in the Town of Brookhaven;"<sup>80</sup>

(3) The availability of substantial remaining vacant land in the town, coupled with the possibility of additional rezoning for multi-family use, lead to the conclusion "that the ordinance on its face has given more than adequate consideration to the local and regional housing needs."<sup>81</sup>

The court then turned to the meaning of *Berenson*:

A careful reading of the Court of Appeals decision in *Berenson v. Town of New Castle* makes clear that the court therein was not attempting to address the types of questions sought to be raised by the plaintiffs at bar, *since it approached the problem of exclusionary zoning solely in terms of traditional zoning and planning considerations, e.g., population density, infrastructure . . . etc., to the exclusion of the type of social and economic implications which the plaintiffs now urge upon us*. Thus, *Berenson* does not address the question of how such housing is to be built; what it will cost to develop . . . *nor does it purport to mandate that a zoning ordinance make it possible for people of all classes to live in a given community*. It merely requires that a town allow for the construction of different types of housing in sufficient numbers for those people who want and can afford it.<sup>82</sup>

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79. *Suffolk Hous. Servs. v. Town of Brookhaven*, 109 A.D.2d 323, 328, 491 N.Y.S.2d 396, 400 (1985).

80. *Id.* at 329, 491 N.Y.S.2d at 401 (emphasis added).

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

82. *Id.* at 331, 491 N.Y.S.2d at 402 (citation omitted; emphasis added).

The *Berenson* doctrine has come full circle. It is clear that the original 1975 decision was generally, even universally, interpreted as seeking to address the housing needs of people, including but not limited to lower income people. The often cited language in that decision, “[r]esidents of Westchester County, as well as the larger New York City metropolitan region, may be searching for multiple-family housing in the area to be near their employment or for a variety of other social or economic reasons,”<sup>83</sup> was interpreted by the appellate division in the same case as applying to “what we shall simply call the less affluent residents of the New York City metropolitan area.”<sup>84</sup> The appellate division went to great lengths to distinguish between lower income housing needs and the demand for multi-family housing in general.<sup>85</sup> It commented sharply on the anomaly of a developer’s proposal to build luxury housing being grounded upon the needs of lower income households.<sup>86</sup> Applying *Berenson* to the question of standing, Justice Lazer in *Suffolk Housing Services* noted that “exclusionary zoning has been defined as land use control regulations which singly [sic] or in concert tend to exclude persons of low or moderate income from the zoning municipality.”<sup>87</sup> Leading commentators echoed this perspective, stressing the intellectual roots of *Berenson* in the New Jersey *Mount Laurel I* decision.<sup>88</sup>

Although the fundamental grounding of the *Berenson* de-

83. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 110, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 681 (1975).

84. *Berenson v. Town of New Castle*, 67 A.D.2d 506, 522, 415 N.Y.S.2d 669, 679 (1979).

85. *Id.* at 519-22, 415 N.Y.S.2d at 677-79. See also Nolon, *Exclusionary Zoning: New York, New Jersey Cases Compared*, N.Y.L.J. July 22, 1985, at 1, col. 1.

86. See *Berenson*, 67 A.D. 2d at 519, 415 N.Y.S.2d at 677. See also *Suffolk Hous. Servs. v. Town of Brookhaven*, 91 Misc. 2d 80, 90, 397 N.Y.S.2d 302, 310 (N.Y. Sup. Ct. 1977), noting “there is not always an identity of interest between landowners and those excluded by zoning restrictions particularly where the complaint is not that multi-family housing is prohibited in Brookhaven, but only that it is so restricted as to exclude the poor and racial minorities” (citations omitted).

87. *Suffolk Hous. Servs.*, 91 Misc. 2d at 83, 397 N.Y.S.2d at 306 (citing 2 Anderson, *American Law of Zoning* § 8.02 (2d ed. 1976)).

88. See, e.g., Anderson, *Survey of New York Law - Land Use Control*, 28 Syracuse L. Rev. 109, 110 (1977).

cision in the needs of people, as argued by plaintiffs in *Suffolk Housing Services*,<sup>89</sup> was eroded in subsequent decisions, it was left to the appellate division in *Suffolk Housing Services* to expunge it entirely. Under the new standard, the only point at issue is the presence or absence of different housing types, to the exclusion "of the type of social and economic implications which the plaintiffs now urge upon us."<sup>90</sup> Instead, the provision of different housing types is to be limited to an amount sufficient "for those people who want and can afford [them]."<sup>91</sup>

It appears that the appellate division has come to believe in a Platonic ideal of land use planning in which the physical uses of the land have been severed from their social and economic implications and in which two different housing types — single-family and multi-family — exist as generic ideal types independent of any relationship to people or housing needs. This position, however, as reflected in *Suffolk Housing Services*, exists in a legalistic vacuum ignorant of or uninterested in social and economic reality, as well as the reality of land use regulation. To ignore realities which are as fundamental as the nature of housing needs and the economics of housing is likely to result in bad law. Part III of this article explores the nature of those realities.

### III. Multi-family Housing and The Marketplace: Land Use Regulations in Economic Context

#### A. *The Changing Character of Multifamily Housing and the Changing Patterns of Exclusionary Zoning*

It is almost a truism that zoning regulation is essentially socioeconomic in nature. Nowhere is that more apparent than in the history of zoning practice with respect to multi-family housing development. The use of the zoning power to exclude multi-family housing from neighborhoods characterized by

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89. See Memorandum, *supra* note 60, at 58.

90. *Suffolk Hous. Servs. v. Town of Brookhaven*, 109 A.D.2d 323, 331, 491, N.Y.S.2d 396, 402 (1985).

91. See *id.*

single family home ownership, and from entire communities, was historically justified in terms that are clearly more closely related to the social character of such housing than to its physical character. The seminal 1926 *Village of Euclid v. Ambler Realty Co.* decision states:

[T]he development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.<sup>92</sup>

It is arguable that the courts in 1926 had a particular visual image of multi-family housing in mind, one of buildings that could be "interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes."<sup>93</sup> Whatever the 1926 court may have had in mind, the image of massive tenement buildings covering every inch of their entire sites with brick and mortar is utterly irrelevant to contemporary suburban multi-family housing. It has been largely irrelevant for at least forty years. From a physical standpoint, multi-family housing of the sort constructed in suburban America since the end of World War II varies remarkably little from single-family development in terms of those considerations supposedly at the heart of zoning regulation: building height, land coverage, setbacks, and the like. As a result, it has become almost commonplace among planning scholars and authorities to advocate mixing single and multi-family housing types within single developments.<sup>94</sup>

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92. 272 U.S. 365, 394 (1926).

93. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

94. For discussion in the professional literature of planning developments containing mixed housing types see K. Lynch & G. Hack, *Site Planning*, 282-83 (1984) and R. Untermann & R. Small, *Site Planning for Cluster Housing*, 37-64, 110-13 (1977). A land use regulatory scheme which effectively eliminated any distinction between single and multi-family housing for zoning purposes in Fort Collins, Colorado,

The increasing physical compatibility of single-family and multi-family housing in postwar suburban development has served to make more clear the underlying socioeconomic basis for the restriction, and frequent exclusion, of multi-family housing. While local officials' justification for exclusion was often fiscal (itself a doubtful basis for land use regulation) Richard Babcock has pointed out the extent to which that justification was itself grounded in social stereotypes:

The resident of suburbia is concerned not with *what* but with *whom*. His overriding motivation is less economic than it is social. His wife spends more at the hairdresser in a month than the proposed apartment house will add to her husband's tax bill in a year. What worries both spouses is that the apartment development is a symbol of everything they fled in the city. When they protest that a change in dwelling type will cause a decline in the value of their property, their economic conclusion is based upon a social judgment.<sup>95</sup>

Babcock's intuitive judgment was confirmed in a 1973 New Jersey study, in which an intensive survey of suburban attitudes toward multi-family housing was combined with the analysis of actual land use decisions governing such development. The report concluded that:

Next to the visual aspect of the community image, social perceptions and fears are another factor underlying resistance to multi-family development. . . . [T]he movement to the suburbs has been in many ways a movement from urban heterogeneity to suburban homogeneity; almost always homogeneous at the neighborhood or subdivision level, and often in newer suburbs relatively homogeneous in population across the community as a whole. The quality of homogeneity is largely perceived to stem from two elements: the physical similarity of the housing

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was awarded the Outstanding Planning Program Award in 1982 by the American Planning Association. See W. Sanders, J. Getzels, D. Mosena & J. Butler, *Affordable Single Family Housing: A Review of Development Standards* 69-85 (1984).

95. R. Babcock, *The Zoning Game* 31 (1966).

in the community, and the importance of homeownership in the suburban life style, which, it is believed, frame an entire complex of related social attitudes and values coloring life in the community.

When apartments are permitted, the desire to insulate the community from their effects can be noted in the frequency with which the towns require developers to erect visual buffers of various sorts between the apartment development and the rest of the community, or in the relegation of apartments to the least desirable parts of town. These common practices are an effort to minimize the presence of multi-family development. At the same time . . . renters are seen by many as an undesirable class, showing no responsibility to the community or even to the development in which they live. . . . The perceived population of many multi-family developments, young couples and singles, is viewed as being particularly undesirable in view of the particular social habits associated by many with the young.<sup>96</sup>

Furthermore, the same study, through extensive interviews with the residents of typical garden apartment developments, established that these stereotyped images bore little or no relationship to any verifiable reality.<sup>97</sup>

During recent decades, however, the character of multi-family housing, with respect to both physical form and tenure, has become highly diverse. As this has taken place, suburban land use regulation has gradually moved from a posture of single-minded opposition to multi-family housing to one in which distinctions among multi-family types are recognized and considered in local decisions. The increasing diversity of multi-family form has been reflected in the increasing volume

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96. N.J. County & Mun. Gov't Study Comm'n, *Housing & Suburbs: Fiscal & Social Impact of Multifamily Development*, Executive Summary 12-13 (1973). In a similar vein, in one of the early New Jersey cases on exclusion of multi-family housing, the defendant municipality argued that "the building would bring an undesirable class of residents into the borough." 2 N. Williams, *American Planning Law: Land Use and the Police Power* 347 (1985) (quoting *Pumo v. Fort Lee*, 4 N.J. Misc. 663, 134 A. 122 (N.J. Super. Ct. (1926))). The court did not, however, find this argument compelling.

97. N.J. County & Mun. Gov't Study Comm'n, *supra* note 96 at 8-9.

of townhouse development, which type has been characterized as a "design transition between the single-family detached house and more typical forms of multi-family dwellings . . . ." <sup>98</sup> More recently, other intermediate housing types have become more widely known, including zero lot line houses, which are technically detached single-family houses, but closely aligned to multi-family housing with respect to many of their site planning and density characteristics. <sup>99</sup> The existence of these trends has been recognized with the enactment of Section 281 of the New York State Town Law, which permits the mixing of various housing types on a site zoned for single-family use through "cluster" provisions without necessitating any change in the underlying zoning classification. <sup>100</sup>

The dimension of tenure has been, arguably, more significant than physical form. Beginning in the 1970's, an increasing portion of multi-family housing constructed in the United States was constructed for condominium ownership rather than rental. <sup>101</sup> As the New Jersey study established, a significant dimension to the socially grounded opposition to multi-family housing was that such units were rental units and, therefore, occupants were not homeowners, which implies a lower social standing and respectability. <sup>102</sup>

There is no question that condominium ownership has made multi-family housing more attractive to suburban deci-

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98. Urban Land Inst., *Residential Development Handbook* 120-21 (1978).

99. See, e.g., W. Sanders, *supra* note 94, at 47-67; R. Untermann & R. Small, *supra* note 94, at 55. For example, zero lot line single-family houses are generally developed at site densities of six to eight units per acre, a density characteristic of many suburban townhouse or mixed townhouse/apartment developments. See W. Sanders, *supra* note 94, at 50, 54.

100. New York Town Law § 281 (McKinney 1965 & Supp. 1987).

101. A 1975 survey found that eight-five percent of all condominium units then in the national housing inventory had been constructed since the 1970 census. U.S. Dep't of Housing & Urban Dev., *HUD Condominium/Cooperative Study (1975)*, cited in, R. Engstrom & M. Putnam, *Planning and Design of Townhouses and Condominiums* 5 (1980).

102. For a particularly valuable analysis of the relationship between social values and land use in general, and of the significance of home ownership in that respect in particular see C. Perin, *Everything in its Place: Social Order and Land Use in America* (1977). For an extensive discussion of the social position of condominium or townhouse ownership see *id.* at 56-60.

sionmakers and more likely to win zoning approval than was the case when multi-family housing was assumed to be for rental occupancy. Local governments have, in fact, sought on many occasions to mandate condominium ownership of multi-family units as a condition of land use approval. While much of this has taken place through informal pressure,<sup>103</sup> there are examples of formal governmental action to that end. A New Jersey municipality adopted an ordinance requiring that multi-family developments be condominiums. The ordinance, however, was invalidated by a New Jersey court on the grounds that the form of tenure was not within the proper scope of land use regulation.<sup>104</sup> In a similar vein, the Town of Brookhaven, New York, has, on occasion, imposed covenants requiring that all of the units in "cluster" developments approved under Section 281<sup>105</sup> be sold as condominiums rather than rented. This practice was noted, with apparent, although tacit, approval, in the appellate division ruling in *Suffolk Housing Services*.<sup>106</sup>

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103. This is based on the experience of the author, largely in New Jersey. Although the form of tenure is recognized to be beyond the formal scope of local land use regulation, it is a frequent subject of planning board interrogation at public hearings of developers seeking approval for multi-family developments.

104. *Bridge Park Co. v. Borough of Highland Park*, 113 N.J. Super. 219, 273 A.2d 397 (N.J. Super. Ct. App. Div. 1971). It is doubtful that the municipality's position in *Bridge Park* would have been upheld in any state. There is substantial division between states with respect to the underlying issue; namely, whether tenure in general, and condominium conversion in particular, can be regulated under municipal land use regulatory powers. North Carolina takes the same position as New Jersey. See *Graham Court Assocs. v. Town Council*, 53 N.C. App. 543, 281 S.E.2d 418 (1981). But California courts have explicitly upheld the power of a municipality to regulate condominium conversion under the Subdivision Map Act, Cal. Gov't Code §§ 66,410-66,499 (West 1983 & Supp. 1987). See *Griffin Dev. Co. v. City of Oxnard*, 39 Cal. 3d 526, 703 P.2d 339, 217 Cal. Rptr. 1 (1985). To the extent that there is relevant case law in New York State, it supports the New Jersey position that regulation of the form of tenure does not fall within the purview of land use regulation. See *North Fork Motel, Inc. v. Grigonis*, 93 A.D.2d 883, 461 N.Y.S.2d 414 (1983) (barring a municipality from denying permission to change the form of ownership of a motel to condominiums, as long as the underlying use as a motel remained unchanged); *FGL&L Property Corp. v. City of Rye*, 66 N.Y.2d 111, 485 N.E.2d 986 (1985) (overturning provisions of a municipal zoning ordinance requiring a certain form of building ownership on a particular site).

105. See *supra* note 100 and accompanying text.

106. *Suffolk Hous. Servs. v. Town of Brookhaven*, 109 A.D.2d 323, 491 N.Y.S.2d

That such municipal actions were not more widespread is easily explained by the fact that, for the most part, economic factors accomplished similar objectives without the need for coercive pressure by the municipality. Leaving aside publicly subsidized housing, during the latter part of the 1970's the volume of rental housing construction declined sharply while condominium construction increased steadily. Table 1 presents an estimate of the distribution of unsubsidized multi-family housing construction between 1975 and 1984. From 1975 to 1980, the share of condominiums in unsubsidized multi-family housing production increased steadily from twenty-four percent to sixty-one percent of the total.<sup>107</sup>

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396 (1985). Strictly speaking, the appellate division did not formally approve the use of such covenants. The court rejected "plaintiffs' challenge to the alleged practices of imposing covenants . . . in the context of the present challenge to the facial constitutionality of the Brookhaven ordinance under the *Berenson* standard." *Id.* at 333, 491 N.Y.S.2d at 403. No reasoning was offered. It is possible, although perhaps difficult, to conclude from this language that while the court found such covenants to be legal in the context of a *Berenson* challenge, and not inconsistent with that doctrine, they might be potentially challenged on other grounds. This, of course, is entirely speculative. It should be noted further that, although the imposition of these covenants was the exception rather than the rule, informal interrogation of developers, and the solicitation of oral pledges by developers that multi-family units would be sold as condominiums, by Brookhaven officials, was more common.

107. As Table 1 shows, production of rental housing increased dramatically in 1983 and 1984. This was the result of a number of factors. While the dramatic reduction in mortgage interest rates was a significant element, even more important were the widespread availability of mortgage financing based on tax-exempt revenue bonds (issued by state and local government entities), and in particular, the availability of accelerated depreciation (ACRS) made possible by the Tax Reform Act of 1981, which made multi-family rental housing an exceptionally attractive tax shelter for wealthy investors. The threatened repeal, or at a minimum significant modification, of the 1981 depreciation provisions in 1985 immediately triggered a significant movement away from future rental development by many developers and investors. This trend has been exacerbated by the effects of the 1986 Tax Reform Act, which significantly reduced the tax advantages to be obtained from development and ownership of rental housing. One respected late-1986 real estate forecast predicted a thirty-seven percent decline in rental housing starts in 1987 compared to 1986, largely as a result of changes in the tax laws. The Lomas & Nettleton Co., U.S. Housing Markets (Dec. 1986) (statistical data from forty-five metropolitan areas, third quarter, 1986).

