

April 1987

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Recommended Citation

Paul Xavier Lima, *Asian Americans for Equality v. Koch: The Battle over Affordable Housing*, 4 Pace Env'tl. L. Rev. 491 (1987)

DOI: <https://doi.org/10.58948/0738-6206.1226>

Available at: <https://digitalcommons.pace.edu/pelr/vol4/iss2/6>

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Asian Americans for Equality v. Koch: The Battle Over Affordable Housing

I. Introduction

In deciding the case of *Asian Americans for Equality v. Koch*,¹ the First Department of the New York Supreme Court, Appellate Division, was called upon to resolve whether the City of New York properly exercised its zoning power in creating the Special Manhattan Bridge District (SMBD) in Chinatown.² The Appellate Division refused to extend to New York the principles established by the New Jersey Supreme Court in *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*³ and *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*⁴ and held that the zoning amendments met the standard established by the New York Court of Appeals in *Berensen v. Town of New Castle*⁵ by specifically taking into account the needs of the low- and moderate-income families in the area.⁶ Since the SMBD zoning amendments do not require that additional low- and moderate-income housing be constructed⁷ despite a demonstrated need,⁸ the court's holding is significant because it did not impose an affirmative obligation on municipalities to provide affordable housing for low-income families.

1. 129 Misc. 2d 67, 492 N.Y.S.2d 837 (1985), *aff'd*, 128 A.D.2d 99, 514 N.Y.S.2d 939 (1st Dep't 1987).

2. *Asian Americans For Equality v. Koch*, 128 A.D.2d 99, 100, 514 N.Y.S.2d 939, 940 (1st Dep't 1987).

3. 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975) (*Mount Laurel I*).

4. 92 N.J. 158, 456 A.2d 390 (1983) (*Mount Laurel II*).

5. 38 N.Y.2d 102, 110, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 680 (1975).

6. *Asian Americans*, 128 A.D.2d at 118, 514 N.Y.S.2d at 951.

7. New York City, N.Y., Dep't of City Planning, Zoning Resolution, ch. 6, art. XI, §§ 116-00 to -70 (June 22, 1981).

8. New York City Dep't of City Planning, Manhattan Bridge Area Study: Chinatown (Sept. 1979) [hereinafter Study].

After an analysis of the issue of zoning and affordable housing as presented in New Jersey's *Mount Laurel* cases and New York's *Berensen v. Town of New Castle* and *Suffolk Housing Services v. Town of Brookhaven*,⁹ this note analyzes the Appellate Division's decision in *Asian Americans*, and compares the rationale behind the majority's decision with Justice Carro's dissenting opinion. It concludes by arguing that the current interpretation of New York law is ripe for adjustment to today's environment.

II. Background

A. *Mount Laurel I* and *Mount Laurel II*

The issues of zoning restrictions and affordable housing requirements were analyzed extensively by the New Jersey Supreme Court in *Mount Laurel I*¹⁰ and *Mount Laurel II*.¹¹ In the first of these two leading cases, the New Jersey Supreme Court struck down suburban zoning restrictions on multifamily dwelling units, which by virtue of impeding the development of lower-cost housing, effectively prevented low- and moderate-income persons from living reasonably near their places of employment.¹² *Mount Laurel II* required that developing New Jersey communities employ a number of affirmative steps to provide lower income housing.¹³ In *Mount Laurel I*, the New Jersey Supreme Court used the general welfare premise¹⁴ for the first time to attack exclusionary zoning ordinances by introducing the concepts of "fair share"¹⁵

9. See, *Suffolk Housing Services v. Town of Brookhaven*, 109 A.D.2d 323, 491 N.Y.S.2d 396 (1985), *aff'd*, 70 N.Y.2d 122, 517 N.Y.S.2d 924 (1987) (the court declined to hold a zoning ordinance unconstitutional because it did not facilitate the development of low- and moderate-income housing).

