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Berenson: An Obligation Undefined is An Obligation Unfulfilled

George M. Raymond*

I. The Need for Re-evaluation

More than ten years after New York's highest court in *Berenson v. Town of New Castle*,¹ placed an obligation on each community in the state to adequately fulfill its present and future housing needs² plus give consideration to regional housing needs and the requirements in enacting zoning ordinances,³ local planning is no nearer to the realization of "properly balanced and well ordered plan[s]"⁴ today than in 1975. In Westchester County, New York, the birthplace of the *Berenson* doctrine, the years since that decision was handed down have seen the emergence of a "gridlock" caused by soaring office space development and the "dreadful record of housing production" in the county. The county's resulting inability to expand its resident work force has caused its ratio of employed individuals to total population to become ten percent higher than in either the state or the nation, thus ex-

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1. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

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

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

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

hausting the availability of new workers within the county.⁵ This, in turn, has posed a "threat to Westchester's economic future" which is recognized as serious even by the decision makers "[i]n the glittering headquarters of . . . [its] major companies"⁶ It is particularly notable that the county in which this housing debacle is occurring is the very one that was used in *Berenson* as the "region" whose needs were supposed to have been considered by all of its communities in their zoning!

While in 1975, the issue which triggered *Berenson* was the reluctance of many communities in the county to permit any multi-family housing in their zoning, events since then have sharpened the fact that the housing that is being built totally fails to serve the needs of any but the higher income consumers. As the Westchester County Department of Planning has noted, the housing shortage has undergone a metamorphosis whereby it is no longer a problem affecting the poor.⁷ According to the Westchester County Real Estate Board, the average single-family detached house price in that county in mid-1986 exceeded \$300,000⁸; the median was \$257,000.⁹ Condominium apartments sold for an average of upwards of \$160,000,¹⁰ with the median just below that figure.¹¹ The housing which was built on the *Berenson* tract itself consists of one hundred and seventy-seven units which were originally priced at between \$177,000 and \$260,000.¹²

The fact that lower income housing did not result after *Berenson* was clearly foreseen by the New York Appellate Division, on remand from the New York Court of Appeals. That court found that the original decision provided no assurance

5. Westchester County Department of Planning, *The Housing Lockout; Its Westchester's Business to Find The Key!* (Spring 1984).

6. *Id.*

7. *Id.*

8. Westchester Multiple Listing Service, Inc., *Quarterly Sales Report* (Second Quarter 1986).

9. *Id.*

10. *Id.*

11. *Id.*

12. Interview with P. Gilbert Marcurio, Executive Vice-President, Westchester County Board of Realtors (Sept. 1986).

"that any of the multi-family units to be constructed will be anything other than luxury condominiums."¹³ The inescapable conclusion which results is that the prices of the types of dwellings that builders produce in the absence of some compulsion or incentive to do otherwise are grossly out of reach for most households in a county where the most recently determined median income was only approximately thirty thousand dollars per year!¹⁴ As for evidence of the housing needs of low- and moderate-income persons, the New York Appellate Division noted that it "abounds in the record."¹⁵

In the face of this need, one would expect that, to satisfy their constitutional obligation, the county's municipalities would all be in the process of amending their ordinances to accommodate the type of housing required. What is in fact happening, however, is quite the opposite. One after another of the county's still underdeveloped towns are adopting development moratoria while revising their zoning ordinances so as to *reduce* the amount of housing that can be built within their boundaries and thus to *increase* the price. The Town of North Salem, which was ordered by the trial court¹⁶ to accommodate two hundred units of multi-family housing in its zoning ordinance including the use of a certain thirty-two acre parcel with a capacity of one hundred and four units, recently amended its zoning ordinance (upon the recommendation of the Planning Board) to rezone that parcel back to its previous two acre minimum single-family detached house use classification.¹⁷ In addition, the new ordinance increases from two to four acres the minimum lot area requirement for most of the remainder of North Salem's useable but still undeveloped

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

14. For four-person households in 1985.

15. *Berenson*, 67 A.D.2d at 519, 415 N.Y.S.2d at 677. In 1977, when the trial court, on remand from the court of appeals, handed down its judgment ordering that the Town of New Castle to allow multi-family housing to be built, the upper income limit of the group qualifying as low- and moderate-income was \$14,613.

16. *208 E. 30th St. Corp. v. Town of North Salem*, No. 12588/79 (Sup. Ct. Dec. 3, 1980).

17. *Town of North Salem, N.Y., Zoning Ordinance for the Town of North Salem* (Mar. 10, 1987).

land.

The Town of Lewisboro, another underdeveloped municipality, has also recently amended its zoning ordinance so as to reduce the total housing capacity of its vacant land by some six hundred units.¹⁸ Additional reductions are sure to result from the onerous accompanying environmental regulations that restrict the type of land that may be used for purposes of computing permitted density. All this is happening at the very time when, in the adjoining still undeveloped and restrictively zoned Town of Somers, great corporations (Pepsico, IBM and Guerlain Perfumes) are erecting office facilities which will employ five thousand workers when the buildings are completed, and as many as eleven thousand workers within a few years thereafter.

