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A Comparative Analysis of New Jersey's *Mount Laurel* Cases with the *Berenson* Cases in New York

John R. Nolon*

I. Introduction

Due to the widespread concern over the lack of affordable housing in New York, renewed interest has been expressed in the landmark case of *Berenson v. Town of New Castle.*[1] That case and an associated line of decisions define the legal rules that will be used by the courts in New York to decide whether municipal zoning unconstitutionally excludes affordable types of housing. Interest has been piqued further by two recent lower court cases in New York which differ greatly in their approach to defining the legal standards to be used in reviewing allegedly exclusionary land use practices.

The rules adopted by the appellate courts in New York differ in degree from those rules applied in New Jersey under the *Southern Burlington County NAACP v. Township of Mount Laurel*[2] cases (commonly known as *Mount Laurel I*

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

2. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied,* 423 U.S. 808 (1975)(*Mount Laurel I*); Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390

and *Mount Laurel II*), although the courts in both states have based their decisions on remarkably similar constitutional principles. At issue in these cases is whether local zoning ordinances which exclude certain types of housing generally recognized as being more affordable, are invalid because of their tendency to exclude from the community a large segment of those in need of housing in the region. The basic inquiry in the cases is whether, and to what extent, the state constitution requires zoning jurisdictions to recognize and accomodate regional housing needs, particularly of lower income people.

The consequence of the *Mount Laurel* decisions has been rezoning by communities throughout New Jersey, which has resulted in the construction of a large number of lower- and middle-income housing units.[3] Throughout the state of New Jersey, land has been rezoned to provide for higher density residential development with the requirement that a percentage (usually twenty percent) of the resultant dwelling units be sold or rented at prices affordable to lower income households.[4] The bulk of the units (approximately eighty percent of those produced) are generally affordable to middle income households. Market forces have dictated this result. Thus, rezoning under *Mount Laurel II* results in the production of housing for a wide spectrum of income groups many of which otherwise could not afford housing produced in the New Jersey market.

Under the *Berenson* cases in New York, rezoning has occurred but it will not result in the production of affordable housing for moderate income households. The direct effect of the *Berenson* cases has been limited mainly to the defendant municipality.[5] As a result of these rulings, New Castle has re-

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(1983)(*Mount Laurel II*).

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

4. *See Mount Laurel II*, 92 N.J. at 256-57, 456 A.2d at 441.

5. The contested parcel of land in the Town of New Castle is currently being developed. On that site, one hundred seventy-seven condominiums will be built at just over three units per acre. They will sell for from one hundred and eighty thousand dollars to three hundred thousand dollars.

vised its zoning to provide for a variety of housing types, generally considered to be more affordable than single-family homes constructed on individual lots.[6] Under this revised ordinance, approximately five hundred medium density townhouses or condominiums have been constructed, some of which have been marketed at relatively affordable prices (under one hundred thousand dollars). Applications are pending for multi-family housing on land rezoned under *Berenson.* There are also other sites zoned for multi-family housing that may be developed in the future. The indirect effect of the *Berenson* case on the provision of multi-family housing cannot be measured accurately. In Westchester County (where New Castle is located) and the surrounding counties, several communities have rezoned land for multi-family housing in response to threatened litigation under *Berenson.*[7]

The central question raised by these events is how two sister state courts could evaluate similar facts and come to decisions that have produced such remarkably different results. This is particularly curious in view of the relatively similar constitutional principles enunciated by the highest court in both states in these cases. A description of the legal thought process in New York, and a point by point comparison of the holdings in each state will assist in understanding why affordable housing is being produced in New Jersey but not in New York.

II. Summary of the *Berenson* Line of Cases

The first *Berenson* case was brought in the early 1970's by Mitchell Berenson against the Town of New Castle in Westchester County, New York. The plaintiff was a land developer aggrieved by the absence of any provision in the New

6. New Castle, N.Y., Local Law No. 16 (1979).

7. In the Town of North Hempstead, New York, a zoning provision requiring local residency as a condition for eligibility to occupancy housing in a senior citizens zoning district was held unconstitutional under *Berenson.* Allen v. Town of North Hempstead, 103 A.D.2d 144, 478 N.Y.S.2d 919 (1984). This case did not result in the production of housing, but it did open existing housing in the town to elderly residents of surrounding communities.

Castle ordinances that allowed the construction of multi-family housing. His claim, briefly stated was as follows:

1. That the town derived its authority to zone from the state constitution through specific authority delegated by the State legislature.

2. That this authority had to be exercised in the interest of all the people of the State.

3. That zoning which prohibits the construction of more affordable types of housing, such as multi-family housing, by definition excludes a large segment of the State's population.

4. That an effective method for the courts to use to remedy this wrong would be to allow the plaintiff, as a builder, to build multi-family housing.

The case was initially brought in the Supreme Court in Westchester County.[8] Both parties presented motions for summary judgment which were denied. Both appealed the denial to the appellate division, which affirmed the lower court decision.[9] Appeal was then taken to the New York Court of Appeals, the state's highest court, which took the opportunity to instruct the lower court on how to proceed at the trial level in reviewing the *Berenson* claim.

The first formal opinion was rendered by the New York Court of Appeals on December 2, 1975.[10] It established a two-prong test to be applied when determining the reasonableness of local zoning ordinances. The two factors are: (1) whether the town has provided a properly balanced and well ordered plan for the community—that is, are the present and future housing needs of all the town's residents met;[11] and (2) were regional needs considered.[12] After adopting these guidelines, the state's highest court remanded the case for trial to the

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8. Berenson v. Town of New Castle, No. 04239/73 (Westchester County Sup. Ct., Nov. 9, 1973).

9. Berenson v. Town of New Castle, 44 A.D.2d 839, 355 N.Y.S.2d 759 (1974); Berenson v. Town of New Castle, 44 A.D.2d 564, 353 N.Y.S.2d 935 (1974).

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

11. *Id.* at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 680-81.

12. *Id.* at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.

Supreme Court in Westchester County. The *Berenson*[13] case was decided by the supreme court, on December 6, 1977. After a trial on the issues, Judge Trainor found that New Castle's ordinance violated both prongs of the test. The zoning ordinance was declared invalid to the extent that it failed to allow for multi-family development at densities of at least eight units to the acre. New Castle was directed to issue a building permit for the project and given six months to amend its ordinances to provide for the construction of three thousand five hundred units of multi-family housing over a ten year period. The decision was then appealed by New Castle. That case was decided by the appellate division, on April 23, 1979.[14] The court upheld the Westchester County Supreme Court's declaration of invalidity of the ordinance itself and the rezoning of plaintiff's land.[15] However, it reversed the lower court's judicially prescribed "fair share" goal as well as its order that New Castle award a specific density for the plaintiff's development.[16] The court gave the Town of New Castle six months to remedy the constitutional defects in its zoning ordinance.[17]

The Town of New Castle again found itself in 1983 defending its zoning ordinance. This time, in *Blitz v. Town of New Castle,*[18] the plaintiffs challenged the amended zoning ordinance adopted by New Castle as required by the April 1979 *Berenson* decision. That amendment had been sustained by the Westchester County Supreme Court after a trial on the facts.[19] The amended ordinance included new multi-family zones, minimum densities with bonuses for certain project features, floating zones with medium densities, and accessory apartment provisions.[20] The appellate division sustained the lower court's findings regarding the ordinance's constitution-

13. Unpublished opinion, Westchester County Sup. Ct. (Dec. 30, 1977), *discussed in* Berenson v. Town of New Castle, 67 A.D.2d 506, 507, 415 N.Y.S.2d 669, 670 (1979).