10. 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

11. 92 N.J. 158, 456 A.2d 390 (1983).

12. *Mount Laurel I*, 67 N.J. at 186-87, 336 A.2d at 731-32.

13. *Mount Laurel II*, 92 N.J. at 261-77, 456 A.2d at 443-51.

14. The court stated that "the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined" *Mount Laurel I*, 67 N.J. at 179, 336 A.2d at 727-28.

15. *Mount Laurel I* never adequately defined the term "fair share." It merely stated that a developing municipality's obligation to provide low- and moderate-income housing extended to at least "that municipality's fair share of the present

and "regional needs."¹⁶ In New Jersey, a municipality, having been delegated the power to zone by the state, "must [now] affirmatively plan and provide a reasonable opportunity for a variety of housing [types], including low- and moderate-income housing, to meet the needs of all prospective residents."¹⁷

Although the *Mount Laurel* litigation focused upon developing suburban communities where lower-income housing had often been entirely excluded, the court in *Mount Laurel II* recognized that general welfare obligations must logically apply to the inner city as well.¹⁸ The court reaffirmed its original holding, clearly identified the communities subject to it and placed an affirmative obligation on those municipalities to take various steps to secure the construction of low- and moderate-income housing.¹⁹

B. *Berenson v. Town of New Castle*

In *Berenson v. Town of New Castle*,²⁰ which was decided

and prospective regional need therefor." *Id.* at 174, 336 A.D.2d at 724. *Mount Laurel II* explained "fair share" by providing general formulas to be applied by municipalities. 92 N.J. at 248-58, 456 A.2d at 436-51.

16. Similarly, *Mount Laurel I* failed to adequately define "regional needs" and created considerable confusion as to how the region's needs were to be defined. *Mount Laurel II*, 92 N.J. at 205, 456 A.2d at 413. In defining "regional needs," the court in *Mount Laurel II* combined "regional needs" with "fair share" and came up with three elements to be considered: (a) a determination of the region; (b) an assessment of the housing need in the region, and (c) an allocation of that need. *Mount Laurel II*, 92 N.J. at 220-23, 456 A.2d at 421-22.

17. Dobkin, Smith, and Tockman, *Symposium: Litigation and Legislation For Affordable Housing*, 13 Rev. L. and Soc. Change 911, 919 (1984-85).

18. "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. The zoning power is no more abused by keeping out the region's poor than by forcing out the resident poor." *Mount Laurel II*, 92 N.J. at 214, 456 A.2d at 418.

19. The municipal obligation to provide a realistic opportunity for the construction of its fair share of low and moderate income housing may require more than the elimination of unnecessary cost-producing requirements and restrictions. Affirmative governmental devices should be used to make that opportunity realistic including lower income density bonuses and mandatory set asides [of low income housing.] Furthermore, the municipality should cooperate with the developer's attempts to obtain federal subsidies. *Id.* at 215, 456 A.2d at 419.

20. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

by the New York Court of Appeals post-*Mount Laurel I* but pre-*Mount Laurel II*, the issue centered specifically on the validity of a zoning ordinance of the Town of New Castle which excluded multi-family residential housing from the list of permitted uses. The development of multi-family dwellings was not being permitted in any of the twelve districts of the town.²¹ The court held that in determining the validity of such an ordinance, the general purposes which the concept of zoning seeks to serve must be considered.²² "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."²³

In determining whether the ordinance met such goals, the court established a two-part test.²⁴ The first branch of the test is whether the town has provided a properly balanced and well-ordered plan for the community at present and in the future,²⁵ and the second part requires that consideration be given to regional needs and requirements.²⁶

Furthermore, in search of out-of-state precedent, the New York Court of Appeals in *Berenson* noted that the ordinances involved there and in the *Mount Laurel* litigation were similar.²⁷ Hence, it is not unfathomable to view the New York Court of Appeals decision in *Berenson* as being influenced by the principles established in *Mount Laurel I*.²⁸

21. *Id.* at 105-06, 341 N.E.2d at 239, 378 N.Y.2d at 676.