This moratorium syndrome has spread across the county to the Village of Ossining, where the Board of Trustees enacted a moratorium on the heels of a proposal for a six hundred and fifty unit rental housing development, thereby stopping the proposal in its tracks.¹⁹ During the interim provided by the moratorium, the Village Planning Board formulated a proposed amendment to the Village Master Plan which would change the zoning of the thirty-eight acre tract on which the development was proposed to a maximum density of between two and six dwellings per acre. Similarly, the Village of Irvington has enacted a moratorium in response to the filing of an application for ninety-eight single-family houses on one hundred and six acres and is working on reducing the currently permitted density of one unit per acre on the site proposed for that development.²⁰ The Village of Tarrytown has also enacted a moratorium on all construction other than single-fam-

18. Town of Lewisboro, N.Y., Zoning Ordinance for the Town of Lewisboro (Nov. 3, 1986).

19. Village of Ossining, N.Y., Local Law No. 3 (May 7, 1986). This occurred despite the intervention of Westchester County's Commissioner of Planning, who wrote that "[t]he creation of 650 units of rental housing would definitely address the issue of non-production of rental housing that has occurred in Westchester since 1974. Since 1974 only 728 non-subsidized rental units have been constructed in the entire County." Letter from Peter Q. Eschweiler to George M. Raymond (May 21, 1986).

20. Village of Irvington, N.Y., Local Law No. 1 (Aug. 19, 1986). The moratorium was extended on March 1, 1987.

ily houses.²¹

Legal actions against recalcitrant municipalities, that would result only in increasing the number of units produced in Westchester County, may only resolve the housing problem which may be affecting the upper-middle income sector of the population. The general scarcity of housing in the region would tend to cause all housing so produced to continue to be priced at the currently prevailing Westchester level. As a result, the Westchester market for more affordable housing would continue to spread deep into Dutchess and Orange Counties, tens of miles and hours of congested traffic away. As for assistance for specifically low- and moderate-income families, and for cities that are struggling under the impact of excessive housing deterioration and overcrowding, these needs would not be addressed at all.

II. Let Not Trees Obscure the Wood

The reason for the lack of progress toward the objectives originally laid down by the New York Court of Appeals lies in the rejection by the New York appellate courts of the need to allocate a specific numerical fair share of the regional housing need to each community which can physically absorb the denser kinds of housing (which is the type in shortest supply) without incurring unacceptably high environmental costs, and define the housing obligation as consisting of the need to provide housing for those households whom the free market fails to serve. The court of appeals came close, but then pulled away from such specificity. Its imposition on all municipalities of the obligation to take regional housing needs into consideration in ordering the use of the land within their boundaries was fatally diluted by its absolving them of any specific responsibility "if regional needs are presently provided for in an adequate manner."²² The burden on any challenger of the va-

21. Village of Tarrytown, N.Y., Local Law No. 8 (Dec. 16, 1985). The moratorium is currently in effect. It has been renewed every forty-five days since its inception, as recently as March 6, 1987.

22. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 681 (1975).

lidity of a particular zoning ordinance is to prove that others in the region are *not* providing "enough" of the needed housing "or land to build such units to satisfy [the defendant's] . . . need as well as their own."²³ This is simply too crushing a burden in the absence of guidelines which identify not only what constitutes a "region," but also as to whose needs must be met and what constitutes an acceptable level of compliance.

Plaintiff's experts are called upon to do a monumental task. They must:

- (1) marshal evidence on a case by case basis;
 - (2) attempt to delineate a "region" using data that can be interpreted in a multiplicity of ways;
 - (3) determine what constitutes the regional need;
 - (4) determine the responsibility of the particular municipality toward its satisfaction;
 - (5) determine, in each of possibly many dozens of municipalities that comprise the region, vacancy rates, zoned capacities, and likelihood of construction of the type of housing for which the subject municipality, while responsible, makes no provision; and
 - (6) present a sufficiently strong case to overcome the contrary evidence marshalled by the defendant's experts which has the advantage of being bolstered by the presumption of validity attendant upon local legislative determinations.
- It is totally beyond any reasonable expectation that such a task can be accomplished by mere mortals! The reason why this is so can best be understood by a brief survey of the recent course of events in the neighboring State of New Jersey.

In 1975, the Supreme Court of New Jersey (which is that state's highest court) established in *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*²⁴ that a municipal zoning ordinance excluding housing for

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

24. 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975). That decision is universally referred to as *Mount Laurel I*, to distinguish it from the New Jersey Supreme Court's second opinion in a return of that case, handed down in 1983. *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983). That case is commonly referred to as *Mount Laurel II*.

lower income people was unconstitutional.²⁵ Two years after *Mount Laurel I*, the New Jersey Supreme Court in *Oakwood at Madison, Inc. v. Township of Madison*,²⁶ attempted to explain some its thinking by ruling

that 'fair share' allocations need not be 'precise' or based on 'specific formulae' to win judicial approval. Instead, . . . a court should look to the 'substance' of a challenged zoning ordinance and the *bona fide* efforts' of a municipality to remove exclusionary barriers in order to determine whether that municipality had met its . . . burden.²⁷

In the absence of action by the state planning agency that would divide the entire state into regions, the *Madison* court agreed with the trial court's definition of "region" as the "area from which, in view of available employment and transportation, the population of the Township would be drawn, absent invalidly exclusionary zoning."²⁸ Of utmost significance in the decision though, was that it reaffirmed that "municipalities must provide realistic opportunities for their fair share of lower income housing,"²⁹ the court required the Township of Madison to grant density bonuses for the construction of

25. In *Mount Laurel I* the court held that the state constitution required that a zoning ordinance, like any police power enactment, must promote the general welfare. Thus, if a zoning ordinance is contrary to the general welfare, it is "theoretically invalid under the state constitution." *Mount Laurel I*, 67 N.J. at 175, 336 A.2d at 725. The court said that it used the term "theoretical" because it did not consider most land use ordinances to be of "constitutional dimensions." *Id.* However, the "basic importance of housing" to the people raises ordinances restricting housing availability to a constitutional level. *Id.*

Furthermore, *Mount Laurel I*, placed the responsibility for providing a "realistic opportunity" for low- and moderate-income housing only on "developing municipalities." The distinction between "developing" and "non-developing" municipalities was expressly discarded in *Mount Laurel II* in favor of a distinction between municipalities that are located in areas suitable for growth and those that are not. See *infra* notes 64-65 and accompanying text.