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

15. *Id.* at 523-24, 415 N.Y.S.2d at 680.

16. *Id.*

17. *Id.*

18. 94 A.D.2d 92, 463 N.Y.S.2d 832 (1983).

19. Unpublished opinion discussed in Blitz v. Town of New Castle, 94 A.D.2d 92, 94, 463 N.Y.S.2d 832, 833 (1983).

20. *See Blitz,* 94 A.D.2d at 94-95, 463 N.Y.S.2d at 833-34.

ality.[21] The court relied upon the County Planning Commissioner's approval of the ordinance,[22] gave a presumption of validity to the county's adopted housing goal,[23] and found that the ordinance accommodated New Castle's expected proportionate share of that legislatively defined housing need.[24]

In 1980, in *Robert E. Kurzius, Inc. v. Village of Upper Brookville,*[25] the *Berenson* issues returned to the New York Court of Appeals for the first time since 1975. The Village of Upper Brookville, in this case, appealed an appellate division ruling that its five acre, minimum-lot size zoning was invalid under *Berenson.*[26] The court of appeals reversed the appellate division and sustained the zoning, in the absence of any showing at the trial that Upper Brookville had failed to consider regional housing needs and that such needs were unsatisfied.[27] The court of appeals found that the evidence provided at trial failed to prove that the ordinance was enacted with an "exclusionary purpose," or that it ignored regional needs and had an unjustifiable exclusionary effect.[28] This additional factor, whether an ordinance has an "exclusionary purpose," as set forth by the court of appeals in *Kurzius,* is now considered to be a third prong of the test by which New York courts will evaluate municipal zoning ordinances. Applying these criteria to the ordinance in question, the court held that the plaintiff had not sustained the burden of rebutting the presumption of constitutionality normally accorded such ordinances.[29]

In *Allen v. Town of North Hempstead,*[30] decided in 1984,

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21. *Id.* at 102, 463 N.Y.S.2d at 838.

22. *Id.* at 96, 463 N.Y.S.2d at 834.

23. *Id.* at 97-98, 463 N.Y.S.2d at 835.

24. *Id.* at 98-100, 463 N.Y.S.2d at 836-37.

25. 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1980), *cert. denied,* 450 U.S. 1042 (1981).

26. Robert E. Kurzius, Inc. v. Village of Upper Brookville, 67 A.D.2d 70, 414 N.Y.S.2d 573 (1979).

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

28. *Id.*

29. *Id.*

30. 103 A.D.2d 144, 478 N.Y.S.2d 919 (1984). This case was decided by the Appellate Division of the Second Department which handed down the 1979 *Berenson* decision.

a durational residency requirement imposed as a pre-condition to qualifying for residence in a Golden Age Residence District in North Hempstead was found to violate the *Berenson* and *Kurzius* tests, and thus to be unconstitutional. The court determined that such a requirement was enacted with an exclusionary purpose and failed to consider regional housing needs. The court wrote that "[t]he durational residence requirement at bar has a more direct exclusionary effect on nonresidents like plaintiffs than the almost total exclusion of multi-family housing held to be unconstitutional by this court [in Berenson]."[31] Here, ample proof regarding the needs of senior citizens in surrounding communities was placed on the record.

In the case of *Suffolk Housing Services v. Town of Brookhaven,*[32] currently pending before the New York Court of Appeals,[33] low-income plaintiffs have argued that the Town of Brookhaven's failure to zone to provide for low- and moderate-income housing, not simply multi-family housing, is in violation of the *Berenson* standards. At issue in *Suffolk Housing Services,* is whether it is sufficient for a municipality to zone allowing for an array of housing types (which the Village of Brookhaven did), or whether there is a constitutional obligation to go further and facilitate the development of housing specifically affordable to lower income households. The appellate division held that the New York Court of Appeals, in its 1975 *Berenson* decision did not intend to impose any such affirmative duty.[34] Recall that the court of appeals *Berenson* test includes an examination of whether the municipality considered the needs of the region as well as the town for multiple housing.[35] The appellate division stated that the New York Court of Appeals' earlier *Berenson* decision "[m]erely

31. *Id.* at 149, 478 N.Y.S.2d at 922.

32. 109 A.D.2d 323, 491 N.Y.S.2d 396 (1985).

33. This case, which was lost by the plaintiffs at the trial court and Appellate Department levels, is the first *Berenson* style case to be brought in New York by low-income plaintiffs who are requesting zoning practices that will make housing for them affordable.

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

35. *See supra* notes 10-11 and accompanying text.

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."[36] To accept the plaintiff 's contention that the court intended an affirmative mandate to facilitate the construction of housing affordable to lower income households, "would require us [the court] to work a change of historic proportions in the development of New York zoning law, a step which we respectfully decline to take."[37] The New York Court of Appeals has agreed to review the unanimous decision of the Appellate Division, Second Department, in *Suffolk Housing Services.*

A very different decision was rendered in *Asian American for Equality v. Koch*[38] by the Supreme Court of the First Judicial Department, shortly after the determination by the appellate division of *Suffolk Housing Services.* As compared to the previous New York exclusionary zoning cases, the *Asian American* case arose out of a novel set of circumstances. In this case, the plaintiffs alleged that the various density bonus provisions of New York City's zoning ordinance, as applied to the heavily settled Chinatown area, displaced lower income residents and, therefore violated the principles articulated in *Berenson.* This court in considering its options, referred directly to the *Suffolk Housing Services* appellate division decision and stated:

> While New York courts have previously been hesitant to adopt the *Mount Laurel* doctrine because it places a heavier burden on municipalities, upon consideration of the important constitutional considerations at stake, it is my opinion that it is now appropriate to adopt the *Mount Laurel* doctrine as the law of New York.[39]

After the court asserted its adoption of the *Mount Laurel* doctrine,[40] it held that "[i]n light of the needs of the China-

36. *Suffolk Hous. Servs.*, 109 A.D.2d at 331, 491 N.Y.S.2d at 402.
37. *Id.* at 332, 491 N.Y.S.2d at 402.
38. 129 Misc.2d 67, 492 N.Y.S.2d 837 (1985).
39. *Id.* at 82, 492 N.Y.S.2d at 848.
40. "[T]he zoning power is no more abused by keeping out the region's poor than

town community, a well-balanced plan may be held to consist of a plan which facilitates the construction of quality low-income housing."[41]

As set forth in the preceding paragraphs, it is easily ascertained that New York law regarding exclusionary zoning is in flux. The factors which the New York Court of Appeals established are broad, allowing the lower courts great discretion in fashioning their decisions. This has resulted in inconsistent decisions within New York, continued litigation on the issue, and has forced some courts to seek other viable alternatives, such as in the *Asian American* case, in the hope of making a fair and just determination.