22. *Id.* at 109, 341 N.E.2d at 241, 378 N.Y.S.2d at 680.

23. *Id.*

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

25. The Court explained that such balancing must include consideration of what types of housing presently exist, and whether this array adequately meets the present needs of the town. Also, it must be determined whether new construction is necessary, and if so, what forms the new developments ought to take. *Id.* at 110-11, 341 N.E.2d at 242, 378 N.Y.S.2d at 680-81.

26. There must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met . . . [T]he court, in examining the ordinance, should take into consideration not only the general welfare of the residents of the zoning township, but should also consider the effect of the ordinance on the neighboring communities. *Id.*

27. *Id.* at 108-109, 341 N.E.2d at 241, 378 N.Y.S.2d at 679.

28. Brief for Respondent at 15-16, *Asian Americans For Equality v. Koch*, 128 A.D.2d 99, 514 N.Y.S.2d 939 (1st Dept. 1987) (No. 22491/83).

Five years later, in *Robert E. Kurzius v. Village of Upper Brookville*,²⁹ issues similar to those presented in *Berenson* were litigated in New York. Although the Court of Appeals found that the appellants had failed to meet the two-part test of *Berenson*,³⁰ it also considered whether there was an "exclusionary purpose behind [the] zoning ordinance."³¹ This additional factor, whether an ordinance has an "exclusionary purpose" is now considered to be the third part of the test applied by New York State courts when evaluating a zoning ordinance.³²

C. *Suffolk Housing Services v. Town of Brookhaven*

In *Suffolk Housing Services v. Town of Brookhaven*,³³ the plaintiffs, a coalition of low-income individuals and organizations concerned with lower income housing needs, sought a judgment, *inter alia*, "declaring the zoning ordinance of the Town of Brookhaven void in its entirety because of the Town's failure to exercise its zoning power (Town Law § 261) to enable development of sufficient low-cost shelter."³⁴ In addition, the plaintiffs sought an order requiring the Town to "take affirmative action to rectify the perceived housing shortage."³⁵

The lower court in *Suffolk Housing* divided the issues

29. 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1980), *cert. denied*, 450 U.S. 1042 (1981).

30. *Id.* at 347, 414 N.E.2d at 685, 434 N.Y.S.2d at 184.

31. *Id.* at 345, 434 N.Y.S.2d at 183. The court stated:

Generally then, a zoning ordinance enacted for a statutorily permitted purpose will be invalidated only if it is demonstrated that it actually was enacted for an improper purpose or if it was enacted without giving proper regard to local and regional housing needs and had an exclusionary effect. Once an exclusionary effect coupled with a failure to balance the local desires with housing needs has been proved, then the burden of otherwise justifying the ordinance shifts to the defendant

Id.

32. Nolon, *A Comparative Analysis of the New Jersey's Mount Laurel Cases With the Berenson Cases in New York*, 4 Pace Env'tl L. Rev. 3, 8 (Fall 1986).

33. 109 A.D.2d 323, 491 N.Y.S.2d 396 (1985), *aff'd*, 70 N.Y.2d 122, 517 N.Y.S.2d 924 (1987).

34. *Suffolk Housing*, 70 N.Y.2d at 128, 517 N.Y.S.2d at 925.

35. *Id.*

into two parts: (1) whether the doctrine articulated in *Berenson* imposed a duty upon a municipality to exercise its zoning powers in order to facilitate the development of low- to moderate-income or low-cost housing,³⁶ and (2) whether the actions taken by the municipality with regard to various applications to develop federally subsidized, multiple-family housing for low- to moderate-income families violated the Federal Fair Housing Act.³⁷