TABLE 1: DISTRIBUTION OF NEWLY CONSTRUCTED UNSUBSIDIZED MULTI-FAMILY HOUSING IN THE UNITED STATES BETWEEN CONDOMINIUM AND RENTAL OCCUPANCY — 1975 THROUGH 1984 (000)

YEAR	CONDOMINIUM	RENTAL/1	% CONDOMINIUM
1975	46	145	24%
1976	66	180	27
1977	83	236	26
1978	112	216	34
1979	146	146	50
1980	138	88	61
1981	134	88	60
1982	124	116	52
1983	197	288	41
1984	203	331	38

1/It should be noted that a significant percentage, arguably the majority, of "unsubsidized" rental units constructed after 1981 were financed with mortgages derived from the sale of tax-exempt revenue bonds, an indirect but substantial form of public subsidy. Since such bond issuing is highly decentralized, there are no readily available statistics which would make it possible to quantify these units.

SOURCE: Analysis by A. Mallach, based upon U.S. Dep't of Commerce, Statistical Abstract of the U.S. (1986) p. 725, and O'Mara & Sears, Rental Housing (1984) p. 16. The estimate of unsubsidized rental housing was obtained, for this Table, by subtracting the number of condominiums and subsidized housing units from the total multifamily housing starts, provided in O'Mara & Sears, *supra*.

Although statistical evidence is lacking, it is likely that the condominium share of multi-family construction in most affluent suburbs was substantially larger.<sup>108</sup> Indeed, a recent newspaper article, announcing the construction of a new multi-family rental development in Suffolk County, stated "some-

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108. A number of representative examples can be cited. Trial Testimony, NAACP v. Town of Huntington, 81 CV. 0541 (ILG) (E.D.N.Y. May 28, 1985) (as recalled by the author) elicited that all multi-family housing approved for development during the past decade was for condominium ownership. See also Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 47-51, NAACP v. Town of Huntington, 81 CV. 0541 (ILG) (E.D.N.Y. May 28, 1985). Similarly, in the Town of New Castle, all of the multi-family housing approved since *Berenson* has been for condominium ownership. Telephone interview with John Nolon, Esq., Tarrytown, New York, Mar. 1986. A review of the real estate advertisements in the Westchester edition of the New York Times, Sunday, Apr. 20, 1986, identified display advertisements for twenty-five new condominium developments in Westchester County, New York, and nearby areas. Not one display advertisement for a new rental development was noted in the New York suburbs.

thing unusual is occurring at Artist Lake . . . [w]hat's unusual is that this development, called Lake Pointe Village, is for rent, not for sale."<sup>109</sup>

Townhouse condominium developments in affluent suburban communities have often become nearly as acceptable in the local regulatory scheme as single-family subdivisions. Such townhouse developments are often as, or more, expensive than detached single-family houses in the same area and are often advertised in ways that make it difficult for the casual reader to determine whether the units are actually detached or attached.<sup>110</sup>

As a result of these largely interrelated phenomena, by the 1980's the once common pattern of across the board exclusion of multi-family housing in suburban municipalities in New York State, as elsewhere, had become the exception rather than the rule. Even municipalities in which there was no applicable multi-family zone as such (the Town of Huntington on Long Island, for example), found ways in which to approve those multi-family developments which were considered to enhance the community socially and economically.<sup>111</sup>

109. N.Y. Times, Apr. 6, 1986, § 8 (Real Estate), at 1. The development in question was located in the Town of Brookhaven.

110. The units are usually characterized as "townhomes," "condominium homes," or "contemporary cluster homes." Examples of such developments in the suburban New York City metropolitan area, from recent advertisements in the New York Times, included The Cotswolds, in North Salem, Westchester County (two bedroom "townhomes" priced at \$280,000 to \$365,000), N.Y. Times, Apr. 13, 1986, § 8 (Real Estate), at 28; The Heights at Carrollwood, in Tarrytown, Westchester County (priced at \$240,000 to \$330,000), *id.*; and Ramapo Cirque in Suffern, Rockland County ("contemporary cluster homes" priced at \$264,900 to \$304,900), Apr. 18, 1986, at A23.

111. The text of the Huntington, New York, zoning ordinance provides, on its face, for multi-family housing only under narrow and highly specific criteria, as follows:

(1) within "an Urban Renewal Area which has been designated as such under the provisions of Article 15 of the General Municipal Law" (and which applies only to a very small area adjacent to the Huntington railroad station), § 198-20(A)(3);

(2) public housing "to be owned, maintained and operated by the Housing Authority of the Town of Huntington" (approval under which has only been sought once by the Authority, in 1964), § 198-20(A)(2);

(3) senior citizen housing (§ 198-21). A substantial number of expensive condominium developments have been approved, however, through use of the

A body of case law that addressed nothing but the total exclusion of multi-family housing, rather than the selective and discriminatory manner of its inclusion, had become largely, if not entirely, irrelevant to the new reality of land use regulation.

The role of local officials as community "gatekeepers,"<sup>112</sup> using discretionary powers to screen out development perceived to be undesirable while permitting development considered to be desirable, is nothing new. The use of discretionary land use authority to prevent construction of subsidized housing in suburban municipalities is renowned.<sup>113</sup> The changes in character of multi-family housing have not changed the underlying exclusionary dynamic of suburban land use regulation, but have merely shifted the locus of the barriers erected against undesirable land use categories. As certain elite categories of multi-family housing enter the realm of the socially acceptable, the barriers remain in place against other forms of multi-family housing, particularly rental housing designed for low and moderate income families.<sup>114</sup>

It is obvious that there is a close relationship between the differently treated multi-family housing types and the different housing needs which they address. Therefore, a brief discussion of the relationship of housing types to housing needs is appropriate before discussing the nature of the regulatory practices involved and the manner in which they prevent the

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Sec. 281 cluster provisions of Town Law. See also *supra* note 100 and accompanying text.

Furthermore, in a number of cases where the underlying permitted density under the existing zoning of the site was considered too low for the proposed condominium use, on a number of occasions the town, upon developer request, first rezoned the site to a higher density *single-family* zone, and then applied Sec. 281 provisions, in order to permit condominium development at densities up to roughly seven units per acre. Trial Testimony of David Portman, NAACP v. Town of Huntington, 81 CV. 0541 (ILG) (E.D.N.Y. May 28, 1985) (as recalled by the author).

112. The gatekeeper characterization is from N.J. County & Mun. Gov't Study Comm'n, *supra* note 96, at 14-15.

113. See *infra* Part IV. B.

114. With the obvious exception of lower income senior citizens who represent in many cases an acceptable category. See *infra* Table 10, at 94.

marketplace from responding to the housing needs of the region.

### B. *Housing Types, Housing Tenure and Housing Needs*

Just as multi-family housing is highly diverse with respect to physical form, or its suburban social acceptability, it is equally diverse with respect to its role in meeting housing needs. Housing needs vary widely and, if they are to be addressed, a wide variety of housing types must be provided. This variety is manifested in many respects: housing type, size, price, and tenure. This is particularly important with respect to meeting the needs which appear to be addressed in *Berenson*, and which were characterized by the appellate division, on remand, as the needs of "the less affluent residents of the New York City metropolitan area."<sup>115</sup>

An analysis of representative sales transactions in Westchester County, New York, documents this statement. As shown in Table 2, while sales prices for condominiums are typically less than those for detached single-family homes, there is no section of Westchester County (including those areas, such as Yonkers or New Rochelle, generally characterized as more urban than suburban) in which the typical house or condominium is affordable to anyone other than the affluent. Estimating the current median household income in Westchester County to be approximately thirty-two thousand dollars,<sup>116</sup> the purchase of the median priced condominium would

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115. *Berenson v. Town of New Castle*, 67 A.D.2d 506, 522, 415 N.Y.S.2d, 669, 679 (1979).

116. Median household income in Westchester County for 1979 as reported by the 1980 census of population was \$22,725. 34 U.S. Dep't of Commerce, Bureau of the Census, 1980 Census of Population: General Social and Economic Characteristics 34-983 (1983). Nationally, between 1979 and 1984 (the last year for which data is available) median household income in dollars increased by 36.2%. See U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract of the United States, 1986 (106th ed.). Assuming a further 4% increase between 1984 and 1985, the result is:  $\$22,725 \times 1.362 = \$30,951 \times 1.04 = \$32,189$ .

TABLE 2: MEDIAN SELLING PRICES FOR SINGLE FAMILY HOUSES AND CONDOMINIUMS IN WESTCHESTER COUNTY BY ZONE — MULTIPLE LISTING SALES FOR FOURTH QUARTER 1985

	SINGLE FAMILY HOMES		CONDOMINIUMS	
	NUMBER	MEDIAN	NUMBER	MEDIAN
ZONE 1	180	\$145,000	17	\$ 92,000
ZONE 2	165	200,000+	23	144,000
ZONE 3	77	196,000	27	175,000
ZONE 4	84	189,000	17	135,000
ZONE 5	71	200,000+	16	147,000
ZONE 6	85	200,000+	3	NA
ZONE 7	34	181,000	14	130,000
ZONE 8	72	200,000+	0	NA
COUNTYWIDE	768	200,000+	116	138,000

ZONE 1: Peekskill, Cortlandt, Yorktown

ZONE 2: Somers, Lewisboro, North Salem, Bedford, New Castle, North Castle

ZONE 3: Ossining, Tarrytown, Ardsley, Hastings, Mount Pleasant

ZONE 4: White Plains, Greenburgh

ZONE 5: Harrison, Rye, Mamaroneck

ZONE 6: Scarsdale

ZONE 7: Yonkers, Mount Vernon

ZONE 8: New Rochelle, Pelham

NOTE: Some municipalities are divided between zones.

SOURCE: Westchester Multiple Listing Service, Inc., 1985 MLS Sales: October, November, December (1986). Analysis by A. Mallach.

require an income of nearly double the county median income.<sup>117</sup>

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117. Using representative figures, an estimate of the annual cost to purchase a \$138,000 condominium is:

Mortgage (10% interest rate for 30 years, assuming a 20% down payment)	11,625
Property taxes 2.5% of market value	3,450
Condominium fees \$75/mo.	900
<b>TOTAL</b>	<b>15,975</b>

Assuming that the figure does not exceed 28% of gross household income, the general lender standard, the minimum income needed to afford this unit will be approximately \$57,000, or slightly less than double the Westchester County median household income. It should be noted that new condominium developments being offered in Westchester in 1986 are substantially more expensive than existing units offered for resale. The latter category includes a large number of units in older buildings that have been converted from rental use during the past decade.

The lower selling price of condominiums, furthermore, does not mean that they are more affordable than single-family homes. It is a reflection of generally smaller size and fewer bedrooms. A comparative analysis of condominium sales and sales of single-family houses within the same price range for that part of Westchester County showing the largest volume of condominium transactions showed that condominium units were approximately ten to twelve percent more expensive than single-family homes in the same area when measured in terms of selling price per square foot of floor area.

TABLE 3: COMPARATIVE PER SQUARE FOOT (SF) PRICES OF CONDOMINIUM AND MODERATELY PRICED SINGLE FAMILY HOUSES — WESTCHESTER COUNTY ZONE 3

	AVERAGE SQUARE FEET PER UNIT	AVERAGE SALES PRICE PER SQUARE FOOT
MODERATELY PRICED HOUSES	1605 SF	\$105.27/SF
CONDOMINIUMS	1387 SF	\$117.90/SF

NOTE: For purposes of reasonable comparison only single family houses selling for \$210,000 (the highest selling price of a condominium unit) or less were included in the sample.

SOURCE: Westchester Multiple Listing Service, Inc., 1985 MLS Sales: October, November, December (1986). Analysis by A. Mallach.

It is doubtful that, by affording developers the opportunity to construct condominiums, a municipality in a highly competitive market area such as Westchester County or Suffolk County is creating any meaningful housing opportunities for the less affluent residents of the region. Such developments are often approved at densities not significantly higher than those characteristic of single-family detached home developments and are expected to sell at prices which are higher than most single-family homes in the area.<sup>118</sup> The affluent

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118. One example is the development under construction on the site which was the subject of the *Berenson* litigation, which was rezoned to a density of three units per acre. Zoning at the same density was provided for a recently-announced condominium development in Mount Kisco (Town of Bedford), New York to sell for prices ranging from \$185,000 to \$236,000, or roughly \$150 per square foot. N.Y. Times, May 4, 1986, § 8 (Real Estate), at 1.

buyers of townhouses and condominiums are not drastically different from those buying single-family detached homes. They may be distinguished by their preference or their life cycle stage, but not by their economic resources.<sup>119</sup>

The role of rental housing, however, is very different. As a result of the American drive for home ownership, a drive that increased markedly during the 1970's,<sup>120</sup> the pool of potential renter households today differs significantly from prospective owners, with respect to both demographic and economic criteria. First, renters earn substantially less than owners. Median income for renter households in the United States is only fifty-eight percent of homeowner households.<sup>121</sup> Furthermore, the gap has been steadily increasing, particularly in northeastern metropolitan areas, as more affluent households become homeowners (often of townhouses or condominiums) with less regard to household size and demographic characteristics than has traditionally been the case. This is both a suburban and urban phenomenon and is illustrated by the trend in three major northeastern areas shown in Table 4. The dynamics underlying the trend have been well summarized by two leading investigators of the housing market:

Thus, increasingly, rental tenurial arrangements have become focused on nonmodular households, with the most prominent phenomenon being the movement of "male head, wife present" households from rental housing into ownership tenure. Thus, the rental market over the past decade has been "cream skimmed" - the most affluent household types have been drawn into homeownership.<sup>122</sup>

As a result, rental housing in suburban communities, even when well out of the reach of lower income households is con-

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119. See generally C. Perin, *supra* note 102, at 56-60; R. Untermann & R. Small, *supra* note 94, at 56-59.

120. G. Sternlieb & J. Hughes, *The Future of Rental Housing* 20 (1981).

121. See U.S. Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States*, 1986, Table 743 at 446 (106th ed.).

122. G. Sternlieb & J. Hughes, *supra* note 120, at 22. For an extensive discussion of the demographic differences between owners and renters see also A. Downs, *Rental Housing in the 1980's* 21-25 (1983).

sistently less expensive than housing for sale in the same com-

TABLE 4: COMPARATIVE INCOME TRENDS FOR OWNERS AND RENTERS IN THREE NORTHEASTERN STANDARD METROPOLITAN STATISTICAL AREAS (SMSAs) DURING THE 1970'S

	URBAN			SUBURBAN		
	OWNER	RENTER	RENTER % OF OWNER	OWNER	RENTER	RENTER % OF OWNER
<u>NEW YORK CITY, NEW YORK SMSA</u>						
1970	\$11700	\$7200	62%	\$14000	\$ 8800	63%
1976	16500	8900	54	21700	11600	53
<u>BALTIMORE, MARYLAND SMSA</u>						
1970	\$ 9500	\$5900	62%	\$12300	\$ 8700	71%
1976	13400	7600	57	20200	12200	60
<u>NEWARK, NEW JERSEY SMSA</u>						
1970	\$ 9800	\$5900	60%	\$13700	\$ 8500	62%
1977	13000	6300	48	22200	11400	51

SOURCE: U.S. Dep't of Commerce, Bureau of the Census, and U.S. Dep't of Housing & Urban Dev., Annual Housing Survey: 1976, New York, N.Y. SMSA; Annual Housing Survey: 1976 Baltimore, Md. SMSA; Annual Housing Survey: 1977, Newark, N.J. SMSA.

munity. The Town of Huntington, an affluent Suffolk County suburban community, is a good example, as shown in Table 5. It is worth nothing, furthermore, that, although Huntington is the most affluent town in Suffolk County,<sup>123</sup> rents in that municipality are not significantly higher than those representative of the county as a whole. A countywide survey of representative rents taken at the same time found that the average rent was \$544 per month for a one bedroom unit and \$646 per month for a two bedroom unit.<sup>124</sup>

Market pressures, which reflect the limited incomes of

123. Median household income in 1979 for the Town of Huntington was \$28,155, or roughly twenty-six percent higher than the Suffolk County median of \$22,359. 34 U.S. Dep't of Commerce, Bureau of the Census, 1980 Census of Population and Housing: Advance Estimates of Social, Economic, and Housing Characteristics 34-65 (1983).