26. 72 N.J. 481, 371 A.2d 1192 (1977).

27. *Id.* at 498-99, 371 A.2d at 1200 (citations omitted).

28. *Id.* at 537, 371 A.2d at 1219.

29. *Id.* at 525, 371 A.2d at 1213.

multi-bedroom units.³⁰ The court, however, failed to mandate that the bonus should be sufficient to assure that those units would be affordable for those for whom they were intended. It did emphasize though, that zoning ordinances limited to not precluding the construction of lower income housing would be acceptable *only* in situations where, even with subsidies and affirmative devices, the municipality would be unable to fulfill its constitutional obligation. Nevertheless, *Madison* was widely interpreted as granting universal permission for municipalities to substitute "least-cost" housing³¹ for housing that is, in fact, affordable for lower income households.

Due to the fact that *Madison* failed to clarify the court's previous decision concerning exclusionary zoning, "fair share" allocation and "region," the New Jersey Supreme Court once again tackled these issues in 1983, in *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*.³² The New Jersey Supreme Court admitted that its 1975 decision had left "the resolution of many questions . . . uncertain."³³ Among these it cited the following: "What was the 'region,' and how was it to be determined? How was the 'fair share' to be calculated within that region? Precisely what must that municipality do to 'affirmatively afford' an opportunity for the construction of lower income housing?"³⁴ The Court recognized the need to strengthen, clarify and make easier for public officials, including judges, the application of the *Mount Laurel* doctrine. In furtherance of this objective, among other things, the *Mount Laurel II* court ruled that:

(a) "Every municipality's land use regulations should provide a realistic opportunity for decent housing for at least some part of its resident poor who now occupy dilapidated housing."³⁵ The only exception is where the poor "represent a

30. *Id.* at 517-18, 371 A.2d at 1210.

31. Housing consistent with minimal standards of health and safety built by private developers at the least cost possible without any assistance from public sources. *Id.* at 510-14, 371 A.2d at 1206-08.

32. 92 N.J. 158, 456 A.2d 390 (1983).

33. *Id.* at 205, 456 A.2d at 413.

34. *Id.*

35. *Id.* at 214, 456 A.2d at 418.

disproportionately large segment of the population as compared with the rest of the region.”³⁶

(b) Every municipality will be responsible for providing a realistic opportunity for a specific number of lower income units divided into those “needed immediately as well as the number needed for a reasonable period of time in the future. ‘Numberless’ resolution of the issue based upon a conclusion that the ordinance provides a realistic opportunity for *some* low and moderate income housing will be insufficient.”³⁷

(c) To satisfy its obligation, in addition to purging its ordinances of “unnecessary cost-producing requirements and restrictions,” a municipality must also use “affirmative governmental devices” including density bonuses and mandatory lower-income set-asides, and grant tax abatements if needed to secure federal subsidies.³⁸

Thus, the *Mount Laurel II* court envisioned that the municipalities would realize that they had an obligation to provide affordable housing.³⁹

III. Why the Judiciary Must Act

The New York Appellate Division agreed with the *Madison* court that “the breadth of [the] approach by the experts . . . to the criteria for [allocating] . . . regional housing goals to municipal ‘subregions’ is so great and the pertinent economic and social considerations so diverse as to preclude judicial dictation or acceptance of any one solution as authori-

36. *Id.*

37. *Id.* at 215-16, 456 A.2d at 419 (emphasis in original).

38. *Id.* at 217, 456 A.2d at 419.

39.

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. . . . The obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience, however, that unless a strong judicial hand is used, *Mount Laurel* will not result in housing, but in paper, process, witnesses, trials and appeals.

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

tative.”⁴⁰ The New York court further cited with approval that New Jersey court’s suggestion that the “solution of these complex governmental, sociological and economic problems is ‘much more appropriately a legislative and administrative function rather than a judicial function to be exercised in the disposition of isolated cases.’”⁴¹ No one could possibly disagree with this *desideratum*. The problem, of course, is that state legislatures and executives have shown every evidence that they would rather do anything other than have to puncture their municipalities’ “home rule” defense. For example, in New Jersey, in 1978, one year after *Madison*, pursuant to a sequence of Executive Orders,⁴² the New Jersey Division of State and Regional Planning issued a Statewide Housing Allocation Report.⁴³ Four years later, also by Executive Order, a new administration in Trenton rescinded the previous orders nullifying any regulations adopted and promulgated

40. *Berenson v. Town of New Castle*, 67 A.D.2d 506, 518, 415 N.Y.S.2d 669, 676 (1979) (quoting *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 499, 371 A.2d 1192, 1200 (1977)).

41. *Id.* at 518, 415 N.Y.S.2d at 676 (quoting *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 534, 371 A.2d 1192, 1218 (1977)).