III. The Constitutional Underpinnings

A. *Berenson v. Town of New Castle*

The standards for judging whether zoning ordinances in New York are unconstitutionally exclusionary were first articulated by the state's highest court in 1975. In the first *Berenson* decision, the New York Court of Appeals clarified certain fundamental principles regarding the delegation and use of the power to zone. First, the court stated that "the primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town's available land."[42] Second, "in enacting a zoning ordinance, consideration must be given to regional needs and requirements. . . . There must be a balancing of the local desire to maintain the *status quo* within the community and the greater public interest that regional [housing] needs be met."[43] Third, that "[a]lthough we are aware of the traditional view that zoning acts only upon the property lying within the zoning board's territorial limits, it must be recog-

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by forcing out the resident poor." *Id.* at 81, 492 N.Y.S.2d at 847 (quoting Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 214, 456 A.2d 390, 418 (1983)(*Mount Laurel II*).

41. *Id.* at 88, 492 N.Y.S.2d at 851.

42. Berenson v. Town of New Castle, 38 N.Y.2d 102, 109, 341 N.E.2d 236, 241, 378 N.Y.S.2d 672, 680 (1975).

43. *Id.* at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 681 (emphasis in original).

nized that zoning often has a substantial impact beyond the boundaries of the municipality."[44]

B. *Southern Burlington County NAACP v. Mount Laurel*

In 1975, the same year that the *Berenson* standards were created, New Jersey's highest court handed down the most far-reaching exclusionary zoning case in state law history.[45] This case was reinterpreted and rendered much more specific in a 1983 decision by the same court.[46] The two *Mount Laurel* cases are based on language similar to that used by the *Berenson* court. In articulating the standards for judging whether zonging ordinances are unconstitutionally exclusionary, the *Mount Laurel* cases set forth three principles. First, that "[w]hen the exercise of . . . [police] power by a municipality affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens. . . . Municipal land use regulations that conflict with the general welfare thus defined abuse the police power and are unconstitutional."[47] Second, that

> it is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.[48]

And third, that "each such municipality [must] . . . plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, includ-

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44. *Id.*

45. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975)(*Mount Laurel I*).

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

47. *Id.* at 208, 456 A.2d at 415.

48. *Mount Laurel I*, 67 N.J. at 177, 336 A.2d at 726.

ing, of course, low and moderate cost housing to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries."[49] Thus, the courts in both these states based their decisions on similar constitutional principles. Since the constitutional principles employed are similar, it follows that the dramatically different results stem from a markedly different application of these principles in the two states.

IV. Defining Municipal Responsibility

Both the *Berenson* and the *Mount Laurel* cases trace the exercise of local zoning power back to the grant of police power by the people to the state government through the adoption of the state constitution. The zoning power delegated to local governments by the state legislature must, by definition, be exercised with the needs of the people of the state as a whole in mind. Both courts have used similar logic to define this obligation. The two courts, however, have chosen different methods of implementing their holdings with respect to exclusionary zoning.

A. *What is the Nature of the Obligation Under these Cases?*

In New Jersey "a developing municipality . . . must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there" which includes the low- and moderate-income residents.[50] The municipality must permit multi-familty housing "as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirements . . . to meet the full panoply of these needs."[51]

In New York "in determining the validity of an ordinance excluding multi-family housing as a permitted use, we must

49. *Id.* at 179, 336 A.2d at 728.
50. *Id.* at 187, 336 A.2d at 731-32.
51. *Id.*

consider the general purposes which the concept of zoning seeks to serve."[52] In excluding new multiple housing, it must be determined whether the town "considered the needs of the region as well as the town for such housing."[53] Thus, New Jersey looks to the categories of people who desire to live in that municipality while in New York one must look beyond the municipality and consider the general needs of the region.

B. *Do All Communities Have These Obligations?*

In both New York and New Jersey, it is principally "developing communities" that must comply with the obligations imposed by these anti-exclusionary zoning cases. For New Jersey, "the general welfare which developing municipalites like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined. . . ."[54] In New York, the *Berenson* line of cases has similarly confined itself to developing communities.[55] The logic behind this limitation is straightforward. "The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago. . . ."[56]

In New Jersey, the court relied on the New Jersey State Development Guide Plan [57] (SDGP) as the method for deter-

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52. Berenson v. Town of New Castle, 38 N.Y.2d 102, 109, 341 N.E.2d 236, 241, 378 N.Y.S.2d 672, 680 (1975).

53. *Id.* at 111, 341 N.E.2d at 243, 378 N.Y.S. at 681.

54. *Mount Laurel I*, 67 N.J. at 179, 336 A.2d at 727-28.

55. "In view of the fact that the Town of Pompey, unlike New Castle, is concededly not a developing community . . . we agree that the *Berenson* test need not be applied in the instant case." Town of Pompey v. Parker, 53 A.D.2d 125, 127, 385 N.Y.S.2d 959, 962 (1976), *aff'd*, 44 N.Y.2d 805, 377 N.E.2d 741, 406 N.Y.S.2d 287 (1978).

56. Duffcon Concrete Prods. v. Borough of Cresskill, 1 N.J. 509, 513, 64 A.2d 347, 350 (1949) (cited in Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 177, 336 A.2d 713, 726-727 (1975)(*Mount Laurel I*)).

57. New Jersey Division of State and Regional Planning, State Development Guide Plan (May 1980). The state legislature had authorized the creation of the State Development Guide Plan (SDGP) "for the future improvement and development of the State." 1961 N.J. Laws c. 47 § 15(a)(2). In 1985 the New Jersey legislature amended that act, requiring a new plan be developed, a "State Development and Redevelopment Guide Plan." 1985 N.J. Sess. Law Serv. c. 398, § 1 (codified at N.J.

mining which municipalities have an obligation to meet the *Mount Laurel* mandate. The SDGP has been used to guide state investment policies, capital growth strategies, program policies, and to determine, in general, where growth should be encouraged and discouraged. In the court's view, the SDGP clearly sets forth "the state's policy as to where growth should be encouraged and discouraged, . . . [and] effectively serve[s] as a blueprint for the implementation of the *Mount Laurel* doctrine."[58] In New York, no uniform method has been adopted to determine which municipalities are developing in order to meet the *Berenson* obligation. As in *Town of Pompey v. Parker*,[59] these decisions are being made on a case by case basis, in the absense of a regional or statewide standards such as those relied upon in New Jersey.