124. Written testimony of Janet Hanson, Executive Director, Suffolk Housing Services, to United States House of Representatives Budget Committee 2 (Feb. 9, 1985).

the renter population, have kept the price of rental housing below that of housing for sale, making it more affordable to a

TABLE 5: UNITS OFFERED FOR RENT IN TOWN OF HUNTINGTON: MONTHLY RENT ASKED AND AFFORDABILITY BY UNIT SIZE (DECEMBER 1984)

	STUDIO	1 BEDROOM	2 BEDROOM	3+ BEDROOM
0 - \$299	1			
\$300 - \$399	5	1		
\$400 - \$499	5	10	1	
\$500 - \$599	2	19	2	
\$600 - \$699		8	9	1
\$700 - \$799		3	8	3
\$800 - \$899		1	5	5
\$900 - \$999			3	5
\$1000+			1	17
Median	\$400	\$550	\$725	\$1100
Minimum income required/1	\$19,200	\$26,400	\$34,800	\$52,800

1/minimum income required for affordability is based on 25% of gross income for rent. Under Department of Housing & Urban Development standards, a household is expected to spend 30% of gross income for rent, including utilities (roughly equivalent to 25% of gross income for rent without utilities). Since many of the units offered do not include utilities in the rent, the lower standard has been used to define affordability in the table.

SOURCE: *Newsday*, Dec. 1, 1984, Real Estate Supplement. Analysis by A. Mallach.

less affluent segment of the population. The median price of units offered for sale at the same time in Huntington was \$165,400.<sup>125</sup> Assuming a conservative ratio of two to one between price and income, such a unit would only be affordable to a household earning \$83,000 or more, which is substantially more than the affordability level for physically comparable rental units.

However, even if the cost of owner-occupied housing were brought down to the level of rental housing, there would remain a substantial pool of households for whom renting repre-

125. See *Newsday*, Dec. 1, 1984, Part III (Real Estate)(tabulation by the author).

sents the only viable shelter alternative. The lower a household's income, the more significant the obstacles in the path of their obtaining mortgage financing are likely to be.<sup>126</sup> This is particularly true among the growing numbers of divorced and separated parents with children, a major component of the suburban rental housing need. Many families, even among those who would be economically capable of becoming homeowners should the cost of such housing be reduced, are more appropriately candidates for rental housing by virtue of their age, their transitional place in their life cycle, or other non-economic factors.

The market pressures that have kept rents at more affordable levels than housing for sale in the same community, however, have not made the rental housing that is available in a community, such as Huntington, available to the lower income population, as that is generally defined.<sup>127</sup> The extent to which the available rental housing is out of the reach of the lower income population, furthermore, increases dramatically with unit size. Table 6, below, indicates that while a substantial number of the available studio or efficiency units and a

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126. Although the author is unaware of any systematic study, from his experience there are at least four separate factors which can act as impediments to obtaining a mortgage, all of which are significantly more likely to affect lower income than more affluent households. These factors are:

(a) inability to raise the cash needed for the minimum down payment and for closing costs;

(b) a work history inadequate to serve as the basis for the mortgage;

(c) a credit history inadequate to serve as the basis for the mortgage, and;

(d) disproportionate amounts of pre-existing non-housing debt, which reduce the size of the mortgage that a lender is willing to offer the prospective buyer.

127. The definition used here is that of the U.S. Dep't of Housing and Urban Dev., which defines lower income households as those earning no more than eighty percent of the median income for the region, adjusted by household size. The term "very low income" household is used to refer to a household earning between zero percent and fifty percent of the area median income. 42 U.S.C. § 1437a(b)(2) (1982). Note that in the *Mount Laurel II* decision, the New Jersey Supreme Court utilized the same definition, but modified the terminology, referring to those households earning between zero percent and fifty percent of area median as "low income", and those between fifty percent and eighty percent of area median as "moderate income." *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 221 n.8, 456 A.2d 390, 421 n.8 (1983)(*Mount Laurel II*).

smaller part of the one bedroom units are within the reach of at least the upper ranges of that population, effectively no rental units with two or more bedrooms are affordable to a household at even the lower income ceiling in the Town of Huntington.

TABLE 6: AFFORDABILITY OF UNITS AVAILABLE FOR RENT IN TOWN OF HUNTINGTON TO LOWER INCOME HOUSEHOLDS

UNIT TYPE	LOWER INCOME CEILING/1	INCOME REQUIRED FOR MEDIAN UNIT	% UNITS AFFORDABLE TO LOWER INCOME HH/2	INCOME REQUIRED AS % OF LOWER INCOME CEILING
EFF	\$18,900	\$19,200	43%	102%
1 BR	21,600	26,400	19%	122%
2 BR	25,650	34,800	3%	136%
3 BR	28,700	52,800	0	184%

1/Lower income ceiling adjusted for family size relative to unit size as follows: efficiency = 1 person; 1 bedroom = 2 person; 2 bedroom = 3.5 person (average of 3 and 4 person income ceiling), and 3 bedroom = 5 person household.

2/It should be noted that these are the percentages of units affordable to households earning the *ceiling* for the respective income/household size category, not units affordable to all lower income households, or even a reasonable cross-section of such households.

SOURCE: Statistical analysis by A. Mallach based upon data presented in Table 5, combined with income ceilings provided to author by Suffolk Housing Services.

This disparity is reflective of the general scarcity of modest multiple bedroom rental units. In Huntington, as in many suburban communities, nearly all three bedroom or larger rentals are detached single-family homes being offered for rent by the owners. This is partly attributable to the widespread practice of imposing bedroom covenants on multi-family approvals; for example, covenants binding the developer to limit, and in some cases exclude entirely, units containing two or more bedrooms.<sup>128</sup> Testimony in *Suffolk Housing Services*

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128. Memorandum, *supra* note 60, at 68-69. This Memorandum also points out that, in many cases where no formal covenant was imposed, municipal records showed that developers provided the town board with oral assurances of compliance

elicited that out of some six thousand apartment units constructed in the Town of Brookhaven roughly five thousand (83%) were one bedroom units and nearly all of the remainder were two bedroom units.<sup>129</sup>

Although the distribution of renters by household size, which determines the market for rental housing by unit size, is skewed to smaller households than the distribution of owners, as shown in Table 7, it is not remotely consistent with the unit size distribution enforced by the practices of the Town of Brookhaven. Indeed, the bedroom distribution that would be

TABLE 7: RENTERS AND OWNERS BY HOUSEHOLD SIZE IN NASSAU-SUFFOLK SMSA, 1980

	RENTERS		OWNERS	
	NUMBER	%	NUMBER	%
1 PERSON	54338	32.6%	58229	9.1%
2 PERSON	54613	32.7	168297	26.2
3-4 PERSON	43049	25.8	274491	42.7
5-6 PERSON	11875	7.1	119780	18.7
7+ PERSON	3031	1.8	21417	3.3
TOTAL	166906		642214	
MEDIAN	2.03		3.25	

SOURCE: 34 U.S. Dep't of Commerce, Bureau of the Census, 1980 Census of Housing, Table 19, at 34-117.

dictated by the marketplace, at least in theory, from the above distribution of households by size would be approximately 50-55% one bedroom units, 30-35% two bedroom units and 10-20% three bedroom or larger units. In comparing that distribution with the data in Table 7, it should be noted that a substantial part of the two-member households in the rental housing stock are single parents with children, for whom a two bedroom unit is appropriate, rather than hus-

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with the Town's policy of limiting the number of large units in multi-family developments. *Id.* at 69. The appellate division rejected plaintiff's challenge of the legality of these covenants. See *supra* note 106 and accompanying text.

129. Memorandum, *supra* note 60, at 69. Only twenty-three out of the six thousand multi-family units were three bedroom units. This represents all multi-family rezonings in the town up to the time of trial.

band-wife couples.<sup>130</sup>

This is, however, only a theoretical distribution. It assumes that all of the household sizes and types reflected in Table 7 are equally able to afford housing in the marketplace. In actuality, many of the larger renter families, particularly those headed by a single woman, lack the income to be considered effective demand by the marketplace.<sup>131</sup> Demand for two bedroom rental units remains strong, however. A recent study found that the distribution of market rate apartments completed in 1982 was 46% one bedroom units, 46% two bedroom units, 5% three bedroom units and 3% efficiency units.<sup>132</sup>

These dimensions of the rental housing market suggest the importance of what can be considered a third sector of the multi-family universe, that of subsidized rental housing. Condominium developments in the New York suburbs are principally for the affluent while private market rentals are, if not only for the affluent, still at least for the non-poor. Subsidized housing, therefore, often represents the only point of access by the lower income population to sound and affordable housing in the overheated suburban housing market.

The evidence that substandard housing conditions are overwhelmingly a problem of the lower income population, and in particular the very low income population, has been repeatedly documented. Nearly 20% of very low income renter households live in inadequate housing,<sup>133</sup> compared to 10% of lower income renter households and less than 4% of

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130. G. Sternlieb & J. Hughes, *supra* note 120, at 34. Documents the increasing percentage of such households in rental housing and the financial implications of this trend. *Id.* at 45.

131. In the United States, four person households headed by a husband-wife couple had a median income of \$30,863, while four person households headed by a single woman had a median income of \$9,847, or less than one third as much. U.S. Dep't of Commerce, Bureau of the Census, Money Income of Households, Families, and Persons in the United States: 1983, Table 25 at 88 (1985). Clearly only a small percentage of households in the latter category are able to compete in the private market for even the most modest housing.

132. W. O'Mara & C. Sears, *Rental Housing* 7 (1984).

133. Inadequate housing is defined in the Annual Housing Survey as housing with plumbing, maintenance, public hall, heating, electrical, or sewage defects or flaws. It does not include overcrowded housing, a major housing deficiency category. See Report of the President's Comm'n on Housing, *supra* note 53, at 7.

non-poor households.<sup>134</sup> Furthermore, the incidence of inadequate and overcrowded housing,<sup>135</sup> after declining sharply during the period from World War II through the mid-1970's, has remained largely the same during the past decade.<sup>136</sup> The number of renter households with a cost burden, that is, spending over 30% of gross income for rent, however, has been rising steadily from 6.2 million households in 1975 to 9.8 million in 1983.<sup>137</sup> Nearly all such households are lower income households.

Housing available at less than the price or rent commanded in the marketplace, whether created through government subsidy or through other means, such as inclusionary housing programs, represents the only method by which the housing needs of a large part of America's lower income population can be addressed in a socially responsible manner.<sup>138</sup> Similarly, in suburban communities it often represents the only means through which young families, without the resources to purchase houses at current price levels, can remain in the communities in which they were raised. The absence of such housing means that employers may have an increasingly difficult time finding workers for their lower paying jobs. As one Long Island, New York, employer complained in a recent newspaper article:

We have to fight three times as hard to compete for people in the labor pool. The higher-level people are a bit easier to get than the entry-level people. Most of the

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134. Analysis by the author, based on data in Report of the President's Comm'n on Housing, *supra* note 53.

135. Overcrowding is defined as a unit occupied by 1.01 persons per room. 18 N.J. Reg. 1542(a)(1) (1986).

136. Presentation by Mary K. Nenko, National Association of Housing & Redevelopment Officials (NAHRO), prepared for American Planning Association, 1986 Affordable Housing Workshops, San Diego, Calif. (Mar. 13, 1986). Data compiled by NAHRO from 1975 and 1983 Annual Housing Survey.

137. *Id.*

138. A detailed discussion of why reliance on the filtering process within the existing housing stock is an inadequate answer to the housing needs of America's lower income households is well beyond the scope of this article. The subject is treated extensively in Mallach, *The Fallacy of Laissez-Faire: Land Use Deregulation, Housing Affordability and the Poor*, 30 Wash. U.J. Urb. & Contemp. L. 35 (1986).

higher-level people can afford some kind of housing, even if it isn't as nice as they are used to. The entry and middle level people are much more difficult. The rents and house prices are just too high for most of them.<sup>139</sup>

In the same article, the regional planning director for Long Island noted that "a single person making \$20,000 a year can't afford housing on Long Island - at least not legal housing."<sup>140</sup>

This is hardly a trivial concern. In Suffolk County, in 1980, 37% of all households fell into the lower income category, with 20% of all households in the very low income category.<sup>141</sup> It is a concern that is closely linked to zoning and to local land use regulatory practice generally. The production of subsidized or below market housing is something that is routinely thwarted by land use regulation, over and above general restrictions on multi-family development that may be imposed. At the same time, however, although far less often, there is a growing body of evidence showing that land use regulation has been used to facilitate, and indeed create, the opportunity for affordable housing below market price. It is appropriate to explore the manner in which the socioeconomic objectives of suburban communities are reflected in their regulation of multi-family housing in general, and subsidized housing in particular.

#### IV. Manipulating the Marketplace: The Effect of the Discretionary Land Use Regulatory System on Multi-family Housing

Despite the clear emphasis placed in *Berenson* on housing needs, subsequent court decisions have shown no sensitivity

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139. O'Hearn, *Hiring Hurt by Home Cost*, *Newsday*, Mar. 1, 1986, Part III (Real Estate) at 29.

140. *Id.* The article references the practice of creating illegal secondary apartments in single-family homes, a practice widespread on Long Island, which has undoubtedly mitigated the effects of the housing crisis in that area. See P. Hare, *Accessory Apartments: Using Surplus Space in Single-Family Houses* 4 (1981). It should be noted that an income of \$20,000 for a single individual is above the lower income ceiling for Suffolk County see *supra* Table 6, at 82.

141. See 34 U.S. Dep't of Commerce, Bureau of the Census, *1980 Census of Population: General Social and Economic Characteristics* 34-983 (1983).

to, or interest in, the substantial distinctions between these multi-family housing alternatives and their implications for meeting housing needs. The decisions have been equally ignorant of, or indifferent to, the implications of the process by which land use decisions are made at the municipal level. Specifically, the manner in which an informal or discretionary process, in which social and economic concerns are equal to or more important than land use issues, has supplanted the formal textbook process of land use regulation with respect to multi-family housing and, as a result, has led to patterns of exclusion well beyond those reflected in the letter of the municipal zoning ordinance.

Part IV explores the informal land use regulatory process. The first section addresses the nature of the process and its effect on multi-family development in general. The second section focuses specifically on the manner in which the implementation of the informal land use process has worked to discourage the development of subsidized housing for low and moderate income families in suburban communities. The third, and closing, section briefly surveys the extent to which the courts, in New York and elsewhere, have taken this informal regulatory system into consideration in dealing with exclusionary zoning issues.

#### A. *Community Gatekeepers and Multi-family Housing*

The special, and invidious, status of multi-family housing in the suburban land use regulatory scheme has frequently been noted by commentators.<sup>142</sup> Leaving aside the exceptional cases in which communities have barred multi-family housing entirely, one consistently finds a two-tier regulatory scheme in effect. Such schemes permit development of major land uses such as single-family residential, commercial, or industrial uses as of right on land already zoned for the purpose, while apartments are permitted only through some form of special

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142. Among the many commentaries that have addressed this issue see New Jersey County & Mun. Gov't Study Comm'n, *supra* note 96; R. Babcock, *supra* note 95; M. Danielson, *supra* note 1; C. Perin, *supra* note 102; N. Williams, *supra* note 13, at chs. 51 & 62; Davidoff & Davidoff, *supra* note 1; Sager, *supra* note 1.

permit or rezoning procedure in which broad discretion is retained by the municipal officials reviewing the application.

The land use scheme of the Town of Brookhaven is one example of such two-tier regulation. The analysis of vacant land by zoning category prepared for the town master plan, shown in Table 8, documented the availability of substantial acreage zoned for single-family residential, commercial and industrial uses.<sup>143</sup>

TABLE 8: VACANT LAND BY ZONING CATEGORY IN THE TOWN OF BROOKHAVEN 1973

CATEGORY	ACREAGE	%
Single family residential (lots >.5 acre)	40,085	58.1%
Single family residential (lots <.5 acre)	19,525	28.3
Industrial	6,435	9.3
Commercial	2,250	3.3
Miscellaneous/1	605	0.9
Multifamily residential	50	<0.1
TOTAL	68,950	100.0%

1/includes special farming categories and retirement communities

SOURCE: Raymond, Parish & Pine, Inc., Vacant Land Analysis (Memorandum to the Planning Board, Town of Brookhaven) (1974). Actual vacant land analysis as of September 1973.

In order to obtain rezoning of a parcel for multi-family use in the Town of Brookhaven, an applicant must pursue a course which the appellate division aptly characterized as "a long, cumbersome, expensive, and to say the least, risky process."<sup>144</sup> The applicant must first file a detailed and extensive application with the planning board, including detailed site

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143. With respect to industrial uses, the amount of suitably zoned vacant land was nearly four times the amount of land already in industrial use in the town. Raymond, Parish & Pine, Inc., Vacant Land Analysis 12 (June 1974) (Draft Memorandum to the Planning Board, Brookhaven Town). The analysis identified only fifty vacant acres zoned for multi-family development; even this modest amount reflected, however, sites rezoned as a result of developers' petitions and not yet built at the time of the survey, rather than mapping of vacant land for multi-family development. *Id.* at 6.