42. Exec. Order No. 35, 1976 N.J. Laws 665 (discussed in *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977)). The executive order directed the State Division of State and Regional Planning to develop “A Statewide Allocation Plan for New Jersey.” *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 531 n.37, 371 A.2d 1192, 1217 n.37 (1977). In particular, the order directed the Division to develop “State housing goals ‘to guide municipalities in adjusting their municipal land use regulations in order to provide a reasonable opportunity for the development of an appropriate variety and choice of housing to meet the needs of the residents of New Jersey.’” *Id.* In its allocation of regional goals, the Division was directed to consider:

1. the extent of housing need in the region;
2. the extent of employment growth or decline;
3. fiscal capacity to absorb the housing goal;
4. availability of appropriate sites for the housing goal;
5. other factors as may be necessary and appropriate.

Id. Later that same year Governor Brendan Byrne postponed hearings and final review of a preliminary version of “A Statewide Housing Allocation Plan for New Jersey” until after November, 1977. Exec. Order No. 46, 1976 N.J. Laws 985 (discussed in *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 531 n.37, 371 A.2d 1192, 1217 n.37 (1977)).

43. New Jersey Division of State and Regional Planning, *A Revised Statewide Housing Allocation Report For New Jersey* (May 1978).

thereunder.⁴⁴

Similarly, following *Berenson*, in 1979, the Westchester County Legislature adopted an official housing policy calling for the provision of fifty thousand housing units (of all types) during the succeeding decade.⁴⁵ Not having the authority to implement this policy, the Board of Legislators called upon all communities in the county to submit voluntarily, within one year, a ten year master plan for housing giving priority to multi-family units.⁴⁶ The aggregate of all the local plans submitted pursuant to this request is purported to have made provision for approximately forty-three thousand units. In fact, however, these local *plans* were ignored by the municipalities in their *zoning*. As a result, in the face of one of the strongest housing markets in many years, the average housing production over the last six years in the county has amounted to only 2,243 dwellings per year, or 48.8 percent of the rate required to implement its official housing policy which itself turned out to have been very conservative given the intervening boom in office construction. The record thus shows that the pressure from municipalities against the imposition of specific mandates by higher levels of government causes their abrogation where they are enacted and their being ignored when the power to impose them is absent.

IV. The Judiciary Can Act Responsibly Where the Legislature Fails to Act

Reacting to the continued shortage of affordable housing in New Jersey, six years after *Madison*, the New Jersey Su-

44. Exec. Order No. 6, 1982 N.J. Laws 925-26 (microfiche).

45. Westchester County Board of Legislators, Westchester County Housing Policy, Res. No. 207-1979, at 3 (Sept. 1979). The Board of Legislators, in making this resolution adopted the findings of a report issued by the Committee on Community Affairs, Health and Hospitals. Committee on Community Affairs, Health and Hospitals, Report Concerning A Housing Policy (Oct. 23, 1978).

The fifty thousand units were deemed needed to provide for existing demand, replacement of lost units and for a "minimal" future growth of one-half of one percent annually.

46. Westchester County Board of Legislators, Westchester County Housing Policy, Res. No. 207-1979, at 5 (Sept. 1979).

preme Court found it necessary to do precisely that from which the *Madison* court had backed away. "In the absence of executive or legislative action to satisfy the constitutional obligation underlying *Mount Laurel*, the judiciary has no choice but to enforce it itself."⁴⁷ The court did this despite its clear perception of the difficulty it faced in attempting to fashion judicial guidelines for the resolution of the "highly controversial economic, sociological and policy questions of innate difficulty and complexity,"⁴⁸ involved in the devising of a housing allocation system. The court continued:

The most troublesome issue in *Mount Laurel* litigation is the determination of fair share. It takes the most time, produces the greatest variety of opinions, and engenders doubt as to the meaning and wisdom of *Mount Laurel*. Determination of fair share has required the resolution of three separate issues: identifying the relevant region, determining its present and prospective housing needs, and allocating those needs to the municipality or municipalities involved. Each of these issues produces a morass of facts, statistics, projections, theories and opinions sufficient to discourage even the staunchest supporters of *Mount Laurel*. The problem is capable of monopolizing counsel's time for years, overwhelming trial courts and undating reviewing courts with a record on review of superhuman dimensions.⁴⁹

Nevertheless, the Court proceeded to do it. As a result, two years into the political earthquake unleashed following *Mount Laurel II*, (by the flood of legal actions that invalidated dozens of manifestly exclusionary local zoning ordinances, resulting in thousands of units being built in locations selected by developers rather than local Planning Boards), the New Jersey State Legislature, with the full support of the same governor who rescinded the earlier Executive Orders estab-

47. *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 252, 456 A.2d 390, 438 (1983)(*Mount Laurel II*).

48. *Id.* at 250, 456 A.2d at 437 (quoting *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 533, 371 A.2d 1192, 1218 (1977)).