The lower court in *Suffolk Housing* interpreted *Berenson* to "[m]erely require that a town allow for the construction of different types of housing in sufficient numbers for those people who want and can afford it."³⁸ In affirming the lower court's holding, the New York Court of Appeals limited the scope of its review to the "affirmed findings" of the lower court, rejecting the claim of illegitimate implementation of the ordinance, and thus did not address whether the standards established in *Berenson* applied to the facts at issue.³⁹

III. Facts of the *Asian Americans* Case

A. *The Manhattan Bridge Area Study*

In September 1979, the New York City Planning Commission published the Manhattan Bridge Area Study.⁴⁰ The Study examined a part of the Chinatown area of Manhattan⁴¹ from the viewpoint of land use planning. The Study focused

36. *Suffolk Housing*, 109 A.D.2d at 330-33, 491 N.Y.S.2d at 401-03.

37. *Id.* at 333-38, 491 N.Y.S.2d at 403-07. See 42 U.S.C. §§ 3601-31 (1968).

38. *Id.* at 331, 491 N.Y.S.2d at 402.

39. *Suffolk Housing*, 70 N.Y.2d at 130, 517 N.Y.S.2d at 926.

40. Study, *supra* note 8. The Study was prepared and published by the New York City Department of City Planning in 1979. The Study enumerated the various functions of the Chinatown area: (a) as a point of entry for new Chinese/Asian immigrants; (b) as a housing resource for low-income people; (c) as a major tourist attraction, and (d) as a center of Chinese culture and services.

41. Generally, the Manhattan Bridge Area Study encompassed much of the lower East Side. Within that area, the Study's primary focus was on the smaller Chinatown Study Area, bounded generally by Delancey Street on the north, Allen Street on the east, Monroe and Madison Streets on the south, and Baxter Street and Bowery on the west. In addition, attention was given to a still smaller area known as Old Chinatown, bounded by Canal Street on the north, Bowery on the east, Worth Street on the south, and Baxter on the West. *Id.* at 5.

mainly on the residential and commercial planning needs of the area.⁴² In general, the factual findings of the Study support the conclusion that there is a compelling need in the District for additional lower-income housing.⁴³ With the exception of a small group of professionals and business persons, most of the residents of the Study area "remain at the bottom of the economic ladder."⁴⁴ According to the Study, "[t]he upper floors of the tenements in Old Chinatown are generally overcrowded,"⁴⁵ and the demand for low-income housing in the area will be "heavy" in the upcoming future due to expected higher levels of immigration into Chinatown.⁴⁶ In fact, for the next decade, the apartments of non-Chinese tenants vacating the old housing stock will be the primary source of housing for the expanding Chinese-American community in Chinatown.⁴⁷

The Study also found that there was little construction of new housing within Chinatown. A major reason for this lack of new construction was that the existing density of Chinatown tenements was substantially higher than the density permitted under the currently existing zoning regulations.⁴⁸ The Study concluded, however, that although construction of new, affordable housing is necessary, "new housing, financed either privately or through public programs is not a realistic possibility for meeting the majority of the area's housing needs."⁴⁹ As a result of the Study, the Special Manhattan Bridge District ("SMBD") was created.

B. The Special Manhattan Bridge District

On August 20, 1981, the Board of Estimate adopted the District amendments establishing the SMBD and setting forth the procedures for the application of a special permit, upon

42. *Id.*

43. *Id.* at 44, 55.

44. *Id.* at 13.

45. *Id.* at 17.

46. *Id.* at 44.

47. *Id.* at 45.

48. *Id.* at 55.