In many developing communities the argument is made that lower income, higher density housing has negative environmental impacts. A town may purport that it's potential for growth is "limited because of its environmental setting and rural characteristics."[60] Other arguments include the assertion that "[t]here are no sewers and no water lines, many of the roads are unpaved. . . ."[61] However, in most instances, the possible negative environmental impact of a specific development can be provided for and mitigated by proper municipal and site planning.

The real issue is what type of growth a municipality will permit. With sophisticated new zoning and development techniques such as cluster and planned-unit development, on-site systems and buffering techniques, housing affordability and environmental conservation can be harmonious objectives. The impetus of *Mount Laurel* and *Berenson* is one additional force that invites more careful and considered planning at the

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Stat. Ann. § 52:18A-196 (West 1985)). This document will replace the SDGP.

58. Southern Burlington County NAACP v. Mount Laurel, 92 N.J. 158, 236, 456 A.2d 390, 440 (1983)(*Mount Laurel II*).

59. 53 A.D.2d 125, 385 N.Y.S.2d 959 (1976), *aff'd*, 44 N.Y.2d 805, 377 N.E.2d 741, 406 N.Y.S.2d 287 (1978).

60. Brown, *County Effort on Zoning Meets Resistance*, N.Y. Times, March 22, 1987, § 8 (Real Estate), at 13, col. 1 (Westchester ed.).

61. *Id.*

local level. In many circumstances, large-lot single-family housing, the preferred zoning in many communities, is ineffective in preserving environmental quality. Higher density, clustered developments, the type preferred by developers, allows for the preservation of valuable open space, for the prevention of environmental contamination, the elimination of septic fields, and the limitation of traffic hazards. Leftover notions of the negative impact of density development that come from the traditional grid-pattern zoning no longer militate against high density development.[62]

C. *How are Regional Housing Needs Defined?*

The 1975 *Mount Laurel I* decision defined a developing municipality's obligation to afford the opportunity for decent and adequate low- and moderate-income housing to extend at least to "that municipality's fair share of the present and prospective regional need therefor."[63] Subsequent to that decision, there was considerable confusion as to how the region's needs, and the municipality's share of those needs were to be defined, because under *Mount Laurel I* the New Jersey court had not assigned a numerical fair share to each developing community. The two hundred page *Mount Laurel II* decision was a reaction by the court to the lack of progress under the relatively general standards adopted by the court under *Mount Laurel I*. The *Mount Laurel II* court addressed these issues frontally. First, it decided that each municipality must be assigned a numerical fair share of its region's need.[64] Second, it defined the need strictly in terms of low- and moderate-income housing, and further defined low and moderate by adopting the standards used for federal housing subsidy programs.[65] Third, it defined "region" as " 'that general area

62. *See* Stever, *A Brief Essay on Inclusionary Zoning and Environmental Zoning*, 4 Pace Envt'l L. Rev. 157 (1986).

63. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 174, 336 A.2d 713, 724, *cert. denied*, 423 U.S. 808 (1975)(*Mount Laurel*).

64. Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 220-23, 456 A.2d 390, 421-22 (1983)(*Mount Laurel II*).

65. *Id.* at 221 n.8, 456 A.2d at 421 n.8.

which constitutes, more or less, the housing market area of which the subject municipality is a part, and from which the prospective population of the municipality would substantially be drawn, in the absence of exclusionary zoning.' "[66] Fourth, it established broad guidelines for defining a fair share methodology by indicating that a formula that was based on projected employment and ratables would be favored.[67]

The *Mount Laurel II* court understood that even these specific guidelines would need greater definition. The task of making these standards more specific was divided into three steps: first, determination of a region; second, an assessment of the housing need in the region; and third, an allocation of that need. The court provided for the completion of these steps by assigning three judges to hear all *Mount Laurel II* cases throughout the state.[68] It was the court's intent that this would result in the relatively early and "fairly consistent determination" of regions and regional needs.[69]

It is important to emphasize that the venture of the New Jersey judiciary into this relatively uncharted area was the result of the court's great frustration with the lack of local compliance with the *Mount Laurel I* decision.

> After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor. Mount Laurel is not alone; we believe that there is widespread non-compliance with the constitutional mandate of our original opinion in this case.[70]

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66. *Id.* at 256, 456 A.2d at 440 (quoting Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 537, 371 A.2d 1192, 1219).

67. *Id.* at 248-58, 456 A.2d at 436-41.

68. *Id.* at 216, 456 A.2d at 419.

69. *Id.*

70. *Id.* at 198, 456 A.2d at 410.

In New York, the *Berenson* courts have rejected any notion of assigning a numerical fair share to an exclusionary municipality. "[T]he Court of Appeals [in 1975] impliedly held that New Castle per se did not have to bear any 'fair share' of any such housing burden."[71] Instead, the *Berenson* doctrine is, that the courts are to "assess the reasonableness of what the locality has done,"[72] in light of present and foreseeable local and regional housing needs. Then in the 1983 *Blitz* decision, the appellate division articulated yet another standard called the "expected proportionate share" doctrine.[73] Here the judicial inquiry should be "whether [a town's] provisions for housing are at all commensurate with some general notion of its expected contribution to the regional housing need."[74] By reviewing the evidence submitted in the second *Berenson* case and the *Blitz* case, it can be implied that the housing region, at least in Westchester County, is the entire county as affected by the overall housing demand in the metropolitan area. This general definition of the region has not undergone further refinement in New York.

Emerging from the *Berenson* line of cases, is an understanding of the extreme importance placed on an evidentiary development of the actual, provable housing need in the applicable region. The New York courts assess the reasonableness of what a municipality has done with its zoning ordinance. In so doing, they give a presumption of validity to the constitutionality of the zoning ordinance, and then require those challenging the ordinance to bear the burden of proving its lack of reasonableness. This burden can be overcome by proving that the locality's share of unmet regional and local housing needs is not accommodated by its present zoning ordinance.

The holding of the 1979 *Berenson* case, which was written four years before the *Mount Laurel II* decision, relied heavily

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71. Berenson v. Town of New Castle, 67 A.D.2d 506, 522, 415 N.Y.S.2d 669, 679 (1983).

72. 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).

73. Blitz v. Town of New Castle, 94 A.D.2d 92, 98, 463 N.Y.S.2d 832, 836 (1983).

74. *Id.* at 98, 463 N.Y.S.2d at 836.

on the fact that no court had ever required that concrete figures be specially found or imposed by judicial fiat. "The [*Oakwood at Madison*] court held that numerical housing quotas . . . were not realistically translatable into specific substantive zoning amendments. . . ."[75] Ironically, it was the lack of action in New Jersey under the general guidelines then incorporated into its earlier decisions, that led the *Mount Laurel II* court in 1983 to assign specific numerical fair share responsibility to offending municipalities.