49. *Id.* at 1248, 456 A.2d at 436.

lishing a housing allocation system, enacted a Fair Housing Act.⁵⁰

This statute established a Council on Affordable Housing and gave it a clear mandate to promulgate guidelines for delineation of housing regions and the determination of each municipality's present and prospective fair share of the housing need in its region.⁵¹ Under the Act, the municipality is given the choice of either developing a housing element which is certified by the Council on Affordable Housing as providing a realistic opportunity for the development of the housing that comprises its fair share, or being left defenseless in the face of the challenges to its zoning ordinance which are certain to ensue.⁵² Certification of the housing element by the Council must be followed by the adoption of an implementing zoning ordinance within forty-five days.⁵³

Having accomplished the seemingly impossible goal of getting the legislative and administrative branches of state government to act, the New Jersey Supreme Court lived up to its previous statement that it had "always preferred legislative to judicial action in the field . . ."⁵⁴ In a subsequent challenge to the legislative enactment, the court held the Fair Housing Act to be constitutional.⁵⁵ With a few exceptions, it agreed to transfer all matters pending before the courts to the legislatively created Council on Affordable Housing.⁵⁶ In addition, without any "weakening of . . . [its] resolve to enforce the constitutional rights of New Jersey's lower income citizens,"⁵⁷ it agreed that, henceforth, any *Mount Laurel* "proceedings before a court should conform wherever possible to the decisions, criteria, and guidelines of the Council [on Af-

50. 1985 N.J. Session Law Serv. ch. 222 (codified at N.J. Stat. Ann. §§ 52:27D-301 to 52:27D-329 (West 1986)).

51. See N.J. Stat. Ann. §§ 52:27D-305 to 52:27D-329 (West 1986).

52. *Id.* §§ 52:27D-309 to 52:27D-312.

53. *Id.* § 52:27D-314.

54. *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 212, 456 A.2d 390, 417 (1983) (*Mount Laurel I*).

55. *The Hills Dev. Co. v. Township of Bernards*, 103 N.J. 1, 510 A.2d 621 (1986). This decision has been referred to as *Mount Laurel III*.

56. *Id.* at 53, 510 A.2d at 649.

57. *Id.* at 65, 510 A.2d at 655.

fordable Housing]."⁵⁸

A. Determination of Fair Share

To move the resolution of the issue out of the dead end into which it had drifted in the years between the two *Mount Laurel* decisions, the New Jersey Supreme Court cut what had become a genuine Gordian knot. It recognized that, in the absence of legislative and administrative action, the judicial responsibility transcended the enforcement of a clearly identified constitutional obligation, that it had to include within its scope the task of determining what that obligation is. While the court was fully aware that it could not itself divide the state into regions and determine the housing need for each region,⁵⁹ it also recognized that a mandate upon the trial courts to make these determinations in each case would eventually lead to an agreement as to the proper methodology. As the court anticipated, its chosen device of restricting *Mount Laurel* litigation to three judges whose aggregate jurisdictions cover the entire state further accelerated the emergence of an accepted standardized method.⁶⁰

58. *Id.* at 63, 510 A.2d at 654.

59. Indeed, at one point in the subsequent evolution of the methodology used to accomplish this, the "region" was determined to vary as between that which was appropriate for the calculation of the "present" need and that which best reflected the "prospective" need.

60. The way in which the so-called "Warren" methodology (named after the township which was the subject of the first case decided under *Mount Laurel II*) was conceived is worthy of note. In *Urban League of Greater New Brunswick v. Borough of Carteret*, 142 N.J. Super. 11, 359 A.2d 526 (Ch. Div. 1976), *rev'd*, 170 N.J. Super. 461, 406 A.2d 1322 (App. Div. 1979), there were eleven defendant municipalities each being sued by as many as four separate plaintiffs. At the conclusion of one of the case management conferences which was attended by twenty-one professional planners representing the various parties, Superior Court Justice Eugene D. Serpentelli suggested that they get together and attempt to devise a methodology to which they could all subscribe. Rising to the challenge, the planners volunteered, formed a committee and, after three meetings over the succeeding months, produced a report (drafted by its chairperson, Carla L. Lerman). For all practical purposes, except for minor variations due to site-specific conditions and one basic modification in the method of determining "present need," (devised by Superior Court Justice Stephen Skillman, now an Appellate Division Justice, one of the other two *Mount Laurel* judges appointed by the Chief Justice of the Supreme Court) this report formed the basis for the determination of fair share obligations in all the cases tried since by all

The key realization needed to permit forward motion was that there is no possibility of arriving at a scientifically accurate answer to the three basic questions: region, regional need, and municipal fair share. The information upon which one must rely is imperfect, frequently internally inconsistent, and more often than not, obsolete because of the enormous cost of keeping it up to date. As stated in *Mount Laurel II*:

We recognize that the tools for calculating present and prospective need and its allocation are imprecise and further that it is impossible to predict with precision how many units of housing will result from specific ordinances. What is required is the precision of a specific area and specific numbers. They are required not because we think scientific accuracy is possible, but because we believe the requirement is most likely to achieve the goals of *Mount Laurel*.⁶¹

Given the demonstrated overwhelming need for more affordable housing of all types, precision in the making of determinations can be of only academic interest. Regardless of the magnitude of housing allocations required to reflect the local share of the total need, the housing industry would be unable to finance and produce dwellings at a rate capable of seriously reducing the size of the problem for many years. What is needed for any beginning to be made, in addition to the acceptance of the concept of universal constitutional responsibility on the part of all municipalities to contribute to the resolution of the housing problem, is the promulgation of a method that uses available information to produce results that appear to be as worthy of belief as those that might be produced by any other method.

This is, in fact, what the New Jersey courts did. Pursuant

three *Mount Laurel* judges. Throughout, however, all three judges made very clear their readiness to modify any and all formulas used in the face of demonstrably more accurate or logical alternative approaches.

61. *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 257, 456 A.2d 390, 441 (1983) (*Mount Laurel II*).

to the *Mount Laurel II* directive the "Warren" methodology⁶² was developed whereby the overall local housing need was divided into two parts: present need and prospective need. The "present need" represents the local housing that is both occupied by the income-eligible group (up to eighty percent of the regional median, in accordance with the definition of the low- and moderate-income sector of the population by the U.S. Department of Housing and Urban Development) and, physically deficient and/or overcrowded (i.e. occupied by more than one person per room, as determined on the basis of the latest U.S. Census of Housing). The "prospective need" is housing that will be needed to house the increase in income-eligible households expected to materialize over the projection period (set at six years).