49. *Id.* at 57.

request to the City Planning Commission, to construct or renovate housing in the area.⁵⁰ This resolution was designed to preserve the residential character of the Chinatown community, to permit new construction which is sensitive to the existing urban design character of the neighborhood, to provide an incentive for a mixture of income groups, to encourage development of new community facility space and to promote the rehabilitation of the existing older housing stock in the area.⁵¹ The resolution was meant to encourage the development of new housing on sites which require minimal residential relocation.⁵² Additionally, to qualify for a special permit under the District provisions, a site must have been vacant or substantially vacant as of August 20, 1981.⁵³ Prior to evicting tenants from a "substantially vacant" site, an applicant for a

50. New York City, N.Y., Dep't of City Planning, Zoning Resolution, Ch. 6, art. XI, at § 116-50.

51. *Id.* at § 116-00. The general purposes of the District were described as follows:

The Special Manhattan Bridge District established in this resolution is designed to promote and protect the public health, safety and general welfare. These general goals include, among others, the following specific purposes:

- (a) to preserve the residential character of the community and encourage the development of new housing on sites which require minimal residential relocation;
- (b) to promote the opportunities for people to live in close proximity to employment centers in a manner which is consistent with existing community patterns;
- (c) to provide an incentive for the creation of new community facility space which is required to meet the unique needs of this community;
- (d) to permit new construction within the area which is sensitive to the existing urban design character of the neighborhood;
- (e) to provide an incentive for a mixture of income groups in the new development so as to not substantially alter the mixture of income groups presently residing in the neighborhood;
- (f) to promote the rehabilitation of the existing older housing stock, and thereby provide a renewed housing resource meeting modern standards, at the same time protecting the character and scale of the community;
- (g) to promote the most desirable use of the land in the area and thus to conserve the value of land and buildings and thereby protect the City's tax revenues.

Id.

52. *Id.* at § 116-00(a).

53. *Id.* at § 116-50(1).

special permit must demonstrate that no harassment of tenants has occurred, that all tenants have been relocated and that, to the extent possible, all relocation arrangements have been made within the District.⁵⁴

On April 14, 1983, the Board of Estimate granted a special permit to Henry Street Partners (HSP) to construct a 21-story residential building consisting of eighty-seven condominium units which would provide housing for upper-middle income and professional residents of Chinatown.⁵⁵ In order to obtain additional floor space, HSP opted to contribute to the development of community facility space, including a pool to be deeded to the YMCA.⁵⁶ Additionally, HSP entered into a restrictive declaration with the City binding any future own-

54. *Id.* at § 116-30(a), (c). This section requires that, before tenants may be evicted from any building on a "substantially vacant" site, an applicant must submit a tenant relocation plan to the New York City Department of Housing Preservation and Development and to the affected community board. This relocation plan has to include an affirmation that "no harassment of tenants has occurred," and that provisions have been made to relocate the "tenants in the [SMBD] to the extent possible." *Id.*

55. Brief for Respondent at 8, *Asian Americans For Equality v. Koch*, 128 A.D.2d 99, 514 N.Y.S.2d 939 (1st Dep't 1987) (No. 22491/83).

56. Several key district zoning amendments permit increases in the basic floor area ratio (F.A.R.) as bonuses to developers. [F.A.R. expresses the relationship between the amount of floor area permitted in a building and the area of the lot on which the building stands.] Thus, developers who construct new housing in the district may increase the amount of permissible F.A.R. by providing any one (or a combination) of three bonus amenities to the community:

- (1) space for community facilities, which the regulations define as senior citizen centers, day care facilities, educational facilities, or a combination thereof resulting in a bonus of up to seven square feet for every square foot of floor area which is used as community facility space, proportionate to the total floor area permitted on the zoning lot;
- (2) dwelling units for low and moderate income facilities resulting in a bonus of up to two square feet for every square foot of floor area which is used for dwelling units for low and moderate income families, proportionate to the total floor area permitted on the zoning lot; and/or
- (3) rehabilitation of existing substandard housing resulting in a bonus of up to six square feet for every square foot of floor area which is demolished in a granting rehabilitation development lot when both are developed in conjunction, proportionate to the total floor area permitted on the zoning lot of the new receiving development.