D. *What Relevance is Given To Legislative Definitions of Housing Needs?*

In both New York and New Jersey, the courts have deferred to legislative and governmental policies with respect to zoning. In the original *Berenson* case, for example, the New York Court of Appeals wrote that:

> Zoning . . . is essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the Legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning. . . . Until the day comes when regional, rather than local, governmental units can make such determinations, the courts must assess the reasonableness of what the locality has done.[76]

This attitude of deference, as articulated in *Berenson*, has continued in cases concerning exclusionary zoning in New York.[77] In New Jersey, the *Mount Laurel II* court adopted the

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75. *Berenson*, 67 A.D.2d at 517, 415 N.Y.S.2d at 676 (quoting Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 499, 371 A.2d 1192, 1200 (1977)).

76. *Berenson*, 38 N.Y.2d at 111, 341 N.E.2d at 243, 378 N.Y.S.2d at 682.

77. In the *Blitz* case, legislative definitions of regional housing needs were given greater weight.

> The town urges that the county housing policy, with its stated goal of 50,000 new housing units . . . should carry with it the same presumption of validity as any other legislative act; . . . . We agree with the town that the 50,000-unit goal is presumptively valid and the evidence at trial clearly established the rationality and soundness of that legislative finding.

State Development Guide Plan (SDGP) as a means of determining which communities have an obligation to meet a fair share of regional needs. By so doing, the court implied that it would have relied on a specific housing need determination that appeared in the SDGP or a similar document prepared by an agency of the state.

E. *Is the Municipality's Obligation Limited to Meeting the Housing Needs of Lower Income People?*

In both New Jersey and New York, the constitutional defect in challenged zoning ordinances has been their tendency to exclude people of limited income. The *Mount Laurel II* court required both a determination of the housing needs of lower income persons and that the municipality's fair share of those needs be met. Lower income was generally defined as income which renders a family eligible for federally subsidized housing programs.[78] This definition of responsibility was a rejection by the *Mount Laurel II* court of its earlier decision to allow municipalities to satisfy their obligations by amending their zoning regulations to render feasible the "least-cost" housing which private industry will undertake. Under *Mount Laurel II*, least-cost housing will only be allowed to satisfy a community's fair share after a showing that no combination of the ordinance's provisions and "other" actions, prove successful in providing housing that could be afforded by lower income people. [79]

Due to the fact that lower income housing has not resulted from the *Berenson* rulings in New York, it is largely thought that the *Berenson* cases are not founded on the provision of lower income housing. However, the 1979 *Berenson* decision reversed the trial court's determination that New Castle must rezone to accommodate three thousand five hundred housing units because its determination was not limited to lower income housing needs. The court stated:

Blitz, 94 A.D.2d at 97, 463 N.Y.S.2d at 835.

78. 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*).

79. *Id.* at 277-78, 456 A.2d at 451-52.

> In point of fact then, the multi-family housing quota of three thousand and five hundred units, adopted by Special Term as New Castle's 'fair share' of regional housing needs is a highly abstract and speculative number. . . . [T]he 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 . . . and was not directly referable to the needs of the low income groups with which the [1975 Berenson] court was primarily concerned. The use of a 'fair share' goal has never been judicially approved in the context of the housing needs of the population at large. Its *raison d'etre* lies in the housing needs of the low and moderate income groups. . . . Moreover, 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.[80]

Thus, the courts in both states have limited their decisions by making it clear that municipalities have an obligation to meet the housing needs of *low-income people,* though the courts postulated different methods for the municipalities to use in carrying out the court's decisions.

F. *How Are Municipalities to Provide for Housing Affordable to Lower Income People?*

New York, under the 1979 *Berenson* decision, incorporated the earlier New Jersey "least-cost" housing concept. Least-cost housing has been defined as housing that can be constructed after the removal of "all excessive restrictions and exactions and after a thorough use by a municipality of all affirmative devices that might lower costs."[81] In *Berenson,* when the court adopted the least-cost method, it stated that:

> [W]hile not sufficient to save the zoning ordinance from

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80. Berenson v. Town of New Castle, 67 A.D.2d 506, 520-21, 415 N.Y.S.2d 669, 678 (1979)(emphasis in original).

81. *Mount Laurel II,* 92 N.J. at 277, 456 A.2d at 451.

> invalidation, 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 sizeable quantities. Indeed, the New Jersey Supreme Court's subsequent focus upon 'least-cost' housing as opposed to *low-income* housing is attributable to its recognition that it will be virtually impossible to provide large amounts of newly constructed housing for the economially less fortunate in the foreseeable future.[82]

Thus, New York found the *Madison*[83] rationale concerning least cost more appropriate in application than other theories postulated for providing low-income housing.

As noted, the *Mount Laurel II* court greatly modified its allowance for "least-cost" solutions by limiting its use to situations where no combination of actions proves capable of providing housing actually affordable to lower income persons.[84] In part, this change is based on the rejection of the notion that middle-income, or least-cost housing would eventually filter down to the poor. The principal technique now relied on in New Jersey is rezoning that provides density bonuses in exchange for the provision of lower income housing. The amount of lower income housing to be provided is suggested by the court to be twenty percent of the total to be constructed.[85] A developer is to be awarded additional density, which in turn, allows him to build and market more housing units than permitted by the underlying zoning. This technique allows for the production of lower income housing because a portion of the value added by the density bonus is used to reduce the price of the lower income units. Additionally, the units can be

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82. *Berenson*, 67 A.D.2d at 521, 415 N.Y.S.2d at 678. *See* Oakwood at Madison v. Township of Madison, 72 N.J. 481, 510-14, 371 A.2d 1192, 1206-08 (1977).

83. *Berenson*, 67 A.D.2d at 517, 415 N.Y.S.2d at 676 (quoting Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 499, 371 A.2d 1192, 1200 (1977)).

84. *See supra* p. 18.

85. *Mount Laurel II*, 92 N.J. at 279 n.37, 456 A.2d at 452 n.37.

priced so that the market rate houses bear all the land costs and a high proportion of the infrastructure costs. The experience under *Mount Laurel II* suggests that sufficient value can be added and other costs reduced by this technique to reduce the cost of the lower income units so they are affordable to lower income households. The recent results in New Jersey under *Mount Laurel II* using this density bonus technique counter the New York court's assertion that "it will be virtually impossible to provide large amounts of newly constructed housing for the economically less fortunate . . . ."[86]

G. *What Specific Actions Must Municipalities Take Under These Inclusionary Zoning Cases?*

Mount Laurel II required that developing New Jersey communities employ a number of affirmative steps to provide lower income housing. First, they must rezone sufficient land at higher densities. Although the court understood that higher densities are often a prerequisite for affordability, it also understood that higher density zoning, alone, seldom produces affordable lower income housing.[87] Second, zoning ordinances must be amended to remove cost generating restrictions and exactions, and to include density bonuses, mandatory lower income set-aside requirements,[88] or mobile home construction.[89] To maintain the affordability of these units on rerental or resale, the court sanctioned the use of rent controls and resale price controls.[90] Third, the court indicated that

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86. *Berenson*, 67 A.D.2d at 521, 415 N.Y.S.2d at 678.