The "present need" was determined on the basis of non-overlapping census counts of units that lack adequate plumbing or heating or that are occupied by more than one person per room.⁶³ Every municipality was made responsible for the satisfaction of this need within its boundaries unless such deficient housing represented a higher proportion of its total housing supply than the regional average. Municipalities which were designated by the state pursuant to the State Development Guide Plan⁶⁴ (SDGP) as being unsuited for growth by reason of environmental sensitivity, remoteness from transportation, or the presence of open space or major agricul-

62. See *supra* note 60.

63. In *Berenson* the New York Appellate Division had been concerned with possible overlaps between the categories of substandard and overcrowded housing in defining present need. *Berenson v. Town of New Castle*, 67 A.D.2d 506, 520, 415 N.Y.S.2d 669, 678 (1979). The *Mount Laurel II* court thus resolved that issue. The other category which concerned the appellate division, "cost imbalanced housing" (i.e. standard housing occupied by income-eligible households but priced beyond their means) was not counted as part of either the local or the regional need. Because the number of units in that category is so great, any effort to resolve that problem by existing or foreseeably available means was recognized as being patently unrealistic.

64. New Jersey Division of State and Regional Planning, State Development Guide Plan (May 1980). In 1985 the New Jersey legislature mandated that a "State Development and Redevelopment Plan replace the State Development Guide Plan. The new plan will be used as a 'tool for assessing suitable locations for infrastructure, housing, economic growth and conservation. . .'" 1985 N.J. Session Law Serv. ch. 398, § 1(c) (codified at N.J. Stat. Ann. § 52:18A-196(c)) (West 1985).

tural land resources which the public interest demands be preserved, were allocated no other housing responsibilities.⁶⁵ The determination of the "prospective need" in each region was made on the basis of official county by county demographic projections which are routinely compiled by the New Jersey Department of Labor.

Every municipality located generally within or in the immediate vicinity of major transportation corridors or on the fringes of metropolitan growth (i.e. in the so-called "growth areas" as designated on the SDGP) was allocated its "fair share" of the following: (a) the excess "present need" in the region (i.e. the number of substandard or overcrowded dwelling units in excess of the regional average aggregated for all the municipalities in the region where such excess exists in addition to its own); and (b) the "prospective need," i.e. the housing that will be needed to house the increase in income-eligible households expected to materialize over the projected period.

The "Warren" methodology distinguished the "region" which it deemed appropriate for the allocation of the fair share of the excess "present need" from that used to calculate the local fair share of the "prospective need." The "present need" region was drawn so as to encompass both areas containing older cities that were likely to contain an excessive number of substandard and overcrowded dwellings and communities having large areas of vacant land which could accommodate substantial housing allocations. Since the "prospective need" represents the *future* increase in income eligible households that would probably be attracted by the presence of employment opportunities, the "region" delineated for the purpose of calculating the local fair share thereof was limited to the area within reasonable commuting distance of the municipality. This method thus delineated a different "prospective need" region for each municipality.

Studies by the Rutgers University Center for Urban Policy Research⁶⁶ led to the division of the entire state into six

65. See *Mount Laurel II*, 92 N.J. at 244, 456 A.2d at 434.

66. See, e.g., Center for Urban Policy Research, Rutgers University, *Mount Lau-*

fixed regions which are currently used by the Council on Affordable Housing. All regions are composed of counties in their entirety so as to permit the use of the Department of Labor demographic projections and of other statistical information which is not available on a less-than-county level. It should be noted that none of the regions currently in use in New Jersey encompasses less than three counties and that the largest, and least developed region, encompasses six counties. Unrealistically in New York, in view of the broad interdependency of the housing and employment markets, the *Berenson* case, and especially its sequel, *Blitz v. Town of New Castle*,⁶⁷ considered the region to consist essentially of Westchester County alone.

The above methodology, which with variations, was adopted by the Council on Affordable Housing set up pursuant to the Fair Housing Act, is not offered as a paradigm that should be blindly applied in any other state. It is evidence that, in a state which is no less strongly committed to local "home rule" than the State of New York, firm judicial enforcement of its state constitution⁶⁸ has made possible the quick development of a methodology which has gained general acceptance.

B. *Despite the Housing Mandate, the Courts Need Not be Local Planners*

The New Jersey courts did not attempt in any way to determine the manner in which each community ordered to amend its ordinance would have to comply. With the exception noted below, the choice of areas to be mapped in higher density zoning districts, as well as the density applied in each

rel II: Challenge and Delivery of Low-Cost Housing (1983).

67. 94 A.D.2d 92, 463 N.Y.S.2d 832 (1983).

68. As stated in *Mount Laurel II*:

while we have always preferred legislative to judicial action in this field, we shall continue—until the Legislature acts—to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine. That is our duty. We may not build houses, but we do enforce the Constitution.