144. *Suffolk Hous. Servs. v. Town of Brookhaven*, 109 A.D.2d 323, 322, 491 N.Y.S.2d 396, 403 (1985).

and floor plans, traffic studies, environmental studies, and the like. The planning board reviews the application and holds a public hearing on the matter. Subsequent to the public hearing, the planning board makes a recommendation to the town board. The recommendation is of a purely advisory nature, however, and is often disregarded by the town board. The same, or an even more extensive application is then filed with the town board, which undertakes a review *de novo*; holds a second public hearing, and eventually renders a decision. The process can take a year or more from the date of filing the initial application with the planning board.<sup>145</sup>

While the same procedure is required of any applicant for rezoning, the likelihood of rezoning for multi-family development being granted in Brookhaven has been substantially less than that for other rezonings, as shown in Table 9. Overall, during the period studied in Brookhaven, only one out of eight applications for multi-family rezoning was approved. Roughly half of all other rezoning applications were approved. Furthermore, during the 1970's the modest likelihood of approval for multi-family rezonings dramatically declined from fifteen percent during the period 1971-1973 to only five percent for the period 1974-1977.<sup>146</sup> Many of the few approvals granted were conditioned upon limitations on the number of bedrooms per unit, and other similar restrictions.<sup>147</sup>

TABLE 9: APPROVAL RATE OF APPLICATIONS FOR REZONING BY LAND USE CATEGORY IN THE TOWN OF BROOKHAVEN 1971-1977

	<u>APPLICATIONS</u>	<u>APPROVED</u>	<u>% APPROVED</u>
Multifamily	94	12	12.8%
Commercial/Industrial	485	245	50.5
Other	133	66	49.6

SOURCE: Analysis by A. Mallach, based upon data gathered from the Town of Brookhaven Zoning Log by the staff of Suffolk Housing Services.

145. This paragraph is based on the personal experience of the author, who has prepared and submitted applications for multi-family rezoning in the Town of Brookhaven.

146. Analysis by the author, based on data gathered from Town of Brookhaven Zoning Log by staff of Suffolk Housing Services.

147. See *supra* note 128 and accompanying text.

This land use practice in the Town of Brookhaven is not unique or unusual, but rather, customary.<sup>148</sup> While the practice is indeed customary, at least among suburban municipalities in New York State, it is utterly lacking in any land use rationale or justification recognized in the professional literature. Indeed, the site plan review procedures now embodied in the land use ordinances of the majority of suburban municipalities provide more than adequate tools with which to control the land use and environmental impacts of multi-family development. The only demonstrable basis for the persistence of the discretionary process, long after changes in the character of multi-family development have eliminated any meaningful land use distinctions, is a socioeconomic one. Regulation of development on socioeconomic grounds is the essence of the role of the local official as the community's gatekeeper, opening the municipal door only to those development alternatives that conform to the desires and prejudices of the municipality.

The existence of this practice, and the manner in which it constrains the satisfaction of housing needs, was documented by the National Commission on Urban Problems, in 1968:

Some of the most effective devices for exclusion are not discoverable from a reading of zoning and subdivision ordinances. Where rezoning is, in effect, necessary for many projects . . . officials have an opportunity to determine the intentions of each developer with some precision. How

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148. This "is the usual and customary way in which municipalities of all kinds and sizes determine what lands may be developed for multi-family use." Defendant's Brief After Trial at 31, *Suffolk Hous. Servs. v. Town of Brookhaven*, No. 75-20017 (N.Y. Sup. Ct. Sept. 17, 1982). It should be noted that considerable nonresidential development, as well as multi-family residential construction, takes place as a result of discretionary actions resulting from a petition for rezoning. The dynamics of the former process, however, are significantly different from the latter. Specifically, where there is substantial vacant land zoned for a particular use by right, a prospective developer of that use always has the choice of obtaining approval by right, or seeking rezoning. As a result, he is unlikely to seek rezoning except under circumstances where he has reason to believe he will be successful, or, alternatively, where the potential incremental profit relative to building on land zoned by right (which is likely to be substantially more expensive), if he is successful, justifies a risk, and some speculative expenditures to that end.

many bedrooms will the units in his apartment house contain? What will be the rent levels? To whom does he plan to rent or sell? "Unfavorable" answers in terms of the fiscal and social objectives of such officials do not necessarily mean that permission will be denied outright. They may, however, mean long delays, attempts to impose requirements . . . over and above those which are properly required. . . .<sup>149</sup>

The gatekeeper characterization was first used in the 1973 New Jersey study, which described the process in straightforward terms:

Use of the variance is at the core of the gatekeeper role. Were substantial amounts of land zoned for apartments with appropriate design and environmental criteria written into the ordinance, builders could purchase land, submit plans meeting these criteria, and construct multi-family housing without regard to the various unwritten goals of the community, be they fiscal, visual, or social. Such goals cannot be written into a local ordinance without immediate, and generally successful challenge in the courts. *By use of the variance process, the community can enforce many of its preferences through an informal process of negotiation between the developer and the planning board or town council.*<sup>150</sup>

No comparable process exists for any other significant land use category in the suburban land use scheme. The basis for

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149. Housing Urban America 289 (J. Pynoos, R. Schafer & C. Hartman, eds. 1973) (referring to Nat'l Comm'n on Urban Problems, Building the American City, pt. III, ch. 1 (1968)).

150. New Jersey County & Mun. Gov't Study Comm'n, *supra*, note 96, at 15. The term variance is used in this discussion because of the specific New Jersey context in which it was written. From a substantive standpoint, the term is equivalent to the rezoning procedure, as it applies in New York State, which does not provide for change of use through the variance process, except under highly unusual circumstances. It should be noted that neither the use variance nor the special exception variance, as they existed under applicable New Jersey law at the time the study was written (this procedure was effectively abolished as a result of statutory changes made in 1976), required the double application, review and hearing procedure required for a rezoning under the procedures applied in the Town of Brookhaven.

its existence with respect to multi-family development is social in character and reflects two fears. One is the fear of who will occupy the apartments, if built. The second fear is that of the city, from which in many instances the suburban opponents of multi-family housing perceive themselves as having escaped.<sup>151</sup>

Thus, at the most basic level, discretionary regulation has the dual effect of limiting the amount of multi-family development constructed, by setting arbitrary hurdles for prospective multi-family developers, and of channelling development that takes place into more socially or economically acceptable forms. It is not surprising, therefore, that these processes have been widely used as a means of explicitly discouraging the development of subsidized lower income housing.

### B. *Municipal Discretion and Subsidized Housing*

The ability of suburban officials to act as the gatekeepers of their community has been most visibly demonstrated in the substantial exclusion of subsidized housing for low income families. In recent years, suburban communities have accepted substantial numbers of subsidized senior citizen units, widely perceived as being both largely designed for occupancy by "our own," while housing proposed for low income families with children under federal or state subsidy programs has been consistently opposed, with almost complete success.

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151. Danielson notes:

For many suburbanites, apartments mean higher residential densities which are automatically equated with slums and the kinds of people who live in slums. "Multifamily dwellings are not considered as housing for people" by suburban foes of apartments in the St. Louis area, "but as some kind of blight." "We don't want this kind of trash in our neighborhood," shouts an opponent of luxury apartments in Suffolk County on Long Island, pointing to newspaper stories of crime and welfare in New York City.

M. Danielson, *supra* note 1, at 54 (footnotes omitted). These comments are not isolated ones. An awareness that discretionary approval procedures are used as a means of excluding or limiting multi-family housing, independently of the facial language of the zoning ordinance, has become commonplace in the literature on zoning and land use regulation. See also D. Moskowitz, *Exclusionary Zoning Litigation* 9-11 (1977); Rubinowitz, *A Question of Choice: Access of the Poor and the Black to Suburban Housing*, in *The Urbanization of the Suburbs* 329 (L. Masotti & J. Hadden, eds. 1973).

Evidence of suburban opposition to subsidized family housing, and of the success most municipalities have had in excluding such housing, is ample and should not be belabored, but a few brief examples may be in order. One indicator of the success of suburban opposition to family housing is the distribution of the over seventeen thousand five hundred Section 8 units financed through the New Jersey Housing and Mortgage Finance Agency (HMFA) in that state between 1975 and 1985, shown in Table 10. One three hundred and sixty unit project, built in a relatively impoverished suburban/rural fringe community<sup>152</sup> in southern New Jersey accounted for over seventy percent of all suburban Section 8 family units financed by the HMFA in New Jersey.<sup>153</sup> It is clear that whatever the accomplishments of the 1975 *Mount Laurel I* decision, it did not materially increase opportunities for development of subsidized family housing in suburban New Jersey.

Similarly, in the Town of Brookhaven, at the time of the *Suffolk Housing Services* trial, roughly five years after the inception of the Section 8 program, the town had approved three senior citizen developments containing one thousand thirty-five units, but not a single development for family occupancy under the Section 8 program.<sup>154</sup> In 1978 the town had blocked efforts to construct a two hundred forty unit Section 8 development for family occupancy.<sup>155</sup> A number of years later, that project was resubmitted and approved after it had been converted to a two hundred twenty unit project, of which

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152. The project in question was built in the Borough of Pine Hill, a community in lower Camden County. In 1980, the median household income in Pine Hill was \$15,647, roughly 13% below the county median of \$18,056, an average which was itself roughly 10% below the New Jersey statewide median income of \$19,800. 5 N. J. 1980 Census of Population & Housing Municipal Profiles Part A at 1, 138 & 166.

153. Although some Section 8 housing was developed in New Jersey during the same period without Housing and Mortgage Finance Agency (HMFA) involvement, the HMFA units given in Table 10 represent the substantial majority of all Section 8 New Construction/Substantial Rehabilitation projects in New Jersey. Furthermore, the non-HMFA Section 8 developments were, if anything, even more heavily concentrated in urban areas than were the HMFA developments.

154. Brief for Plaintiffs-Appellants at 23, *Suffolk Hous. Servs. v. Town of Brookhaven*, 109 A.D.2d 323, 491 N.Y.S.2d 396 (1985).

155. *Id.* at 26-30.

TABLE 10: PROJECTS SUBSIDIZED UNDER FEDERAL SECTION 8 PROGRAM AND FINANCED BY NEW JERSEY HOUSING & MORTGAGE FINANCE AGENCY 1975-1985 BY LOCATION AND TYPE

	URBAN		SUBURBAN		TOTAL	
	NUMBER	UNITS	NUMBER	UNITS	NUMBER	UNITS
FAMILY	26	4,511	2	512	28	5,023
SENIOR CITIZEN	42	7,062	35	5,451	77	12,513
TOTAL	68	11,573	37	5,963	105	17,536

NOTE: Where a development is shown in the HMFA annual report as being in part for family and in part for senior citizen occupancy, it has been equally divided between the two categories, and counted as a project in each category.

SOURCE: Tabulation by A. Mallach from New Jersey Housing and Mortgage Finance Agency, Annual Report (1985). Classification of communities from New Jersey Division of State & Regional Planning, New Jersey Municipal Profiles: Intensity of Urbanization (1972). One municipality (West New York) was reclassified by the author from Urban-Suburban to Urban Center, based upon an evaluation of the criteria used in the report.

all but fifty-seven units were for senior citizens.<sup>156</sup> Subsequent to the *Suffolk Housing Services* trial, two separate proposals for rezoning to permit subsidized family housing were presented by the Suffolk Inter-religious Coalition on Housing (SICOH) and were turned down by the town board. In one case, the rejection took place in the face of a favorable recommendation by the planning board.<sup>157</sup>

The means by which suburban municipalities ensure the exclusion of subsidized family housing is, of course, through

156. Interview with Janet Hanson, Executive Director, Suffolk Housing Services (June 1986).

157. The project in question, which was to be constructed in the East Patchogue neighborhood of the Town of Brookhaven, was denied by the town board on September 15, 1983. A favorable recommendation had been made to the town board by the planning board regarding this rezoning proposal. Letter from John Luchsinger, Chairman, Town of Brookhaven Planning Board to Brookhaven Town Board (July 12, 1983). It should be noted that the recommendation of approval was conditioned on a variety of matters unrelated to the land use aspects of the proposal, including "the plan . . . for detailed security on a 24-hour basis and how this is to be implemented and funded" and "a tenant selection screening committee . . . with members from SICOH, the management firm, the local area, town representatives and others." *Id.* at 1-2. In denying the rezoning, however, the town board made no reference to any of these conditions, but merely noted neighborhood opposition. See Brief for Plaintiffs-Appellants, *supra* note 154, at 52.

their land use regulatory powers and, more particularly, through their ability to exercise broad discretion over multi-family zoning through the processes summarized above. It has been noted that “[w]ith the advent of the Section 235 and 236 programs in 1986, which required neither the participation of local housing authorities nor the existence of workable programs, land-use controls became the key suburban weapon to check the construction of subsidized housing.”<sup>158</sup> Black Jack, Missouri, provides a particularly dramatic example of land use controls employed as a weapon:

Black Jack had been an unincorporated area governed by St. Louis County, [which] had adopted a master plan which designated the site involved in this litigation for multi-family construction. An option was obtained on the site by the Inter-Religious Center for Urban Affairs (ICUA) which intended to build a Section 236 multi-family project for moderate-income persons. After the proposed development became a matter of public knowledge, the residents organized in order to obtain the incorporation of Black Jack as a city. They were successful in their efforts and the new city council adopted a zoning ordinance which prohibited the construction of multi-family housing in the site which ICUA wanted to develop.<sup>159</sup>

The unusually explicit exclusionary actions in Black Jack, coupled with the patently racially discriminatory effect, led to extended litigation through which the plaintiffs obtained substantial relief, although the development plan was aborted due to the loss of federal funding initially committed to that project.<sup>160</sup> It is rare, however, that a municipal action is so ex-

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158. M. Danielson, *supra* note 1, at 96.

159. D. Moskowitz, *supra* note 151, at 111-12. See also M. Danielson, *supra* note 1, at 31-33.

160. The *Black Jack* litigation has an interesting and unusual history, and is notable for the number of separate times plaintiffs lost at the trial level and succeeded in having the decisions of the trial courts reversed by the circuit court. *Park View Heights Corp. v. City of Black Jack*, 454 F. Supp. 1223 (E.D. Mo. 1978), *rev'd*, 605 F.2d 1033 (8th Cir. 1979) (a claim for damages by plaintiffs was settled in 1976 for \$450,000 by the City); *United States v. City of Black Jack*, 372 F. Supp. 319 (E.D. Mo. 1974), *rev'd*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975),

PLICITLY and visibly directed at thwarting the development of subsidized housing. Moreover, in the absence of evidence of a racially discriminatory *intent*, it is often difficult to satisfy a court that the requisite level of racially discriminatory *effect* is present.<sup>161</sup>

Most frequently one finds a double standard of land use regulation. "[I]t is not zoning so much . . . as it is the [in]consistent or inaccurate or arbitrary administration thereof. . . . We find that many, many times a rezoning application will be treated different[ly] if it is for a luxury apartment than if it is for a 236 project."<sup>162</sup> The process of selecting socially acceptable forms of multi-family housing affects subsidized housing most directly, and excludes it most thoroughly, even where substantial numbers of non-subsidized multi-family units are able to pass through the suburban net.

Issues are raised in response to rezoning applications for subsidized housing, or challenges to exclusionary zoning, which are rarely heard in other settings. Environmental issues are widely used as the pretext for opposition to lower income housing.<sup>163</sup> In Brookhaven, planning board objections raised in

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*reh'g denied*, 423 U.S. 884 (1975); *Park View Heights Corp. v. City of Black Jack*, 335 F. Supp. 899 (E.D. Mo. 1971), *rev'd*, 467 F.2d 1208 (8th Cir. 1972). Although plaintiffs did not develop any housing in Black Jack, a Section 8 project for low income families was constructed by a private developer in the City in 1982.

161. The difficulties typically lie in two areas. With respect to discriminatory effect, the statistical issues associated with the question of the disproportionate effect of municipal action or inaction on racial minority groups, as articulated in *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), pose particular problems. Faced with a more complex statistical picture than that evident in *Arlington Heights*, courts are often reluctant to draw even those conclusions that may be apparent to parties in the case. See *Suffolk Hous. Servs. v. Town of Brookhaven*, 109 A.2d 323, 334, 337, 491 N.Y.S.2d 396, 404, 406 (1985). The second issue is the difficulty of establishing that local officials' actions were racially motivated. Although plaintiffs may be able to show that neighborhood opposition was racially motivated, and that local officials' actions may have been grounded at least in part in their awareness of neighborhood opposition, courts have been equally reluctant to draw the connection between the two. *Id.* at 337-38, 491 N.Y.S.2d at 406-07.

162. M. Danielson, *supra* note 1, at 97 (quoting a Dayton planner) (footnote omitted).

163. See M. Brooks, *Housing Equity and Environmental Protection: The Needless Conflict 9-12* (1976). In one major exclusionary zoning case, the New Jersey chapter of the Sierra Club filed an amicus brief in support of the municipality. See *id.* at 10. On another occasion, objectors to a subsidized housing project filed a lawsuit

response to subsidized housing proposals have focused on matters unrelated to land use, such as details of the project management plan, 24-hour security, and the proper supervision of children from single parent families.<sup>164</sup>

In the final analysis, the reasons for disapproval of subsidized housing are likely to have little relationship to the pretexts brought forward.