The use of density bonuses in New Jersey since the *Mount Laurel II* decision in 1983 has produced remarkable results. According to a recent study carried out in a three-county area in central New Jersey, a total of 1,754 units of low- and moderate-income housing units were occupied, being built, approved or pending approval. *See* Kinsey & Hand, *supra* note 3. The study showed that lower-income units were being provided in eleven of the seventeen townships in the three-county area. In the three years since *Mount Laurel II*, more lower-income housing was being provided than in fifty years of federal housing subsidy programs, which had in this area been responsible for only 1,334 units of affordable housing. *Id.*

87. *Mount Laurel II*, 92 N.J. at 261, 456 A.2d at 443.

88. *Id.* at 267-74, 456 A.2d at 446-50.

89. *Id.* at 274-77, 456 A.2d at 450-51.

90. *Id.* at 269, 456 A.2d at 447.

"[w]here appropriate, municipalities should provide a realistic opportunity for housing through other municipal action inextricably related to land regulations."[91] Such actions could include granting a tax abatement where it is a prerequisite for a housing subsidy, passing resolutions required for a project to qualify for tax-exempt financing, or participating in the federal community development block grant program. The court did not go on to require municipal funding of supportive infrastructure, an issue that is still open under *Mount Laurel II*. Thus, the New Jersey court has decided to require municipalities to act aggressively and affirmatively to insure that lower income units are actually constructed.[92] By contrast, the New York rule is more passive:

> [Z]oning ordinances will go no further than determining what *may* or may not be built; . . . in the absence of government subsidies. Thus, in terms of low-to-moderate income rental housing—generally conceded to the most pressing need . . . even the most liberal zoning ordinance, in the absence of affirmative governmental action to shift the balance of market forces, will have no success in promoting such housing construction.[93]

There is, however, some recognition in the *Berenson* line of cases that what is achievable in New Jersey will work in New York. The 1979 *Berenson* court held the door open for more aggressive judicial action if New Castle continued to act in bad faith. It indicated that New York courts may give explicit, qualitative instructions to guide the municipality in its rezoning.[94] The *Berenson* court cited the New Jersey *Oak-*

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91. *Id.* at 264, 456 A.2d at 444.

92. The potential envisioned by the *Mount Laurel II* mandate is currently being realized as the number of actual low- and moderate-income units constructed in New Jersey dramatically increases.

93. Blitz v. Town of New Castle, 94 A.D.2d 92, 99, 463 N.Y.S.2d 832, 836 (1983). The case was decided by the appellate division just six months after the New Jersey Supreme Court adopted a wholly different view of the extent to which zoning ordinance revisions can go in creating lower income housing.

94. *See* Berenson v. Town of New Castle, 67 A.D.2d 506, 518, 415 N.Y.S.2d 669, 676 (1979).

wood at Madison, Inc. v. Township of Madison[95] case as illustrative of what courts in New York might do. In *Madison,* the court directed the township to allocate substantial land areas for small-lot single-family houses, and to substantially enlarge the areas for small-lot single-family houses.[96] In addition, the township was ordered to substantially enlarge the multi-family apartment district, to modify building restrictions in various districts, and to eliminate undue cost-generating restrictions. There appears to be no reason in such a case why a court in New York could not go on to specify density bonuses, set-asides, and mobile homes, if it were shown that such techniques were needed to accomplish the purpose of providing housing affordable to lower income households.

H. *What Remedies Will the Court Use for Invalid Zoning?*

Mount Laurel II employed three remedies. First, the developer who brings a successful exclusionary zoning suit will ordinarily be authorized to construct his project. This is called the "builder's remedy."[97] Second, the court may employ a

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95. 72 N.J. 481, 371 A.2d 1192 (1977).

96. *Id.* at 553, 371 A.2d at 1228.

97. Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 279-81, 456 A.2d 390, 452-53 (1983)(*Mount Laurel II*).

In 1985 the New Jersey legislature passed a Fair Housing Act, which imposed a legisaltive moratorium on the "builder's remedy." 1985 N.J. Sess. Law Serv. ch. 222 § 28 (codified at N.J. Stat. Ann. § 52:27D-328 (West 1986)). The moratorium applied to exclusionary zoning litigation which had been filed after January 20, 1983, unless a final judgment providing for a builder's remedy had already beeen rendered for the developer. *Id.* This moratorium terminates upon municipalities adopting resolutions to submit a fair share housing plan to the agency created by the act (the Council on Affordable Housing); submitting a "housing element" to that agency; and submitting any fair share housing ordinances which have been enacted. N.J. Stat. Ann. § 52:27D-309 (West 1986). The minimum statutory period given for the municipalities to submit such documentation was nine months. At the end of that period the moratorium would be terminated. This provision in the Act was then attacked as being unconstitutional, the plaintiffs arguing that the provision usurped the judiciary's exclusive powers to provide relief. The New Jersey Supreme Court found that the section was constitutional: total preclusion of the builders remedy had not occurred; "and most importantly, we have never elevated the judicially created builder's remedy, in particular, to the level of a constitutionally protected right." The Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 46, 510 A.2d 621, 645 (1986). That case is commonly known as *Mount Laurel III.*

master (an expert), after a trial in which a zoning ordinance has been invalidated.[98] The master's role is to work with the offending municipality and the plaintiff to negotiate the requirements of a new zoning ordinance. Third, where a municipality fails to adopt a satisfactory ordinance on its own, the court can issue orders requiring adoption of specific ordinances, imposing moratoria on other development, invalidating other ordinances or regulations, or requiring approval of particular applications to construct housing, including lower income units.

The *Berenson* line of cases has also identified a number of remedies. As in *Mount Laurel, Berenson* adopted the builder's remedy which awards the plaintiff developer a rezoning for higher density, multi-family development.[99] Another remedy is that the zoning ordinance may be declared unconstitutionally exclusionary, and that the municipality may be instructed to rezone to cure the constitutional defect and to accomodate its share of the regional housing need.[100] Finally, courts may retain jurisdiction of such cases to order more comprehensive relief if the local legislative body fails to act in good faith.[101]

V. The Major Unresolved Issues in New York

There are several issues to be resolved by the New York courts in the coming year. The appeals of *Suffolk Housing Services* and *Asian American* provide the court with a unique opportunity to explain its earlier reasoning in the *Berenson* and *Kurzius* decisions. The *Asian American* decision is particularly important because that court has specifically embraced the *Mount Laurel* obligation. The issues presented in the lower court decisions involve a web of considerations,

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98. *Mount Laurel II*, 92 N.J. at 281-85, 456 A.2d at 453-55.

99. Unpublished opinion, Westchester County Sup. Ct. (Dec. 30, 1977), *dicussed in* Berenson v. Town of New Castle, 67 A.D.2d, 506, 507, 415 N.Y.S. 669, 670 (1979).

100. Berenson v. Town of New Castle, 67 A.D.2d 506, 523-24, 415 N.Y.S.2d 669, 680 (1979). *See also* Blitz v. Town of New Castle, 94 A.D.2d 92, 96-98, 463 N.Y.S.2d 832, 834-36 (1983).