Southern Burlington NAACP v. Township of Mount Laurel, 92 N.J. 158, 212-13, 456 A.2d 390, 417 (1983)(*Mount Laurel II*).

case, were left entirely to the localities. This is true, so long as the lands selected had the needed capacity and could reasonably be expected to develop in the near future, and the density selected was sufficient to provide the necessary inducement to developers to include the affordable housing in their developments. The exception deals with "builders' remedies," for example, those instances where, unless the municipality could prove conclusively that doing so would be grossly inappropriate, the court granted the developer whose suit was instrumental in invalidating the local zoning the right to build multi-family housing, with a *Mount Laurel* set-aside, on his land regardless of its prior zoning.⁶⁹

This did not mean that the New Jersey Supreme Court's decision left all municipalities wide open to developer suits without regard to planning considerations. In specific cases, the locality could deny the developer use of his land for higher density development if it could prove that such use would be environmentally harmful or grossly inappropriate from a planning point of view. On a broader scale, the fortuitous promulgation in New Jersey of the SDGP enabled courts to exclude from the lands available for the satisfaction of the *Mount Laurel* obligation those areas where state policy required that growth be discouraged or prohibited.⁷⁰ This was enormously helpful since the boundaries delineated by the state had an official *imprimatur* and since the process which led to their determination had involved the county, local planners and cross-acceptance of the results. It is important to note that the *Mount Laurel II* court condoned with approval large lot zoning and other restrictive planning policies anywhere else in the municipality on lands other than those required for the

69. Except for the requirement that there be a low- and moderate-income housing set-aside, this is what the New York Court of Appeals did in *Berenson*.

70. See, e.g., *Allan-Deane Corp. v. Township of Bedminster*, Nos. L-36896-70 P.W., L-28061-71 P.W. (N.J. Super. Ct. Law Div. Mar. 6, 1980)(Order for Remedy). In *Allan-Deane Corp.*, the Somerset County Planning Board prepared a "County Plan" which designated certain areas as suitable for development, and removed other areas from such consideration. The court, in according relief, mandated that permitted densities be placed only in those areas suitable for growth, as delineated in the "County Plan."

fulfillment of its obligation.⁷¹ The court also offered municipalities protection from any "radical transformation" that might result from its being allocated a fair share number grossly disproportionate with its size and character.⁷² In such instances, the compliance period was to be extended, within reason.

To avoid becoming involved in details of planning techniques and evaluations, the trial courts made almost universal use of planning masters whose role was to assure that the zoning revisions met the goals of *Mount Laurel II*, and to report to the court all instances of local resistance to the fulfillment of the fair share and the elimination of unnecessary restrictions. The use of masters proved to be very successful in settling the inevitable disputes that arose between developers and municipalities, thus saving untold judicial time and costs of continued adversary proceedings in court.⁷³

V. Toward A Solution in New York State

A. *An Effective Doctrine Cannot be Income-Blind*

By definition, the type of housing that is a legitimate concern of other than producers and consumers is that which, under prevailing conditions, cannot be produced by private enterprise at an affordable price or at all due to zoning regulations that directly prohibit it. The New York cases deal only with the latter. In fact, the appellate division itself in *Berenson* concluded that:

71. "[O]nce a community has satisfied its fair share obligation, the *Mount Laurel* doctrine will not restrict other measures, including large-lot and open area zoning, that would maintain its beauty and communal character." *Mount Laurel II*, 92 N.J. at 219, 456 A.2d at 421.

72. *Id.* at 219, 456 A.2d at 420-21.

73. In seven instances in which the writer served as court-appointed master over a period of seven years, not one issue ever escalated to a hearing in court during the development and adoption of an ordinance. This was almost equally true in those cases where his role was continued for the purpose of reporting to the court about any disputes that arose during the process of approval of the developers' applications. A closely reasoned discussion of the desirability of use of masters is found in *Mount Laurel II*. *Id.* at 281-85, 456 A.2d at 453-55.

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'être lies in the housing needs of the low and moderate income groups whose 'circumstances of . . . economic helplessness . . . to find adequate housing . . . [combined with] the wantonness of foreclosing them therefrom by [exclusionary] zoning' impelled the New Jersey Supreme Court to adopt the 'fair share' doctrine in the first instance.⁷⁴

The zoning ordinance of the Town of New Castle had triggered the attention of the courts only because it had made no provision for multi-family dwellings anywhere within its fourteen square mile territory. By contrast, the New Jersey courts, from the very beginning, defined the issue in terms of the income of those households whose housing needs are not being satisfied.

Ever since the United States Housing Act of 1937,⁷⁵ the housing needs of the poor have been addressed through publicly-constructed and subsidized housing. The needs of the lower middle-class were first addressed in the 1960's through adoption of federal legislation providing interest-rate subsidies to developers in exchange for their guaranteeing the affordability of the resulting units.⁷⁶ These types of programs, which produced millions of units over their relatively brief (and confused) life-time, have all but evaporated since the advent of the present national administration, and cannot reasonably be expected to again become a significant factor in the housing market in the foreseeable future.

Recognizing that reliance on the government is no longer applicable, the New Jersey Supreme Court concluded that the needed housing could only be produced in quantity if private

74. *Berenson v. Town of New Castle*, 67 A.D.2d 506, 521, 415 N.Y.S.2d 669, 678 (1979)(citing *Pascack Ass'n. v. Mayor and Council of Township of Washington*, 74 N.J. 470, 480, 379 A.2d 6, 11 (1977))(emphasis in original).

75. Pub. L. No. 37-412, 50 Stat. 888 (1937). The statute has been amended numerous times in subsequent years. The current version appears in 42 U.S.C. §§ 1437-1437n (1982 & Supp. III 1985).