Requests for rezoning or special exceptions also alert local residents to the developer's plans before approval has been secured. In the wake of disclosure that subsidized housing is planned for a site, opponents usually turn out in force, dominating hearings and other public proceedings of local planning, zoning, and governing bodies. In the emotional climate that often results, rezoning for subsidized housing usually is rejected by suburban officials responsive to the interests of their local constituents.<sup>165</sup>

In Brookhaven, it is customary practice, in public hearings regarding multi-family rezonings, for the presiding officer to seek a show of hands from the audience with respect to their support for or opposition to the proposal.<sup>166</sup> The denial of the SICOH rezoning applications was perceived, indeed, as an al-

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under the National Environmental Policy Act claiming that the presence of poor people in and of themselves would adversely effect the environment. *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 372 F. Supp. 147 (N.D. Ill. 1973). It should be noted that the court did not find it difficult to dismiss this claim.

164. Letter from Dorothy Horak, Secretary, Town of Brookhaven Planning Board, to John J. Hart, Jr., Esq., attorney for SICOH (Jan. 26, 1983). "At the hearing, the applicant indicated that single parent households would utilize this site. Information would be required as to supervision and care of children from said single parent households." *Id.* at 2. In the end, the planning board rejected the rezoning application for the site on which this question was raised (a site in the East Setauket area of the Town), on the grounds that "the answers it had received were insufficient." *Village Herald*, June 1, 1983, at 3. In an interesting recent West Virginia case, that state's Supreme Court overturned a denial of approval for a public housing development, stressing that the denial had been grounded in improper considerations, particularly with respect to the social and economic characteristics of the prospective occupants. *Kaufman v. Planning & Zoning Comm'n of the City of Fairmont*, 298 S.E.2d 148 (W. Va. 1982).

165. M. Danielson, *supra* note 1, at 97.

166. Brief for Plaintiffs-Appellants, *supra* note 154, at 28.

most routine matter to a newspaper reporter covering the story:

It took the local zoning board two minutes recently to turn down a proposal by a coalition of religious leaders and civic activists for a 60 unit garden apartment complex for people with low and moderate incomes.

Though the rejection was swift, it was not surprising. Echoing traditional suburban resistance to subsidized apartment projects, hundreds of residents had argued that the project would threaten the quality of life in this village on Suffolk County's south shore.<sup>167</sup>

At that hearing, the Brookhaven Town Supervisor (mayor) summarized the basis for the town board's action: "May I say there is a need for this housing desperately in the Town of Brookhaven. But until it has the support of the community where it is located, I don't feel that you are going to get a [town] board that is going to approve it."<sup>168</sup> In a subsequent letter to a prominent local religious leader, the same official justified the denial of the projects by writing that "[b]oth applications of SICOH were adamantly opposed by residents of the areas involved."<sup>169</sup>

Citizen opposition, although facially directed at a variety of concerns, is often grounded in racial fears, prejudices and stereotypes.<sup>170</sup> In most cases, however, as objectors become

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167. *Economics May Change Climate of Suburbia*, N.Y. Times, Oct. 16, 1983, § 4 (The Week in Review) at E6.

168. Amicus Curiae Brief in Support of Plaintiffs Motion for Leave to Appeal at 27, Suffolk Hous. Servs. v. Town of Brookhaven, 109 A.D.2d 323, 491 N.Y.S.2d 396 (1985) (filed Apr. 25, 1986) (quoting statement of Henrietta Acampora, Supervisor, Town of Brookhaven, Minutes of Town Board Meeting (Sept. 20, 1983)).

169. Letter from Henrietta Acampora, Supervisor, Town of Brookhaven, to Rabbi Adam D. Fisher (Oct. 21, 1983).

170. In the Black Jack case, community opposition was fueled by the desire to prevent "another Pruitt-Igoe in the suburbs." M. Danielson, *supra* note 1, at 84. Pruitt-Igoe was the notorious trouble-prone high-rise public housing project in the city of St. Louis which, in the end, was demolished with considerable publicity in 1976. See Rainwater, *The Lessons of Pruitt-Igoe*, reprinted in *Housing Urban America* 548 (J. Pynoos, R. Schafer & C. Hartman, eds. 1973). It is frequently mentioned, in the author's experience, by suburban opponents of subsidized housing as the basis for their position. Needless to say, the proposal for the Black Jack site, as is

relatively more sophisticated in their approach, racial motivations are veiled.<sup>171</sup> In the final analysis, the effects are the same. Subsidized housing for low income families, widely and often accurately perceived as being disproportionately occupied by members of minority groups, is barred, and largely white senior citizen housing is approved.<sup>172</sup>

### C. *The Discretionary Process and the Courts*

While defendants in *Suffolk Housing Services* may have characterized the two-tier regulatory system in effect in the Town of Brookhaven as universal,<sup>173</sup> a characterization accepted without qualification by the trial court<sup>174</sup> New York State today increasingly stands as an anomaly among the major urban states of the nation in its unlimited tolerance of this patently discriminatory system. The three other states most widely known for land use regulation — California, New Jersey and Pennsylvania — have explicitly required, as a result of legislative action or case law, that municipalities map sites for multi-family housing in advance of applications from developers, at least to the extent needed to meet local and regional housing needs.<sup>175</sup>

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true for nearly every suburban subsidized housing proposal, was for low density apartment units rather than high rise housing. This author is unaware of any such low density suburban subsidized project actually built which, after completion, developed problems even remotely comparable to those experienced in the Pruitt-Igoe development.

171. As the leader of the objectors to one of the SICOH projects commented, denying any racial motivation, “[w]e’re a middle-class community here — we’re too smart for that.” *Rental Plan Stirs Three Villages*, N.Y. Times, Dec. 19, 1982, § 21, (Long Island Weekly) at 16.

172. Brief for Plaintiffs-Appellants, *supra* note 154, at 62. The only subsidized family housing in the Town of Brookhaven at the time of trial had a minority occupancy rate of approximately thirty-eight percent. Subsidized senior citizen housing in the town had an average black occupancy of approximately two percent.

173. See *supra* note 148.

174. See *Suffolk Hous. Servs. v. Town of Brookhaven*, No.75-20017 at 15-16 (N.Y. Sup. Ct. 1982).

175. Massachusetts, another important land use law state, although not directly requiring pre-mapping of sites, addressed the same issue through enactment of the “anti-snob zoning” law in 1969. See Mass. Gen. Laws Ann. ch. 40B, §§ 20-23 (West 1969). Under this law, a developer has the right to appeal a municipal denial of permission to build low or moderate income housing to a state appeals board. That body

The California housing legislation is perhaps the most explicit. Under the provisions governing the housing element of the municipal general plan (master plan), every municipality<sup>176</sup> must:

Identify adequate sites which will be made available through appropriate zoning and development standards and with public services and facilities needed to facilitate and encourage the development of a variety of types of housing for all income levels, including rental housing, factory-built housing and mobile homes, emergency shelters and transitional housing in order to meet the community's housing goals.<sup>177</sup>

The housing goals themselves are based on a determination of both local and regional housing needs. The latter are, by statute, determined by the regional council of governments, or for areas where no such entity exists, by the State Department of Housing and Community Development.<sup>178</sup>

In New Jersey, *Mount Laurel II* clearly established the affirmative responsibility of the municipality to provide for low and moderate income housing needs. In addition, legislation has been enacted establishing specific standards by which those responsibilities are to be met.<sup>179</sup> The central element in the new legislative scheme is the requirement that all municipalities prepare a housing element as a part of their master

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may order the permission granted, if the municipality has not already approved certain minimum amounts of low or moderate income housing, as defined in the statute. See N. Williams, *supra* note 13, § 66.30

176. Under California law, counties have the power to regulate land use in unincorporated areas, representing a substantial part of the state. Thus the term "municipality" used here should be read to include counties as well.

177. Cal. Gov't Code § 65583(c)(1) (West Supp. 1987)(emphasis omitted). It should be noted that the general plan and its constituent elements are binding regulatory documents under California law, in contrast to the purely advisory character of the master plan under New York State law.

178. Cal. Gov't Code § 65584(a)-(b) (West Supp. 1987). Note that subsection (b) provides that, under certain circumstances, the Department of Housing and Community Development can delegate its responsibility for determining regional housing needs to local jurisdictions. This delegation applies only in those areas lacking councils of governments.

179. N.J. Fair Housing Act, N.J. Stat. Ann. §§ 52:27D-301 to -329 (West 1986).

plan, which element must meet a variety of explicit statutory criteria. Among other provisions, the housing element must include “[a] consideration of the lands that are most appropriate for construction of low and moderate income housing . . . including a consideration of lands of developers who have expressed a commitment to provide low and moderate income housing.”<sup>180</sup> Unlike California, New Jersey does not bind municipalities strictly to the provisions of their master plans.<sup>181</sup> The New Jersey law provides, however, that “the municipality shall establish that its land-use and other relevant ordinances have been revised to incorporate the provisions for low and moderate income housing.”<sup>182</sup>

A similar doctrine has been in effect in Pennsylvania since *In re Girsh* was decided, in 1970.<sup>183</sup> This case, dealing with the denial of approval to a developer seeking to build multi-family housing in a growing suburban township, appears to be the first significant decision, and one of the few, in which the invidious character of the two-tier regulatory system is explicitly addressed. The court noted that “[a]ppellee’s land use restriction in the case before us cannot be upheld against constitutional attack because of the *possibility* that an *occasional* property owner may carry the heavy burden of proving sufficient hardship to receive a variance.”<sup>184</sup> The court continued, more significantly:

By emphasizing the possibility that a given land owner *could* obtain a variance, the Township overlooks the broader question that is presented by this case. In refusing to allow apartment development as part of its zoning

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180. *Id.* § 52:27D-310(f).

181. New Jersey law requires municipalities to adopt at a minimum the land use element of a master plan as a condition precedent to adoption of a municipal zoning ordinance, N.J. Stat. Ann. § 40:55D-62(a) (West Supp. 1986), and to carry out a detailed reexamination of that master plan every six years. *Id.* § 40:55D-89. The zoning ordinance, however, is the controlling document for purposes of development regulation, and zoning regulations inconsistent with the master plan may be adopted by the municipal governing body by following certain procedures. *Id.* § 40:55D-62(a).

182. N.J. Fair Housing Act, N.J. Stat. Ann. § 52:27D-11 (West 1986).

183. *In re Girsh*, 437 Pa. 237, 263 A.2d 395 (1970).

184. *Id.* at 241, 263 A.2d at 397.

scheme, appellee has in effect decided to zone out the people who would be able to live in the Township if apartments were available . . . .<sup>185</sup>

The *Girsh* doctrine has since been refined by the Pennsylvania courts and broadened to include the fair share principle explicitly embodied in the California and New Jersey legislation,<sup>186</sup> albeit in a less precisely quantified manner.<sup>187</sup>

Ironically, the trial court in *Berenson* showed considerable sensitivity to the issue posed here, noting "it would be unrealistic to expect multi-family housing to be built in the future unless provision is made now to set aside adequate lands for that purpose."<sup>188</sup> The court then explicitly offered the Town of New Castle two alternative approaches to rezoning:

The Town . . . may create a "floating" zone, a conditional use or other special permit process for such housing that is not located geographically or mapped until the specific development proposal is approved in accordance with the pre-stated inclusionary policy statement. This will avoid

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185. *Id.* at 242, 263 A.2d at 397. In marked contrast to the holding of the appellate division in *Suffolk Housing Services*, the Pennsylvania Supreme Court took notice of the existence of some apartments in the municipality — two projects approved by variance — but found that their existence was irrelevant to the more fundamental issues raised by the case. *Id.* at 239-42, 263 A.2d at 396-97. See also the discussion of this case in N. Williams, *supra* note 13, §§ 50.18, 66.22.

186. See Cal. Gov't Code § 65584(a) (West Supp. 1987); N.J. Stat. Ann. § 52:27D-307 (West 1986).

187. The Pennsylvania courts adopted the fair share doctrine, conceptually if not quantitatively, in finding that the amount of land mapped for multi-family development in a given suburban municipality was inadequate in light of the community's fair share responsibility. *Township of Williston v. Chesterdale Farms, Inc.*, 462 Pa. 445, 341 A.2d 466 (1975). An effort to provide a body of planning criteria, still without explicit quantification, for the Pennsylvania fair share doctrine was made in *Surrick v. Zoning Hearing Board*, 476 Pa. 182, 382 A.2d 105 (1978). The issue was, however, somewhat muddled in a subsequent decision, *In re M.A. Kravitz Co.*, 501 Pa. 200, 460 A.2d 1075 (1983), in which a developer's effort to compel a municipality to permit a townhouse development was unsuccessful on the basis that the township already permitted certain types of multi-family housing (although not townhouses) in another part of the township. See also Payne, *From the Courts: Doctrine and Politics in Exclusionary Zoning Litigation*, 12 Real Est. L.J. 359 (1984).

188. *Berenson v. Town of New Castle*, Index No. 4239/73 at 15 (N.Y. Sup. Ct. Dec. 6, 1977).

the problem of mapping such districts with such specificity that land prices may escalate to such an extent that interferes with the economic feasibility of proposed development. *Refusal of development permission may be justified only for inconsistency with the Town's inclusionary policy statement.* Alternatively, if and to the extent that the Town should decide to locate the zones for needed housing geographically in advance, it may "over-zone" for this purpose to avoid inflated land values or the possibility that such land may instead be used up for lower density housing.<sup>189</sup>

Thus, while recognizing that there can be legitimate reasons for not pre-mapping multi-family zones, the judge, although clearly aware of the potential abuse arising from that practice, made it clear that that alternative would not provide for the sort of discretion typically exercised by suburban municipalities.

Another trial court found against the Town of North Salem, New York, and ordered rezoning to comply with the *Berenson* doctrine. In this particular case, the town already permitted multi-family housing in certain, although limited, zones by special permit.<sup>190</sup> In finding the municipality's zoning invalid and ordering rezoning, the trial court explicitly required that the rezoning provide for multi-family housing "in a zone for such use, as of right."<sup>191</sup>

The appellate division did not pursue the issues raised by the trial court in *Berenson*. While the Town of New Castle did in fact provide for mapped multi-family zones in its subsequent remedial ordinance, no doctrine governing the underlying issue was created as a result of the *Berenson* decision.

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189. *Id.* at 26 (emphasis added). The reference to overzoning in order to ensure that adequate land will be available to meet the municipality's fair share obligation, notwithstanding the loss of some land to lower density development, the unwillingness of some landowners to sell for development, etc. evolved from the New Jersey Supreme Court decision in *Oakwood at Madison v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977).

190. 208 E. 30th Street Corp. v. Town of North Salem, Index No. 12588/79 at 2 (N.Y. Sup. Ct. Dec. 3, 1980).

191. *Id.* at 13.

Moreover, the North Salem decision was neither reported nor appealed. Thus, the New York courts, while offering lip service to the ideal of housing opportunity, have not yet moved against a practice which effectively nullifies that opportunity for all but those classes of population most favored by each suburban municipality's official gatekeepers.

## V. Toward Zoning to Meet Regional Housing Needs

The Law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread. — Anatole France<sup>192</sup>

### A. *Ending the Pretense of Zoning Neutrality*

Zoning, notwithstanding the legal fictions characteristic of case law, is not economically neutral. It is most patently discriminatory when administered through the exercise of largely unbridled discretion. Even when that discretion is curbed and the full range of land uses are permitted as of right, however, true neutrality of the ordinance with respect to housing needs and opportunities does not necessarily follow.

The standards of a given zone — minimum lot area, frontage, setback, interior floor area, and the like — can be translated into a minimum cost for a unit built in that zone, which in turn will dictate the minimum income a household will need to live in that zone.<sup>193</sup> At least with respect to single-family residential zones, the only households having the nec-

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192. The Home Book of Quotations 1079 (B. Stevenson ed. 10th ed. 1967)(citing Cournos, *Modern Plutarch* 27).

193. See L. Sagalyn & G. Sternlieb, *Zoning and Housing Costs: The Impact of Land-Use Controls on Housing Price* (1972). A purely technical analysis of minimum housing costs related to zoning standards is relatively straightforward, and has been done often in connection with exclusionary zoning litigation. See *Brief for Plaintiffs-Appellants*, *supra* note 154, at 21. In actuality, the issue is more complex, since the actual cost of the unit will be a function of the interaction of the zoning requirements with the characteristics of market demand in the area. See G. Hack & G. Polk, *Housing Costs and Governmental Regulation: Is Regulatory Reform Justified by What We Know?* 5-8 (1981).

essary minimum income will typically be the most affluent ones in the municipality or region.<sup>194</sup> When one turns to multi-family zoning, the economic dimensions of the regulatory scheme become more complex.

It is possible to draft language governing a multi-family district so that "least cost" zoning<sup>195</sup> is created. That is to say, no costs are directly generated by the ordinance over and above those intrinsic to producing housing meeting minimum standards of health and safety. Even such an ordinance, however, under most circumstances, is unlikely to result in the construction of any appreciable number of lower income housing units.<sup>196</sup> Multi-family housing includes a wide variety of housing types, from both an economic and physical standpoint. In competing for suitably zoned land, the more expensive, and therefore more profitable, housing types will consistently outbid the others. The price of multi-family zoned land therefore will reflect the most expensive multi-family housing which market demand will permit. Consequently, only expensive housing will actually be constructed.