101. *Berenson*, 67 A.D.2d at 523-24 n.2, 415 N.Y.S.2d at 680 n.2.

which are best addressed as a whole.

The first issue is the basic view of judicial responsibility in reviewing land use matters. What standards should the judiciary use in determining whether local ordinances are constitutional? If local zoning is found to be unconstitutional, how far should the courts go in supervising the process of conforming that zoning with constitutional standards?

The second issue is a practical corollary of the first. Assuming a judicial inclination to prescribe local action, what can be done to actually create affordable housing? Is there evidence that suggests that affirmative land use action can result in truly affordable housing? To the extent that it is perceived by the judiciary that local zoning amendments cannot result in affordable housing, it may be reluctant to place a heavy burden on local governments in that regard.

The third issue has to do with who is to be protected by the judiciary in these cases and how that protection is to be insured. Is the legal obligation primarily focused on providing housing for lower-income people? What mechanisms exist to provide effective remedies for such people? If private developers, who are the plaintiffs in most exclusionary zoning cases, are to be rewarded with zoning changes, how can the court insure that such changes principally benefit lower income people?

The fourth issue is whether the court perceives as practical the task of proving local and regional housing needs, and of defining the extent of each municipality's obligation to meet those needs. Can these matters competently be proved? Can the court supervise the process of defining the local share of established lower-income needs?

Finally, the courts must address the limitations on any burden it may choose to impose on localities. Does the burden, if any is found to exist, apply equally to all communities of whatever size, no matter where located? If not, what standards are to be used to distinguish among them? Are there any economic or environmental standards that should be applied to increase the burden in some instances and decrease it in others?

In resolving these issues on appeal, the court would be

helped by taking a comprehensive view of them all. How far the judiciary will go will likely be influenced by whether the court perceives that the class of persons protected by the constitutional principles at issue in these cases can truly be benefitted by judicial action. Similarly, its view will be influenced by whether it believes that manageable methods exist for defining and allocating need, and pinpointing the responsibility of differently situated municipalities.

VI. Conclusion

There are five key observations made in the foregoing analysis. First, both the *Mount Laurel* and *Berenson* cases are based on similar interpretations of their state constitutions. Both hold that the local zoning power of developing communities must be exercised with the housing needs of the broader region in mind. Both evidence a specific concern for the housing needs of low- and moderate-income households, because of their " 'circumstances of . . . economic helplessness.' "[102] Both hold that the exclusionarily zoned municipalities must accommodate these needs by rezoning which provides for more affordable types of housing.

Second, the specific mandates issued by the two courts are also similar. *Mount Laurel* requires developing municipalities to plan and provide by their land use regulations, a reasonable opportunity for an appropriate variety of choice of housing including low- and moderate-cost housing. *Berenson* provides that a community must show that it has reasonably provided, through its zoning, for the present and the future needs of its residents, and its expected proportionate share of the unmet regional needs.

Third, New Jersey has gone further than New York in articulating the ways in which land use regulations should be exercised to provide greater housing opportunity. For example, frequent references are made in the *Mount Laurel* cases to eliminating "cost generating restrictions and exactions,"[103]

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102. *Berenson*, 67 A.D.2d at 521, 415 N.Y.S.2d at 678 (quoting Pascack Ass'n. v. Mayor & Council of Washington Township, 74 N.J. 470, 480, 379 A.2d 6, 11 (1977)).

103. Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J.

and to using "set-asides," and small-lot zoning.[104] Additionally, the *Mount Laurel II* case exhibited an unprecedented faith in the ability of municipalities, through the exercise ot their land use regulations alone, to create low- and moderate-cost housing.

The *Berenson* doctrine is simply less developed in this regard. To date, the plaintiffs in *Berenson* cases, with the exception of *Brookhaven,* have been developers who have sought authority to build multi-family housing at moderate densities to provide middle to upper income housing. The *Berenson* cases refer primarily to the exclusion of "multi-family housing" as the offending characteristic of challenged ordinances. At the time that the last appellate division *Berenson* case was decided, the "least-cost" doctrine was being followed in New Jersey, and the belief among the New Jersey and New York courts was that the amendment of land use regulation alone was unlikely to produce a significant amount of lower income housing. *Berenson* referenced the New Jersey experience in 1979 and concluded: "it will be virtually impossible to provide large amounts of newly constructed housing for the economically less fortunate in the foreseeable future."[105] Four years later, the least-cost doctrine was all but repudiated in New Jersey and the remarkable record of lower income housing production that has resulted from that change in judicial attitude must be recognized, if not followed, in New York.

Fourth, New Jersey has also been more aggressive than its sister state in defining and allocating responsibility for regional housing need. Through the use of special judges and a broad range of experts, regions are being defined, needs determined, and specific allocations of need are being assigned to developing communities. The *Mount Laurel II* court took these steps because of its impatience with the lack of specific progress in complying with its more general 1975 guidelines. No such system for need determination and allocation exists in New York. In fact, the New York courts have rejected the

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158, 258-59, 456 A.2d 390, 441 (1983)(*Mount Laurel II*).

104. *Id.* at 267-74, 456 A.2d at 446-50.

105. *Berenson,* 67 A.D.2d at 521, 415 N.Y.S.2d at 678.

notion of judically allocating fair share goals to specific communities. It was noted, in the 1979 *Berenson* decision, that no court had ever made a numerical fair share allocation. Here, also, there has been a change in New Jersey. Specific numerical fair shares have been judically mandated and in a relatively short period, zoning to accommodate a large number of lower and middle income units has resulted.

Fifth, although the New York courts may remain firm in their decision regarding the allocation of housing need to individual communities, they have already put in place judicial guidelines for ordering rezoning based on a specific showing of regional needs and of a community's failure to meet its expected proportionate share of those needs. The New York approach is to proceed case by case and to require of its plaintiffs explict proof of regional needs and of local responsibility. Where such proof is not offered, no relief can be expected. The burden of proving the unreasonableness of a zoning ordinance can be met by a showing that unfulfilled regional needs have not been considered or accommodated by that ordinance. Besides the regional need approach, the 1979 *Berenson* court opened the door to the consideration of a "fair share" allocation of lower income housing. The court rejected in that case the evidence presented because it referenced housing need generally, and was not limited to the lower income needs. By linking "fair share" with lower income needs only, the New York Court of Appeals may find this theory of allocation more palitable.

Finally, both courts are reluctantly involved in needs determination and other planning issues because of the lack of assistance with these matters by other branches of government. The New Jersey court effectively used the legislatively sanctioned, and administratively issued, State Development Guide Plan as the overall structure for implementing its mandates. Under *Berenson*, regional and state legislators and planners have been called on to define needs and responsibilities. A county planner's testimony has been relied on to determine local compliance with regional needs, and a county housing goal has been given a presumption of legislative validity.