76. See, e.g., Housing Act of 1961, Pub. L. No. 87-70, § 101(a)(6), 75 Stat. 149, 150-51.

enterprise could be enlisted in the effort.⁷⁷ As is only to be expected, the sole stimulus to which private enterprise readily responds is a sufficient economic incentive. In *Mount Laurel II* the court enumerated a number of incentives that could be used by municipalities, including: incentive zoning, mandatory set-asides, direct subsidies, and elimination of unnecessarily cost-generating restrictions and exactions for developments that are built to satisfy the local fair share of lower income housing.⁷⁸ The elimination of unnecessary requirements proved to be useful, but with only marginal effects. Density bonuses, on the other hand, unleashed a flood of demand by developers anxious to take advantage of the resulting increase in the yield of their land *even at the cost of having to sell or rent as many as twenty-two percent* of all the resulting units below cost.⁷⁹

77. This does not preclude use by municipalities of such subsidies as may be available from time to time toward the satisfaction of their fair share. It also does not preclude the rehabilitation of substandard units that are occupied by lower income households to the full extent of their "present need."

78. *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 258-78, 456 A.2d 390, 441-52 (1983) (*Mount Laurel II*).

79. The reason why developers have found it advantageous to build communities that include such housing are obvious. So far, at least, the New Jersey experience evolved during a period of strong pent-up housing demand in the suburbs brought about by the decades-long spread of jobs toward the fringes of the metropolitan area unaccompanied by the provision of housing. This has escalated the profit-margin on market rate housing to a very high level. Consequently, the developer's ability to increase the yield of his land by a factor of five or six is extremely profitable. At the same time, the "loss" sustained by the developers on the housing restricted to the affordability level of low- and moderate-income households is not as great as it is usually made out to be. The picture customarily presented by the developer is based on all costs for the assisted housing being directly prorated on the basis of square footage of floor space. In fact, however, this method greatly exaggerates the *actual* costs incurred on behalf of such housing. To illustrate, since the presence of the low- and moderate-income units does not diminish the site's permitted market-rate housing yield, the land they occupy should be assigned no cost. The costs associated with the processing of the development are, if anything, reduced by reason of the presence of the affordable housing which places the entire project under the protection of the court's prohibition of unnecessary exactions and unnecessarily cost-generating requirements, including excessive delays in the approval process. Site preparation and infrastructure costs do not increase proportionately for the last twenty percent of the development where the density is also increased markedly (i.e. the lengths of roads and utility lines can remain almost unchanged). The interior facilities and finishes in affordable units are generally considerably less costly than those in market rate units.

B. *Whither New York State?*

The perception of the New Jersey Supreme Court as to what would continue to happen in the absence of a specific "fair share" is equally applicable to the *Berenson* doctrine in New York State. If its applicability and meaning continue to be defined and redefined on a case by case basis, the judicial process is bound to suffer "from uncertainty and inconsistency at the trial level [and] inflexible review [of] criteria at the appellate level,"⁸⁰ all of which will lead to substantial waste of judicial energy at every level, outrageously lengthy and complex trials, and prohibitively expensive litigation.

Those who agree that housing production for the income groups that are currently underserved is an essential ingredient of current and future social well-being for the entire state and all its regions, would do well to note particularly four facets of the New Jersey experience. First, that the municipalities would never have engaged in incentive zoning with affordable housing set-aside without judicial prodding. Second, that the housing developments that have materialized prove that market-rate housing *can* be intermixed with assisted housing without adverse consequences to the communities in which the developments are located. Third, that there is a strong consumer demand for market rate housing in developments that include dwellings restricted to occupancy by low- and moderate-income households when the proportion of such housing is limited and where this type of housing is sited, designed, and landscaped and serviced with the same attention to details as the market-rate housing.⁸¹ Fourth, that

In some cases, by reason of the twenty percent affordable housing set-aside, developers were able to get also favorable state or federal financing for the entire project.

A recent twenty-two percent proportion of affordable housing has not deterred five major developers in the Township of Mahwah from seeking approval for developments totaling 2,751 units!

80. *Mount Laurel II*, 92 N.J. at 200, 456 A.2d at 410.

81. This approach, which seeks to achieve as much equality in treatment of all housing in the development as possible, was voluntarily embraced by most developers of *Mount Laurel* housing for totally selfish reasons: adjacency of market rate housing to poorly designed and landscaped units would detract from the saleability of, and price commanded by the former.

while experience with rental housing is as yet insufficient for such a conclusion to be drawn, there is no question that town-houses and condominium apartments, priced within the means of low- and moderate-income households with the aid of an internally contributed capital subsidy, can be successfully financed, produced and marketed in large numbers. It is important to note that, given a sufficient amount of housing being produced in the form of inclusionary developments, their market-rate components are likely to include many units priced so as to cover the needs of much of the remainder of the spectrum of incomes above the narrowly defined low- and moderate-income level that is underserved at the present time.

There should be no doubt in the mind of anyone who is not prepared to be confused by conflicting methods of determining the housing region, the regional need, and whether or not other communities in the region are satisfying it that the zoning ordinances of most suburban and exurban municipalities in New York State are exclusionary. The only route that can significantly remedy the situation is the firm reaffirmation by the New York courts of the constitutional obligation on the part of every municipality to provide a realistic opportunity for the development of housing that is truly affordable for those who are currently underserved. This reaffirmation must be accompanied by a clarification of the *Berenson* doctrine to the effect that first, every municipality must participate in satisfying that obligation to the extent of a numerically fixed "fair share" of the need in its region, and second, that the municipality to satisfy its obligation must more than step out of the way of housing production: it has an affirmative responsibility to use all available means to assure that such housing will be provided.