The upward pressure on land prices that emerges in any area demonstrating significant development demand is relatively insensitive to variations in the quality of land, or to an excess of the supply of suitably zoned land over the market

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194. In the largest lot zone in Brookhaven, based on testimony presented at trial by the author, and depending on variables such as taxing districts (of which there are many separate districts within the town), percentage of income devoted to shelter, etc., the minimum income needed to purchase the least expensive house that could be built would be between \$47,000 and \$69,000. Brief for Plaintiffs-Appellants, *supra* note 154, at 21. The median household income in Brookhaven in 1979, roughly the time of the Suffolk Housing Services trial, was \$20,864. 34 U.S. Dep't of Commerce, Bureau of the Census, *Advance Estimates of Social, Economic, and Housing Characteristics* 34-63 (1983).

195. See *Oakwood at Madison v. Township of Madison*, 72 N.J. 481, 512-14, 371 A.2d 1192, 1207-08 (1977). It should be noted that there are distinct differences, particularly with respect to different regions in the United States, as to precisely what constitutes "least cost" zoning. In particular, a density level that may be considered the maximum consistent with health and safety for a two-story garden apartment development in the northeastern United States may be considered unreasonably low in California, where norms of density are consistently higher. See A. Mallach, *Inclusionary Housing Programs: Policies and Practices* 111-12 (1984).

196. This is particularly true in the absence of substantial federal subsidy funds.

demand for the land. While in theory these factors should affect the pressure on land prices, and result in lower land prices and thus lower housing costs, this often fails to take place in reality. The land market is an irrational one. Land-owners develop expectations of the value of their land which tend to be highly responsive to any upward movement of the land market and highly unresponsive to downward movements.<sup>197</sup>

The land market is not entirely oblivious to reality. Circumstances which could be considered optimal for construction of multi-family housing affordable to lower income households, within the parameters of conventional land use regulation, can be imagined, although it is unlikely that they actually exist in any real world municipality. In an environment where demand for expensive multi-family development is weak and the amount of land suitably zoned for least cost multi-family housing is in excess of demand, it is conceivable that some of the land (albeit the less desirable parcels), would be available at prices within the reach of subsidized development or development of least cost housing.<sup>198</sup> Assuming that development standards governing the land were reasonable and largely free of cost-generating provisions, it might be possible, with public subsidies, for housing affordable to lower income households to be constructed. For example, given the limited market demand in the Town of Brookhaven in 1979, when SICOH was seeking to buy land for the development proposals, it is very likely that had there been land zoned for multi-family development, it would have been possible for SICOH to purchase it at a price consistent with the con-

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197. This is a version of the phenomenon known to economists as a "price ratchet." That is to say, land prices tend to remain fixed at the upward end of a price cycle for an extended period after changes in objective reality have come to dictate lower prices. See A. Mallach, *supra* note 195, at 90.

198. One question which has not been satisfactorily addressed relates to the extent of overzoning dictated by this hypothesis: what is the excess of land supply relative to demand that is necessary before some of the land becomes available at prices substantially below those commanded by the most desirable parcels? Intuitively, given the strength of the price ratchet, the author believes that the amount of suitability zoned, developable and available land might have to be three or more times that for which effective market demand exists.

straints of the federal Section 8 program.<sup>199</sup>

One cannot count on private market demand to be absent. The need for affordable housing tends to be greatest in those areas which show the strongest levels of market demand because those areas are likely to be experiencing the greatest employment growth as well as the greatest price pressure on the existing housing stock. Thus, land market conditions in the areas of greatest need are likely to be farthest from the optimal conditions suggested above. Recognition of these considerations led Justice Trainor, in *Berenson*, to propose the creation of a "floating zone" for multi-family housing, or in the alternative, to pre-map and "over-zone" the land designated for that purpose.<sup>200</sup>

The problem with Justice Trainor's proposed floating zone, in which the land is not pre-mapped for multi-family development but in which the municipality, under court order, is given little or no discretion to refuse to rezone a parcel that meets certain objective criteria, is that it begs the issue. A municipality that is actively seeking to thwart multi-family development will be able to use even the barest glimmer of discretionary authority to that end. Even mandatory deadlines for action can be sidestepped without great difficulty.<sup>201</sup> Barring ongoing and active judicial supervision (which is usu-

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199. This is based on the experience of the author, who was in part responsible for seeking potential development parcels for SICOH in 1979. At that time, with virtually no development activity taking place, and thousands of acres of vacant and potentially developable land being offered, a wide variety of parcels were available in the vicinity of \$10,000 per acre or less, almost without regard to zoning categories.

200. *Berenson v. Town of New Castle*, Index No. 4239/73 at 26 (N.Y. Sup. Ct. Dec. 6, 1977).

201. A good example of this is in New Jersey, where the Municipal Land Use Law, N.J. Stat. Ann. §§ 40:55D-1 to -112 (West Supp. 1986), adopted in 1976, established explicit time limits for municipal land use actions: e.g., preliminary site plan approval (§ 40:55D-46(c)); minor subdivision approval (§ 40:55D-47); preliminary major subdivision approval (§ 40:55D-48(c)). In the author's experience, however, innumerable applicants have been asked to waive their right to a decision within the deadline, and have done so, facing the implicit or explicit threat that their failure to waive that right would result in denial of the application. At least one municipality known to the author, as of 1984, required a written waiver in advance, as an element in any applicant's submission, of the right to a decision within the statutory deadlines. Applications which did not contain the waiver were treated by the municipality as incomplete and not processed.

ally and justifiably avoided by the courts), such a remedy is apt to ultimately be more closely related to the problem than the solution.

The problem is compounded by the near total absence of federal or other housing subsidy funds. Even under the federal Section 8 program, through which federal housing subsidies for new construction were available between 1974 and 1982, as long as costs fell within limits acceptable to the Department of Housing and Urban Development (HUD), the Section 8 subsidy funds covered the difference between what a lower income household could afford and the actual cost of building and operating the units. Thus, if a Section 8 developer were seeking to build in a town in which the optimal circumstances described above existed, he might well be able to find an affordable site and develop a project meeting HUD criteria, thus providing housing affordable to lower income households.

In the absence of public subsidy funds, facial neutrality of the municipal land use scheme will not guarantee housing affordable to lower income households. Even under optimal circumstances, the combination of the profit demands of the developer and the inexorable realities of the cost of building housing will invariably place the resulting housing out of the reach of all or most of the lower income population.<sup>202</sup> In the optimal conventional multi-family zoning environment at least some of the multi-family housing constructed is likely to be less expensive than that constructed under more representative suburban systems.<sup>203</sup> It will, nevertheless, still fall short of meeting the full range of housing needs addressed in *Berenson*. Furthermore, even this modest accomplishment is only likely to occur under circumstances which are unheard of in New York State suburban zoning.

The conclusion is clear: while remedial action within the

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202. An analysis illustrative of the cost level of developing under more or less optimal conditions, as of 1983, is given in A. Mallach, *supra* note 195, at 80-83.

203. Given enough overzoning, and generally reasonable land use standards, it is likely that developers seeking to build to less affluent segments of the market will be attracted into the market, thus leading to simultaneous construction within a community of both more and less expensive housing.

framework of conventional zoning can undoubtedly bring about some improvement in the availability and affordability of housing, that improvement is inevitably severely limited by the interplay of the economic realities of housing development with land use regulation. Furthermore, to accomplish that modest improvement, the remedy would have to provide for massive overzoning of land for multi-family development beyond the measurable market demand for such housing, in order to free up any significant opportunity for development of other than the most expensive multi-family types. Finally, the effectiveness of conventional zoning remedies is likely to be least in those areas of greatest housing demand, in which the need is greatest. This is not surprising because the false neutrality of conventional zoning does no more than reinforce the directions set by economic pressures and market demands.

If zoning is to be used as a means of creating affordable housing opportunities, the pretense of neutrality must be abandoned. A new approach to land use control, in which the economic realities of land development are consciously and explicitly addressed and used as the basis for affirmative regulation, must be adopted. This approach, generally known as inclusionary zoning, has been shown to be an effective means of producing lower income housing in growing suburban housing markets. Housing programs grounded in inclusionary zoning ordinances represent perhaps the only way by which, under today's economic conditions, the promise of *Berenson* can become reality for the lower income population of New York State.

## B. *Using Inclusionary Zoning to Meet Regional Housing Needs*

### 1. *What is Inclusionary Zoning?*

Inclusionary zoning ordinances, and housing programs based on such ordinances, represent an approach by which the development of less expensive affordable housing is integrated

into the development of housing responsive to market demand in a community.<sup>204</sup>

The essence of inclusionary zoning lies in the economic linkage that is created between the lower income units and the market units in the same development. To that end, such programs can be either mandatory ones, where inclusion of lower income units is required as a condition of development, or voluntary, in which the developer is offered an incentive, typically an increase in the permitted density, to provide lower income units. Many mandatory programs, rather than simply superimposing the inclusionary requirement on preexisting zoning, couple it with a simultaneous and substantial increase in permitted density. Thus, an implicit density bonus is often part of a mandatory program as well.

A typical inclusionary zoning ordinance, in addition to the usual land use controls governing development (density, coverage, setbacks, etc.) will specify the percentage of lower income units to be provided and define the income range or ranges of the population to whom those units are to be affordable. The inclusionary ordinance adopted in Orange County, California, in 1978, for example, required that twenty-five percent of the units in each development be "affordable housing." The distribution of these units by affordability level was to vary, as shown in Table 11, depending on the availability of public subsidies.<sup>205</sup>

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204.

An *inclusionary zoning ordinance* is a zoning scheme under which prospective developers are required by a municipality or county to provide, as a condition of approval, or, alternatively, are given incentives to provide low- and moderate-income housing as a part of, or in conjunction with, their proposed development projects.

An *inclusionary housing program* is a program designed to bring about housing affordable to low- and moderate-income households in a community, using a variety of programs and activities, but relying principally for its implementation on an inclusionary zoning ordinance . . . under an inclusionary housing program, the provision of housing for lower income households becomes part and parcel of the overall residential development of the community, constructed as a direct outcome of the construction of more expensive housing, and in some cases . . . as an outcome of nonresidential development.

A. Mallach, *supra* note 195, at 2.

205. A. Mallach, *supra* note 195, at 12.

TABLE 11: AFFORDABILITY REQUIREMENTS IN ORANGE COUNTY, CALIFORNIA INCLUSIONARY PROGRAM (% OF TOTAL UNITS IN DEVELOPMENT)

Units to be affordable to households earning:	If public subsidies available	Subsidies not available
Below 80% of median	10%	0
80%-100% of median	10%	15%
100%-120% of median	5%	10%

SOURCE: S. Schwartz, R. Johnston & D. Burtraw, *Local Government Initiatives for Affordable Housing: An Evaluation of Inclusionary Programs in California* 24 (1981).

In New Jersey, ordinances typically require between fifteen percent and twenty-two percent of the units in inclusionary developments to be affordable to lower income households. In keeping with the guidelines set forth by the New Jersey Supreme Court in the *Mount Laurel II* decision, half of these units are generally targeted to low income households and half to moderate income households.<sup>206</sup>

In addition to establishing the requirements for lower income units in the development, a comprehensive inclusionary zoning ordinance, or subsequent regulations based on the or-

206. Low income households are those earning between zero and fifty percent of the regional median income, adjusted for family size. Moderate income households are those earning between fifty percent and eighty percent of the regional median, adjusted for family size. The definitions of applicable income categories are found in *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 221 n.8, 456 A.2d 390, 421 n.8 (1983)(*Mount Laurel II*). General language requiring that the definition of the municipal housing obligation take the needs of both low- and moderate-income households into account, in reasonable relationship to their proportions in the population are found in *id.* at 256-57, 456 A.2d at 441- 42. In practice this principle has generally been applied by requiring that half of all lower income units provided under inclusionary programs be for low income households, and half for moderate income households, as defined above. *See id.* at 309, 456 A.2d at 468.

In Bergen County, an affluent suburban county along the state boundary with New York, in 1986, a family of four would be considered low income with gross earnings up to \$18,200, and moderate income with gross earnings between \$18,201 and \$29,120. New Jersey Dep't of Community Affairs, *Median Income by Metropolitan Statistical Area and County* (1985)(single sheet). The Bergen County figures are among the highest in the state. Comparable figures for Cumberland County, a relatively impoverished county along Delaware Bay, would be 0-\$12,750 for a low income family of four and \$12,751-\$20,400 for a moderate income family of four. *Id.*

dinance,<sup>207</sup> provides standards sustaining the lower income occupancy and affordability of the set-aside units;<sup>208</sup> governing the relationship, both spacial and temporal, between the lower income units and the market units in the development;<sup>209</sup> and governing the marketing of the lower income units and selection of lower income tenants or homebuyers.<sup>210</sup> Ordinances may also allow alternative means by which a developer can fulfill his obligations to provide lower income housing units, including construction of those units on another site or the making of a cash contribution in lieu of constructing units.<sup>211</sup>

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207. The extent to which all of the relevant provisions of an inclusionary program must be enacted by ordinance, versus being embodied in policy statements or regulations adopted by administrative bodies, appears to vary widely from state to state. Many of the California programs, for example, are "policies" rather than formally adopted ordinances, which are nonetheless enforceable under California law. See Mallach, *supra* note 195, at 180-85. Similarly, many substantive elements of the Montgomery County, Maryland, program are enacted in the form of administrative regulations from the office of the county executive. See Mallach, *supra* note 195, at 218-20. Given the extent to which an inclusionary program, similar to any other lower income housing program, is likely to require extensive and detailed governing provisions, the ability to adopt a general ordinance, and adopt the detailed provisions through administrative regulation, is clearly desirable.

208. An extensive body of legal and other analysis has emerged in recent years with respect to techniques of ensuring continued lower income affordability and occupancy of units constructed under inclusionary programs, including the use of covenants, deed restrictions, and the like. For an overview of this subject see A. Mallach, *supra* note 195, at 133-65.

209. The many issues involved in this area include the following:

1) the extent to which lower income units should be integrated with, or separated from the market rate units in a development;

2) the extent to which design or other controls should be imposed to ensure visual compatibility among the different unit types;

3) in particular, timing controls to prevent the outcome raised in the *Mount Laurel II* decision that a developer may build "all its conventional units first and then reneges on the obligation to build the lower income units."

*Mount Laurel II*, 92 N.J. at 270, 456 A.2d at 447.

210. See A. Mallach, *supra* note 195, at 135-41.

211. There are numerous examples where these options are offered. See *id.* at 173-79. A recent, and widely publicized, variation on this approach is found where municipalities, including San Francisco and Boston, have imposed lower income housing obligations on nonresidential developers, often keyed to a formula that projects the number of jobs to be added by the additional office or commercial floor space, and translates that figure into an assessment of housing need. See *id.* at 179-90. See also Inclusionary Zoning Moves Downtown (D. Merriam, D. Brower, & P. Tegeler, eds. 1985); Urb. Land Inst., Downtown Linkages (D. Porter ed. 1985).

In the final analysis, the central and essential element in a successful inclusionary program is the reasonableness of the inclusionary requirement itself and the general land use requirements governing the zone district subject to inclusionary conditions. Since the ability of the developer to provide lower income units is determined by the economic feasibility of the development as a whole, an inclusionary ordinance which does not provide for a reasonable density, *and* permit a developer to build the market units efficiently and profitably, *and* maintain a reasonable balance between the benefits conferred on the developer (by virtue of the market units he can build) and the costs imposed by the inclusionary requirements, is not likely to produce much affordable housing.<sup>212</sup>

The precise land use standards that should be adopted, as well as the extent — in terms of both percentage and affordability range — of the inclusionary requirement will vary significantly from community to community. The most important factor is the nature and extent of market demand in the community. The larger and more affluent the market for which the developer can build, the greater the extent to which he can simultaneously provide lower income housing. In this respect, the economic effect of inclusionary zoning is exactly opposite that of conventional zoning. In a conventional zoning environment the stronger market demand creates fewer opportunities to develop affordable housing. Under an inclusionary ordinance, the stronger market demand creates more opportunities for provision of lower income housing.<sup>213</sup>

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212. There is little doubt that at least some ordinances have been drafted with the expectation, or at least the hope, that they would prove economically unmanageable, and that no lower income housing would result. See A. Mallach, *supra* note 195, at 107-10. Such an ordinance would be vulnerable, of course, to a taking challenge, but it would be a difficult one to win, given the standard that must be met. See *infra* note 244 and accompanying text.