In the absence of effective guidance by county, regional

and state officials, these important land use decisions will continue to be decided by the vagaries of litigation. Particularly in New York, the future use and effect of *Berenson* will be determined primarily by those who decide to initiate litigation under this line of cases, and the purposes for which such suits are brought.

VII. Postscript

A. *Introduction*

On June 11, 1987, the New York Court of Appeals affirmed the decision of the appellate division in *Suffolk Housing Services v. Town Of Brookhaven,*[106] dismissing the complaint.[107] Chief Judge Wachtler, writing for a unanimous court,[108] stated that "[i]n view of the affirmed factual findings"[109] this court declines taking "the legislative action urged by plaintiffs in the context of this lawsuit."[110]

B. *Case Background*

The plaintiffs, before the court of appeals, sought a judgment which would "among other things, declare the zoning ordinance of the Town of Brookhaven void in its entirety because of the Town's failure to exercise its zoning power . . . to enable development of sufficient low-cost shelter."[111] They also wished to obtain an order which would force the Town of Brookhaven to "take affirmative action to rectify the perceived housing shortage."[112] To achieve this the plaintiffs had "originally contended that the Town ordinance itself contained several exclusionary devises."[113] However, on appeal

106. 109 A.D.2d 323, 491 N.Y.S.2d 396 (9185).

107. Suffolk Hous. Servs. v. Town of Brookhaven, No. 87-150, slip op. at 6 (Ct. App. N.Y. June 11, 1987).

108. Opinion by Chief Judge Wachtler. Judges Simons, Kaye, Hancock and Bellacosa concurred. Judge Alexander concurred in the result only. Judge Titone took no part in the decision. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* slip op. at 1.

112. *Id.*

113. *Id.* slip op. at 2.

they conceded "that the ordinance 'on its face does not betray the Town's opposition' to low-income, multi-familty housing."[114] Thus, their core contention before the court of appeals was that "the Town [had] impeded low income housing through its *implementation* of the ordinance."[115] The proof presented by the plaintiffs in support of this contention was "that a developer wishing to construct any housing other than a single-family dwelling obtain a special permit."[116]

C. *Court of Appeals Decision*

In this case the New York Court of Appeals concluded that its scope of review was limited by the affirmed factual findings,[117] thus, it did not have to address the issue of whether the Town of Brookhaven's zoning ordinances met the standard's established by *Berenson.*[118] The record before the court substantiated the fact that "numerous developer applications for multi-family and subsidized housing were approved despite the special permit procedures."[119] In addition, the court found that the reason for the inadequate response to the need for low-cost multi-family housing was not the alleged chilling effect of the application procedures but the fact that

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114. *Id.*

115. *Id.*

116. *Id.*

> Under the Brookhaven zoning scheme, a developer may apply for permission to "cluster" developments in single-family residential districts ("the section 281" application). . . . Only after public hearing may the Town Board by resolution grant the developer permission to build multi-family housing at desities already allowed in the underlying single-family zone. Alternatively, a developer may apply for rezoning to on of the two multi-family (MF-1 and MF-2) districts — a process that allows development at densities higher than those allowed in the single-family zone, but, according to plaintiffs, like the "section 281" application, exposes approval of project to vehement community opposition. The plaintiffs allege that the failure of the Town to "premap. . . inflates the cost of housing because a developer must submit to a protracted and expensive approval process; and, second, the process usually ends in failure because the Town zoning board inevitably bows to strong public sentiment against low-cost housing projects.

Id. slip op. at 2-3.

117. *Id.* slip op. at 4.

118. *Id.*

119. *Id.*

developers did not wish to undertake these types of projects because of the lack of monetary return.[120] The court, in sum, found that the plaintiffs "failed to demostrate that [the] efforts by the Town caused the claimed shortage of shelter."[121]

The court distinguished the issues presented in the instant case from those in *Berenson* and concluded that the application of the *Berenson* doctrine was inappropriate. "In *Berenson,* plaintiffs challenged only the facial validity of a *per se* exclusion of multi-family dwellings from a zoning ordinance. . . . Plaintiffs here [Suffolk Housing Services] challeng[ed] not facial validity, but [the] legitimate implementation of the ordinance."[122] Though the court did not delve into a *Berenson* analysis, it felt compelled to remind the plaintiffs, and thus the New York legal community at large: first, that zoning was essentially a legislative task;[123] and, second, that when reviewing such claims as presented in this case, the court desired a more particularized claim directed at a specific parcel of land.[124]

In conclusion, the court stated that "although it affirmed the dismissal of the complaint, the decision [should not] be read as revealing hostility to breaking down even unconstitutional zoning barriers that frustrate the deep human yearning of low-income and minority groups for decent housing they can afford in decent surroundings."[125] The court stressed that

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* "Zoning, we have already recognized, is an essentially legislative task, and it is therefore anomalous that courts should be required to perform the tasks of a regional planner." *Id.* (citations omitted).

124. *Id.* slip op. at 5.

> The desirability of a more particularized claim directed at specific parcel of land or project or plan for housing is apparent from our cases. Historically, the law of zoning in this State had been concerned with development of *individual* plats. . . . In more recent years, we have required a regional approach — the considered balance of development of the individual parcel with implementation of a comprehensive plan, taking into account community needs. . . counterbalancing the parochial tendencies of local planning boards to insulate their communities from an influx of "less desirable" residents.

Id. (citations omitted).

125. *Id.* slip op. at 6.

due to the "abstract character of the case"[126] no other decision could be rendered except the drastic solution proposed by plaintiffs of "essentially legislative interference by the judiciary"[127] which the New York Court of Appeals felt compelled to reject.[128]

D. *Author's Comments*

We see, in this case, a continuation of the tendency in New York to place a heavy burden of proof on those who challenge the validity of local zoning. We also see the state's highest court suggesting that future exclusionary zoning litigation be focused more narrowly on specific parcels of land and be brought by plaintiffs who have a direct interest in what happens on that land.

This case, decided on June 11, 1987, follows by a few weeks the First Department Appellate Division's reversal of the supreme court's adoption of *Mount Laurel* in *Asian Americans for Equality v. Koch.*[129] In essence, the Appellate Division found no comparison between the facts of *Mount Laurel* and those involved in New York City. The court concluded that, as a whole, New York City's zoning provides for a properly balanced and well ordered plan for the community as required by *Berenson.*[130]

These recent decisions, handed down after the text of this article was completed, suggest that there is significant resistance in New York to the comprehensive approach taken in New Jersey. Apparently, in New York, the exclusionary zoning issue will continue to be decided on a case by case basis, with a heavy emphasis on competent proof, and on particularized claims and remedies. The critical issues, summarized

126. *Id.*

127. *Id.*

128. *Id.*

129. Asian Americans for Equality v. Koch, ____ A.D.2d ____, 514 N.Y.S.2d 939 (1987).

130. *Id.* at ____, 514 N.Y.S.2d at 951-952.

above, remain open for the courts to address as plaintiffs follow the new paths, as well as that blazed by the New Jersey judiciary.