213. The issue implicit in this paragraph, namely who actually pays the subsidy cost associated with constructing lower income housing through inclusionary programs, is a complex and uncertain one, although most analysts eventually conclude that, at least in theory, the costs should be largely passed backward in the form of reduced land values. See A. Mallach, *supra* note 195, at 86-96. See also Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. Calif. L. Rev. 1167, 1187-92 (1981); Hagman, *Taking Care of Ones's Own Through Inclusionary Zoning: Bootstrapping*

## 2. *Inclusionary Zoning Works: The New Jersey Experience*

Inclusionary ordinances have been in place in some American communities since the early 1970's.<sup>214</sup> With respect to New York State, and the potential effect that inclusionary zoning might have, relevant inferences can be drawn most strongly from the experience in New Jersey since the 1983 *Mount Laurel II* decision. The New Jersey experience will become particularly relevant if the New York judiciary reconsiders the blind alley it has followed in interpreting *Berenson*, and decides to incorporate inclusionary zoning as a significant element in future remedial orders in exclusionary zoning cases. The New Jersey Supreme Court did not require municipalities, in framing measures to comply with the *Mount Laurel II* decision, to enact inclusionary ordinances. After characterizing density bonus and similar incentive techniques as being ineffective,<sup>215</sup> the court held that "a more effective inclusionary device that municipalities must use if they cannot otherwise meet their fair share obligations is the mandatory set-aside."<sup>216</sup> Faced with the absence of federal or other subsidies which could be used to produce lower income housing more conventionally, most New Jersey municipalities seeking to comply with *Mount Laurel II* have sought to meet all or most of their lower income housing obligations through the

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*Low- and Moderate- Income Housing by Local Government*, 5 Urb. Law & Policy 169 (1982).

214. Among the major jurisdictions enacting the earliest programs, all in the early 1970's, were Fairfax County, Virginia, Montgomery County, Maryland, and Los Angeles, California. See Kleven, *Inclusionary Ordinances - Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 UCLA L. Rev. 1432 (1974); H. Franklin, D. Falk & A. Levin, *supra* note 23, at 131-410. The Fairfax County ordinance was subsequently invalidated in the first court test of an inclusionary ordinance, in *Board of Supervisors v. DeGross Enterprises*, 214 Va. 235, 198 S.E.2d 600 (1973), a decision characterized as "almost uniquely lacking in legal reasoning or rationale." N. Williams, *supra* note 13, § 66.27. See A. Mallach, *supra* note 195, at 197-218. See also S. Schwartz, R. Johnston & D. Burtraw, *Local Government Initiatives for Affordable Housing: An Evaluation of Inclusionary Programs in California* (1981).

215. *Mount Laurel II*, 92 N.J. at 266-67, 456 A.2d at 445-46. See generally Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 Hastings Const. L.Q. 1015 (1976); A. Mallach, *supra* note 195 at 13-14, 114.

216. *Mount Laurel II*, 92 N.J. at 267, 456 A.2d at 446.

enactment of inclusionary zoning ordinances.

Although there is no statewide data available on the overall level of affordable housing development activity resulting from *Mount Laurel II*, a substantial body of information is nevertheless available which indicates that the use of inclusionary programs has already had a dramatic effect on the production of housing affordable to lower income households in suburban New Jersey. Particularly germane is a recent study, carried out on behalf of a private regional planning organization in central New Jersey, which inventoried inclusionary development within the area of interest to the Mercer-Somerset-Middlesex Regional Study Council,<sup>217</sup> an area which contains thirty suburban townships and boroughs. Of these thirty municipalities, however, seventeen can be considered growing townships, with substantial remaining vacant developable land.<sup>218</sup>

The study found that, as of April 1986, within this area a total of 1,754 units of low- and moderate-income housing, developed under inclusionary ordinances adopted as a result of *Mount Laurel II*, were either occupied, under construction, approved, or pending before local planning boards.<sup>219</sup> Developments containing lower income housing were in some stage of the development process in eleven of the seventeen townships in the area.<sup>220</sup>

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217. D. Kinsey, *Affordable Housing in Central New Jersey: The Consequences of Mount Laurel II* (Apr. 30, 1986) [hereinafter Kinsey & Hand] (report prepared by Kinsey & Hand, Princeton, N.J., for Middlesex Somerset Mercer Regional Council, Inc., Princeton, N.J.) .

218. There are five hundred and sixty-seven municipalities in the State of New Jersey. The area within the scope of the council, which is a purely private body with no governmental powers, also includes the older core cities of Trenton and New Brunswick. *Manual of the Legislature of N.J.* 913 (1981). It should be noted that a borough under New Jersey law is roughly analogous to a village under New York law.

219. Kinsey & Hand, *supra* note 217, at 40. Specifically, forty-two units had been occupied, three hundred eighty-four were under construction, eight hundred fifty-two had received planning board approval, and four hundred seventy-five were pending before various planning boards.

220. *Id.* This outcome, only three years after the New Jersey Supreme Court *Mount Laurel II* decision, compares remarkably to past performance. The study found that in the same thirty suburban municipalities, during the fifty years of federal housing programs, only 1,334 subsidized housing units had been provided. *Id.* at

It is clear that a substantial amount of lower income housing is being produced through inclusionary programs elsewhere in New Jersey. A more detailed description of the first development constructed and occupied as a result of the 1983 decision is informative. The development consists of two hundred sixty limited-equity condominium units, built as part of a 1,287 unit development in Bedminster, which is an affluent suburb in the north-central part of the state.<sup>221</sup> The distribution of the two hundred sixty units, by size, price and maximum qualifying income, is given in Table 12. After court approval, construction and marketing activities began in mid-1984. The project was completed and occupied by spring 1985.<sup>222</sup>

TABLE 12: FEATURES OF LOW AND MODERATE INCOME UNITS CONSTRUCTED UNDER INCLUSIONARY PROGRAM AT THE HILLS PUD, BEDMINSTER, NEW JERSEY

UNIT TYPE	SQUARE FOOTAGE	NUMBER OF UNITS	INCOME CATEGORY	INCOME CEILING	SELLING PRICE
1 BEDROOM	558	68	LOW	\$13,500	\$27,100
1 BEDROOM + LOFT	658	44 24	LOW MOD	15,150 23,860	30,100 48,900
2 BEDROOM	760	80	MOD	26,500	54,600
3 BEDROOM	990	18 26	LOW MOD	18,200 28,100	34,200 57,800
TOTAL		260			

SOURCE: Bedminster Hills Housing Corporation, Pluckemin, New Jersey, fact sheet distributed to prospective buyers.

Extensive arrangements were made to ensure careful screening of prospective buyers, as well as effective monitoring of controls on resale of the units, which were embodied in

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221. A. Mallach, *supra* note 195, at 237-53.

222. This information, as well as other information on this development, comes from the personal experience of the author, who was directly involved in the development of this project and is at present a member of the board of trustees and vice-president of the Bedminster Hills Housing Corporation, a nonprofit entity with substantial responsibilities relating to the development.

deed restrictions. A nonprofit corporation, the Bedminster Hills Housing Corporation, was established, which was responsible for advertising of the units and initial screening of the prospective buyers, the latter being done on the basis of a series of carefully developed priority categories, generally providing priority for households living or working in the area and living in substandard or overcrowded housing units.<sup>223</sup> The same corporation (which is governed by a board containing representatives of the municipality, the developer, the mortgage lender and the New Jersey Department of the Public Advocate<sup>224</sup>) has responsibility, under the deed restrictions, for establishing resale prices based on an appreciation formula, and for referring previously screened and qualified prospective buyers to units available on resale.<sup>225</sup>

Full occupancy has been reached and the development appears to have settled into a successful routine. Residents of the lower income units, which make up a separate residential cluster among many clusters in the development, participate fully in the organizational life of the development freely and utilize the available recreational facilities. There is no evidence that the presence of the lower income units has had any negative effect on the marketability of the more expensive

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223. See Bedminster Hills Housing Corp., Procedure for Selection of Homebuyers for Village Green Units - The Hills PUD, Bedminster, N.J. (undated).

224. The New Jersey Dep't of the Public Advocate is an agency of state government generally charged with representing the public interest in a variety of forums, with particular emphasis on public interest litigation. See Bierbaum, *On the Frontiers of Public Interest Law: The New Jersey State Department of the Public Advocate — The Public Interest Advocacy Division*, 13 Seton Hall L. Rev. 475 (1983). The Public Advocate played a significant role in exclusionary zoning litigation in New Jersey, particularly during the late 1970's in the cases leading to *Mount Laurel II*. See Van Ness, *On the Public Advocate's Involvement in Mount Laurel*, 14 Seton Hall L. Rev. 832 (1984). The Public Advocate became involved in this matter by virtue of having taken responsibility for representation of low and moderate income plaintiffs in exclusionary zoning litigation against Bedminster Township, which litigation led to the enactment of the ordinance under which the Bedminster development was built. *Allan-Deane Corp. v. Township of Bedminster*, 205 N.J. Super 87, 500 A.2d 49 (1985).

225. *The Village Green at Bedminster Neighborhood Condominium Declaration of Covenants, Conditions and Restrictions of Resale*, Public Offering Statement Filed by the Hills Development Co. (1984)(prepared by Brenner, Wallack & Hill, Attorneys).

units<sup>226</sup> or on the manner in which the development is perceived, either internally or externally.<sup>227</sup> The developer, initially, was not eager to undertake an inclusionary development. He has, however, come to perceive it as a more than acceptable alternative and has, in fact, actively sought to purchase sites subject to inclusionary requirements in other municipalities for future development.<sup>228</sup>

After initial hesitation, the New Jersey development community has widely embraced the inclusionary approach, finding, as a rule, that, with the opportunity to build at adequate density and without unreasonable restrictions and conditions, the cost of providing lower income housing is more than compensated by the profit opportunities of market development in a strong economy. Much of the initial hesitation was engendered by the fact that, under the Supreme Court guidelines, the lower income units were to be priced to levels of affordability substantially below those typical of inclusionary programs in other states.<sup>229</sup> Developers have learned, however, that it is possible to produce a substantial number of units affordable by households earning less than fifty percent of the regional median income without materially impairing the success or profitability of their developments as a whole.

The most significant indicator of the active interest of the development community in undertaking inclusionary development was found in its response to the "builders remedy" offered as an inducement for litigation by the New Jersey Supreme Court. As part of the overall emphasis on bringing about substantive results, the *Mount Laurel II* court held:

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226. The more expensive units in the Bedminster development sell for prices up to \$250,000. Telephone interview with John Kerwin, President, The Hills Development Corp.

227. Interview with Carol Ann Auger, Director of Sales, Hills Development Company, and President, Bedminster Hills Housing Corporation.

228. Telephone interview with John Kerwin, President, The Hills Development Company.

229. The Orange County, California, affordability targets, shown in Table 11 *supra*, at 111, are representative of California inclusionary programs. See A. Mallach, *supra* note 195, at 201-07. Note that the bottom of the lowest range in the Orange County program to be applied where no public subsidies are available, corresponds to the top of the highest range of the *Mount Laurel II* standards.

Where 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.<sup>230</sup>

If a developer could meet three tests, therefore, the courts would order the defendant municipality to approve the developer's project, or at least rezone the developer's land to a density reasonably consistent with efficient multi-family development. The three-part test is: (1) that the developer prevail in litigation (i.e., that the municipality was not in compliance with the *Mount Laurel II* doctrine); (2) that the developer offer to provide a substantial amount of lower income housing in the development (typically twenty percent); (3) that the project be not clearly inconsistent with sound land use and environmental planning considerations.

By September 1984, approximately ninety suits had been brought in the New Jersey courts by developers seeking a builder's remedy.<sup>231</sup> By June 1985, the number had grown to one hundred and forty suits against some seventy municipalities, including almost every large suburban township in northern or central New Jersey.<sup>232</sup> In the end, few builder's remedies were actually granted by the courts, but the threat of such remedies led to many settlements of *Mount Laurel* cases on terms generally favorable to the developer bringing the suit.<sup>233</sup> The potency of this judicial weapon led to the emer-

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230. *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 279-80, 456 A.2d 390, 452 (1983)(*Mount Laurel II*). This was couched as an explicit reversal of the doctrine on builders' remedies set forth in *Oakwood at Madison v. Township of Madison*, 72 N.J. 481, 551-52 n.50, 371 A.2d 1192, 1227 n.50 (1977).

231. Administrative Office of the Courts, State of New Jersey, Press Release (Sept. 26, 1984).

232. A Listing of *Mount Laurel II* Litigation (June 18, 1985) (compilation by Peggy Schnugg for Brener, Wallack & Hill, Attorneys).

233. Settlements were encouraged, arguably even coerced, by some judges hearing matters similar to the *Mount Laurel* case. The desirability of bringing about settlements, as contrasted to extended litigation and protracted appeals, was stressed in many post-*Mount Laurel II* decisions. See *Morris County Fair Hous. Council v.*

gence of a consensus that legislative action in the realm of exclusionary zoning was necessary, which consensus led to the enactment of the New Jersey Fair Housing Act in July 1985, establishing an administrative structure for the meeting of municipal lower income housing obligations and the resolution of disputes between municipalities and developers.<sup>234</sup>

The current transition from the judicial system to the new administrative system has not been without its difficulties.<sup>235</sup> Nevertheless, it is clear that inclusionary housing programs, having demonstrated their effectiveness, will continue to be the central means by which New Jersey municipalities create lower income housing opportunities. The Fair Housing Act does not require the adoption of inclusionary ordinances. It does provide, however, that as a part of its housing plan each municipality *must* consider “[r]ezoning for densities necessary to assure the economic viability of any inclusionary de-

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Boonton Township, 209 N.J. Super. 108, 506 A.2d 1284 (1986); *J.W. Field Co. v. Township of Franklin*, 206 N.J. Super. 165, 501 A.2d 1075 (1985).

234. New Jersey Fair Housing Act, N.J. Stat. Ann. 52:27D-301 to -329 (West 1986). The builder's remedy doctrine became a highly controversial political issue, manipulated to considerable political advantage by a number of suburban politicians, including the incumbent governor of New Jersey, Thomas Kean. The politicians appear to have convinced a substantial part of the suburban electorate, contrary to all objective evidence, that the builder's remedy meant that their communities would be overrun with hundreds of thousands of unwanted and unneeded housing units. Thus, a major theme in the framing and adoption of the Fair Housing Act was a desire to curb this particular aspect of the *Mount Laurel II* doctrine and redress what was perceived to be the imbalance of power between developer and municipality. See Payne, *The Myths of Mount Laurel*, N.J.L.J., June 5, 1986, at 4, col. 3. This is mentioned as background although not germane to the immediate subject, which is the effectiveness of inclusionary zoning programs. An awareness of the potential political ramifications of a decision might be germane to the manner in which another court may seek to address similar remedial issues in the future.

235. The Fair Housing Act, N.J. Stat. Ann. 52:27D-301 to -329 (West 1986), is a poorly drafted and ambiguous document, containing many provisions designed to facilitate anticipated efforts by the Council on Affordable Housing to reduce municipal lower income housing obligations, or, to put it in other words, to restore what was perceived as the appropriate distribution of power between municipality and developer. For a critical view, see Mallach, *From Mount Laurel to Molehill: Blueprint for Delay*, 15 N.J. Rptr. 21 (Oct. 1985) (monthly magazine). In the course of affirming the constitutionality of the Fair Housing Act, the New Jersey Supreme Court, in a decision that has come to be widely known as *Mount Laurel III*, subsequently resolved some of the facial inadequacies of the act. See *Hills Dev. Co. v. Township of Bernards*, 103 N.J. 1, 47-63, 510 A.2d 621, 646-54 (1986).

velopments, either through mandatory set-asides or density bonuses, as may be necessary to meet all or part of the municipality's fair share."<sup>236</sup> Through the use of inclusionary zoning techniques, a municipality can ensure that the lower income housing created will not become a segregated or isolated ghetto, as often happens in suburban as well as urban settings.<sup>237</sup> Furthermore, the municipality can accommodate lower income housing without materially affecting municipal fiscal conditions because there is no direct fiscal outlay required of the municipality<sup>238</sup> and the simultaneous construction of expensive housing ensures that deficits that might result from the lower income units are offset.

Finally, and most importantly, inclusionary programs ensure, to the extent that any market demand exists in the area, that the lower income units are actually constructed. There is no need to rely on the uncertain availability of federal subsidies or the equally uncertain initiatives of local nonprofit organizations or housing authorities. The only necessary condition for production of lower income housing is that the developer can make enough profit from construction of the market units in the development to support the lower income housing requirements of the ordinance. In any area of strong market demand that condition can easily be met by a well-drafted inclusionary ordinance. It has been demonstrated by New Jersey, therefore, that inclusionary zoning is a uniquely powerful tool for the creation of suburban lower income housing opportunities.

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236. The Fair Housing Act, N.J. Stat. Ann. 52:27D-311(a)(1) (West 1986).

237. The Homestead Village development in the Town of Brookhaven is one example of isolation. It is the only substantial subsidized family housing project (as distinct from senior citizen housing) in the town. It contains four hundred thirty-one units and is located within the small black enclave of Gordon Heights. Memorandum, *supra* note 60, at 31-32.

238. There may be indirect fiscal outlays, through the waiver of processing and inspection fees on the lower income units, a common practice in New Jersey, or through subsequent tax abatement of lower income rental housing.

C. *Inclusionary Zoning and the Future of Housing Opportunity in New York State*

Two fallacies of particular significance undergird the failure of the post-*Berenson* courts to address the substantive issues raised in that decision. They are, first, the patent disregard of the intimate relationships between land use regulations and socioeconomic realities, and second, the treatment of zoning as a passive instrument capable of creating, at most, the threshold opportunity for development and no more.

Zoning and land use regulation are inextricably intertwined in a close relationship with social and economic factors and forces. Zoning need not be a passive element in that relationship. Land use regulation can be turned into a positive means of counteracting the seemingly inexorable economic pressures for higher prices and greater exclusion. It can be used as a means of creating housing opportunity, rather than thwarting it.

Ironically, in spite of post-*Berenson* lower court holdings, the New York Court of Appeals has not been oblivious to these issues in the past. In 1968, Judge Keating noted in *Udell v. Haas* that:

Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.<sup>239</sup>

While, arguably, this can be dismissed as little more than generalized rhetoric, it is nonetheless significant rhetoric. Furthermore, it served as a starting point for the important *Maldini v. Ambro* decision, in which the court of appeals explicitly embraced the socioeconomic dimension of zoning.<sup>240</sup>

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239. *Udell v. Haas*, 21 N.Y.2d 463, 469, 235 N.E.2d 897, 900, 288 N.Y.S.2d 888, 893 (1968).

240. 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385 (1975), *cert. denied* &

The court held:

That the "users" of the retirement community district have been considered in creating the zoning classification does not necessarily render the amendment suspect, nor does it clash with traditional "use" concepts of zoning. Including the needs of potential "users" cannot be disassociated from sensible community planning based upon the "use" to which property is to be put.<sup>241</sup>

This is, of course, the crux of the issue. If *Berenson* is about housing needs, as a facial reading of the decision clearly indicates, then the needs of the "users," that is, the "residents of Westchester County, as well as the larger New York City metropolitan region . . . searching for multiple-family housing in the area . . ." are not only relevant, but are central to determining what land use and zoning standards constitute a truly balanced plan, a plan which takes regional and local concerns into account.<sup>242</sup>

Arguably, the post-*Berenson* courts may have drawn away from the implications of *Maldini* and adopted their self-limiting position supporting the lack of relationship between zoning and socioeconomic considerations, in part as a result of the conclusion that any attention to lower income housing needs is futile in light of what they perceived to be the inexorable economic barriers to meeting those needs.<sup>243</sup> It is in this light that the demonstrated effectiveness of inclusionary zoning becomes so important. It establishes that recognition of the relationship between zoning and housing needs is not necessarily an academic exercise. Once it is recognized that the municipal zoning scheme must address the needs of the less affluent residents of the New York City metropolitan area, effective regulatory tools are available through which the mu-

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*appeal dismissed*, 423 U.S. 993 (1975). This decision was rendered only a few months before the *Berenson* court of appeals decision. It upheld the legality of a retirement community zoning district.

241. *Maldini v. Ambro*, 36 N.Y.2d at 487, 330 N.E.2d at 407-08, 369 N.Y.S.2d at 319-92.

242. *Berenson v. New Castle*, 67 A.D.2d 506, 511, 415 N.Y.S.2d 669, 672 (1979).

243. *Id.* at 521, 415 N.Y.S.2d at 678.

nicipality can affirmatively address those needs through its land use regulations.<sup>244</sup> These considerations suggest directions in which judicial action may transport the *Berenson*

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244. Although there has never been a decision specifically on this issue, there appears to be an exceptionally strong basis for concluding that an inclusionary ordinance which required a developer to set aside a percentage of lower income units as a condition of approval would be legal under existing New York State statutory and case law. First, it should be noted that New York case law provides for a broadly couched presumption of validity for municipal zoning enactments. See *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 96 N.E.2d 731 (1951). In a similar vein, it is hard to see how a taking challenge to a fairly drafted inclusionary ordinance, such as that raised in *Board of Supervisors v. DeGroff*, 214 Va. 235, 198 S.E.2d 600 (1973), could help but fail under the standard set forth in *In re National Merritt, Inc. v. Robert Weist*, in which the Court of Appeals held:

[I]t should be emphasized that when we deal with a challenge to the constitutionality of an ordinance as applied to a particular piece of property, the burden is entirely on the challenger to demonstrate beyond a reasonable doubt that the property will not yield a reasonable return under any of the uses permitted by the zoning ordinance.

*In re National Merritt*, 41 N.Y.2d 438, 445, 361 N.E.2d 1028, 1034, 393 N.Y.S.2d 379, 385 (1977). Second, more directly to the point of an inclusionary ordinance itself, New York State law already contemplates the use of zoning for explicit socioeconomic purposes. In *Maldini* the court of appeals noted, in support of the municipal ordinance, that:

[T]he town's good faith effort to meet the special needs of its elderly, who otherwise would be likely to be excluded from enjoyment of adequate dwellings within the community, is inclusionary. . . . Certainly, when a community is impelled, consistent with such criteria, to move to correct social and historical patterns of housing deprivation, it is acting well within its delegated general welfare power.

*Maldini*, 36 N.Y.2d at 485-86, 330 N.E.2d at 406, 369 N.Y.S.2d at 389-90. A New Jersey case, not dissimilar to *Maldini*, *Taxpayer's Ass'n of Weymouth Township v. Weymouth Township*, 80 N.J. 6, 364 A.2d 1016 (1976), was cited as a substantial part of the court's rationale for approving of inclusionary zoning in *Mount Laurel II*. *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 217-72, 456 A.2d 390, 448 (1983) (*Mount Laurel II*). While simple logic dictates that low income households should be entitled to the same status that *Maldini* provides senior citizens, existing New York case law also reaches that conclusion. Indeed, pursuant to N.Y. Pub. Hous. Law § 99 (McKinney 1955), municipalities are empowered to enter into agreements with public housing authorities to zone sites to make possible development of low income housing by those authorities. The municipal power to undertake such special purpose socioeconomic zoning for the benefit of lower income households has been upheld in *Chase v. City of Glen Cove*, 34 Misc. 2d 810, 227 N.Y.S.2d 131 (1962), and in *Marino v. Town of Ramapo*, 68 Misc. 2d 44, 326 N.Y.S.2d 162 (1971), in which the court held that zoning based on classification by income, in furtherance of the objective of providing lower income housing, is both rational and legal. See *id.* at 61-63, 326 N.Y.S.2d at 183-85.

doctrine into reality.

First, an end to the abuse of the regulatory powers vested in local government by the discretionary process, as applied to multi-family housing development, is long overdue. It serves no planning or environmental purpose recognized by professionals. It exists solely for invidious social and economic reasons. The discretionary process is not only abusive in itself but also effectively hinders any effort to implement affirmative measures and inclusionary housing programs. Opportunities for development of multi-family housing, at least to the extent dictated by the magnitude of regional housing needs, should be permitted by right, just as opportunities are provided in the typical suburb for development of single family houses, factories, office buildings, or shopping centers.<sup>245</sup>

Second, suburban municipalities should have an affirmative obligation to provide opportunities through which local, as well as regional, housing needs can be met. If the false impartiality of a facially neutral zoning ordinance is relied upon, economic factors will ensure that local and regional housing needs will not be satisfied. An affirmative obligation need not necessarily lead in all cases to the enactment of inclusionary ordinances. New Jersey municipalities, confronted with an affirmative obligation under *Mount Laurel II*, have come up with many different approaches to meeting lower income housing needs, many of which utilize the existing housing stock in innovative and creative ways, grounded in the particular conditions and realities of their community.<sup>246</sup> In the fi-

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245. This does not mean, of course, that developers could not continue, should they so choose, to submit petitions for rezoning of other lands for multi-family use, and that such petitions should not be approved where they meet reasonable land use criteria. Just as unlimited discretion poses problems, which have been discussed extensively herein, a rigid and inflexible pre-mapping of all land uses will create many difficulties over time, albeit of a different nature.

246. Among the many activities that New Jersey municipalities have undertaken in order to comply with their lower income housing obligations under *Mount Laurel II*, one may note (a) undertaking programs to rehabilitate existing housing occupied by lower income households; (b) facilitating creation of accessory apartments at rents affordable to lower income households; (c) facilitating use of such limited federal subsidy programs as are available; (d) creating, through use of fees levied on nonresidential development, rent subsidy programs to enable lower income households to afford

nal analysis, however, the inclusionary ordinance has been, and undoubtedly would be in New York State as well, the principal means by which lower income housing will be created and the municipal affirmative obligation carried out.

An additional, and difficult, question remains for the courts to address. The question addresses quantity — how many units should be provided, or how much land should be rezoned. The appellate division in *Berenson* rejected application of the fair share concept, as embodied in New Jersey case law and as proposed by the trial court below.<sup>247</sup> In light of the complexities and difficulties that have arisen with respect to the fair share process in New Jersey, the reluctance of New York's appellate division is understandable.<sup>248</sup> Nonetheless, the question of quantity cannot be disposed of easily. As an example, assume that the Town of Brookhaven is ordered by a court to rezone to provide by right for multi-family and lower income housing opportunities. How much land must be rezoned and to what densities? In a town of some three hundred forty square miles, would rezoning of one hundred acres at a density of five units per acre, with a requirement that fifteen percent of the units be lower income housing, be con-

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to rent private market apartments; (e) use of municipally owned land, or acquisition of privately-owned land by the municipality, for lower income housing development; (f) creation of nonprofit development entities to develop lower income housing, or mixed income housing with a higher percentage of lower income units than would be attractive to a private profit-motivated developer, etc. This analysis is based upon the experiences of the author.

247. *Berenson v. Town of New Castle*, 67 A.D.2d 506, 521-22, 415 N.Y.S.2d 669, 678-79 (1979).

248. Notwithstanding the difficulties, the process of determining municipal fair share obligations in New Jersey has been systematized to a remarkable degree since 1983. As a result of the efforts of the special Mount Laurel judges appointed by the Supreme Court in late 1983, a largely standardized methodology for determining municipal fair share allocations was developed by spring 1984, and set forth in *AMG Realty Co. v. Township of Warren*, 207 N.J. Super. 388 (1984). The methodology set forth in *AMG* was used, with minor modifications in all subsequent post-*Mount Laurel II* litigation. Subsequently, under the Fair Housing Act, N.J. Stats. Ann. § 52:27D-307, the Council on Affordable Housing was mandated to develop a fair share allocation methodology. The proposed methodology, which is similar in many respects to that set forth in *AMG*, was adopted in 1986. See N.J.A.C. 5:92 (1986). All municipalities in New Jersey now have an administratively determined lower income housing obligation.

sidered an adequate response? If that (which would represent roughly 1/20 of 1% of the land area of the town and create the theoretical capacity for seventy-five lower income units) were likely to be considered on its face to be inadequate, would two hundred acres, or five hundred acres, be adequate?

The New Jersey Supreme Court, in *Mount Laurel II*, recognized that the resolution of the fair share questions had "produce[d] a morass of facts, statistics, projections, theories and opinions sufficient to discourage even the staunchest supporters of *Mount Laurel*."<sup>249</sup> It nevertheless concluded that the adoption of a fair share doctrine, with all its difficulties, was preferable to the absence of such a doctrine. The reasoning of the court is worth citing:

When we relieved the parties and the court of the obligation to determine with precision the region, its need, and the fair share of the municipality, we underestimated the pressures that weigh against lower income housing. . . . The temptation for municipalities after our decision in *Madison* to ignore the *Mount Laurel* obligation or to provide the absolute minimum of *apparently* realistic opportunity for *some* lower income housing apparently became irresistible. Some of its results are before us today.

Trial courts interpreted *Madison* as shifting the burden of compliance from the judiciary to the municipality and looked sympathetically on ordinances that arguably constituted a bona fide effort to comply. Sometimes, when the litigation was concluded, no one would know what the fair share of that municipality was, for no one had been required to determine it. There was no standard that municipalities could apply if they wanted to comply.<sup>250</sup>

There may be alternatives to the New Jersey fair share approach. There are no alternatives addressing the underlying question of framing, in some fashion, a standard which will 1)

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249. Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 248, 456 A.2d 390, 436 (1983) (*Mount Laurel II*).

250. *Id.* at 251-52, 456 A.2d at 438.

enable all those concerned to know whether a municipality is in compliance with its obligation to address local and regional housing needs; 2) provide the municipality with reasonable assurance that it is protected from further exclusionary zoning litigation; 3) relieve the courts of the need to engage in highly abstract crystal-ball gazing.

As both the *Berenson* court, in New York, and the *Mount Laurel II* court, in New Jersey, have pointed out, questions of land use planning and housing provision preferably belong in the legislative and administrative branches of government.<sup>251</sup> The New York legislature has not enacted a single law in the decade since *Berenson* to relieve the judiciary of their responsibility in this area. Despite the court's plea for intervention in its 1975 *Mount Laurel I* decision, the New Jersey legislature acted only when the explicit standards and directions of the *Mount Laurel II* decision, eight years later, made it clear that it was an issue of significance, and that it would not go away of its own accord.

The New York legislature is unlikely to rescue its judiciary from the obligation of addressing these issues. The question of exclusionary zoning and housing needs have not gone away since the 1975 *Berenson* decision. The housing needs of New York State's less affluent citizens have become more extensive and the public policy implications of continued exclusionary zoning have become more pressing. It is time the New York courts confront and address these questions in a forthright fashion. They are difficult questions, as are all legal questions that address complex social, economic and political issues. They are questions that, nevertheless, can and must be resolved.

#### D. *Postscript: The Issues Remain Unresolved*

The New York Court of Appeals has spoken in *Suffolk Housing Services*,<sup>252</sup> and the issues raised by the case are no

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251. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 243, 378 N.Y.S.2d 682, 682 (1975); *Mount Laurel II*, 92 N.J. at 352, 456 A.2d at 490.

252. *Suffolk Hous. Servs. v. Town of Brookhave*, No. 87-150, slip op. (N.Y. Ct. App. June 11, 1987).

nearer a serious resolution than before. While the decision is unfortunate as respects the merits of the case before it, it is doubly so in its failure to even address the serious issues raised by the case; much as an earlier commentator characterized the equally unfortunate *DeGroff* decision in Virginia,<sup>253</sup> it is a decision "almost uniquely lacking in legal reasoning or rationale."<sup>254</sup> It is sad evidence of the current diminished state of what was once one of the great state courts.

The decision itself hinges on two, and only two, points: the nature of the factual findings of the lower court which led the court of appeals to conclude that "[p]laintiffs, in sum, have failed to demonstrate that efforts by the Town caused the claimed shortage of shelter,"<sup>255</sup> and the "abstract character . . . of the relief sought."<sup>256</sup> In focusing on the absence of a plea for relief from the denial of a specific development application, the court appeared unwilling to address either the systemic nature of the issues raised by the plaintiffs, or the possibility that an issue such as exclusionary zoning with its overriding social and economic effects might not be effectively addressed by individual idiosyncratic lawsuits hinging on the peculiarities of specific parcels and planning boards. Indeed, the court appears to have retreated to a nineteenth century view of their role, by characterizing anything going beyond the relief of concrete and immediate harm to specific named individuals as "legislative" relief, and therefore beyond the appropriate bound of the judicial role.<sup>257</sup> While the court did not overturn earlier lower court decisions that found that plaintiffs had standing to bring the case, they appear to have enunciated a new legal doctrine: public interest plaintiffs may have standing to bring cases of this nature, but no standing to

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253. Bd. of Supervisors of Fairfax County of *DeGroff Enter., Inc.*, 214 Va. 235, 198 S.E.2d 600 (1973).

254. 3 N. Williams, *American Land Planning Law* 77 (1975).

255. *Suffolk Hous. Servs.*, No. 87-150, slip op. at 1.

256. *Id.* slip op. at 6.

257. *Id.* Note that the court substantially misrepresented the nature of relief sought by plaintiffs, characterizing them as: "ask[ing] the courts to undertake radical re-zoning of some 49,100 acres . . .," (*Id.* slip op. at 4.) a request unrelated to anything explicitly or implicitly sought by plaintiffs.

win them.

The decision is not necessarily hostile to the interests of the poor, nor does it offer a blank check for exclusionary local land use practices. It can arguably be read as encouraging the developers of lower income housing to bring suits challenging their denial of special permits or rezoning, and to vindicate in that manner the rights of the low income and minority groups "yearning . . . for decent housing they can afford in decent surroundings."<sup>258</sup> Such lawsuits are potentially important; the question is, however, whether in light of today's realities this apparent opportunity may not be more of an abstraction than the remedies sought by plaintiffs and which the court characterized as abstract.<sup>259</sup>

In the final analysis, what the court failed to do remains more significant than what they did. Nowhere in the decision is any awareness of the complex social and economic interplay between the zoning laws and the lack of housing opportunity for the poor; nowhere even appears a glimmer of understanding of the pattern, lavishly documented in the legal and planning literature for over two decades, between discretionary land use regulation and exclusion.

The problems addressed by the articles in this issue, in the final analysis, are still left unresolved by the court of appeals decision. They will not go away, because they go to the core of the decision-making process of local government, and its effect on the poor and on racial minorities. One can only hope that some day the New York State judiciary will be ready to deal with them.

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258. *Id.* slip op. at 6 (citing *Warth v. Seldin*, 422 U.S. 490, 528-29 (1975) (Brennan, J., dissenting)).

259. *Id.*