In no event may the total F.A.R. of any new development, under provisions (1), (2), or (3) of this section exceed 7.5. SMBD, §§ 116-01, -11, -12, -20, & -21.

ers of the property, and also agreed to contribute \$500,000 to the New York City Department of Housing Preservation and Development to rehabilitate or subsidize low- and moderate-income housing within the District.⁵⁷ The City, though, has not to date created any program or procedure for allocating these funds to the construction or rehabilitation of a quantifiable number of lower-income units.⁵⁸

Asian Americans for Equality (Asian Americans), a non-profit organization, brought this action seeking declaratory and injunctive relief, challenging the constitutionality of the zoning amendments adopted by the Board of Estimate which established the SMBD. The plaintiffs claim that this case presents a pattern of "*de facto* exclusionary zoning,"⁵⁹ and allege that the zoning ordinance does not conform to the Study, that the Study is not a "well-considered plan," and that the Study does not consider city-wide or regional needs.⁶⁰

IV. The Lower Court Findings

In September, 1983, the plaintiffs, Asian Americans, instituted a class action suit for declaratory and injunctive relief based on four causes of action: (1) that the zoning ordinance creating the SMBD was unconstitutional under New York law since it was not the product of a "well-considered" plan nor responsive to the need outlined by the Study;⁶¹ (2) for a directive to the defendant City agencies to create a new plan which provides a realistic opportunity for the construction of low- and moderate-income housing, as it should in its exercise to provide for the general welfare of the community;⁶² (3) for the revocation of the permit granted under the SMBD amendment to HSP, since the proposed development will consist solely of luxury dwellings,⁶³ and (4) for an order enjoining

57. *Asian Americans*, 128 A.D.2d at 107, 514 N.Y.S.2d at 945.

58. Brief for Respondent at 8, *Asian Americans For Equality v. Koch*, 128 A.D.2d 99, 514 N.Y.S.2d 939 (1st Dep't 1987) (No. 22491/83).

59. *Id.* at 22.

60. *Id.* at 24.

61. *Asian Americans*, 129 Misc. 2d at 70, 492 N.Y.S.2d at 840.

62. *Id.*

63. *Id.* at 71, 492 N.Y.S.2d at 840. Subsequent to the lower court decision in

any tax abatement, reduction or credit to the HSP project in the SMBD because it does not provide for the construction or significant rehabilitation of low-income housing in Chinatown.⁶⁴ The defendant City, before submitting its answer, moved to dismiss for failure to state a cause of action.

The Supreme Court of New York County, J. Saxe writing the opinion, held that *Asian Americans'* first three causes of action challenging the validity of the zoning amendment and the special permit were valid causes of action.⁶⁵ The fourth cause of action was held not to be "sufficiently matured so as to constitute a justiciable controversy."⁶⁶

The court began its analysis by recognizing the strong presumption of validity and constitutionality that is attached to legislation enacted by a municipality.⁶⁷ Specifically, the court interpreted New York General City Law Section 20⁶⁸ to require "that consideration must be given to the needs of the community as a whole."⁶⁹ Moreover, "once a priority community need has been identified, a developmental scheme which ignores or does not make reasonable provisions to meet that need [low-income housing] violates the constitutional or statutory mandate to regulate for the health, safety, and welfare of community."⁷⁰ Thus, a case by case analysis of whether a

Asian Americans, the New York Court of Appeals annulled the special permit issued to HSP because the defendant City had failed to make an environmental analysis that took into consideration the environmental requirements required by the regulations promulgated by the City of New York. *Chinese Staff and Workers Assoc. v. City of New York*, 111 A.D.2d 1081, 491 N.Y.S.2d 885 (1st Dep't 1985), *rev'd* 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986).

64. *Asian Americans*, 129 Misc. 2d at 90, 492 N.Y.S.2d at 852.

65. *Id.*

66. *Id.* at 90, 492 N.Y.S.2d at 853.

67. *Id.* at 75, 492 N.Y.S.2d at 843 (citing *Lighthouse Shores, Inc. v. Town of Islip*, 41 N.Y.2d 7, 359 N.E.2d 337, 390 N.Y.S.2d 827 (1976); *S.E. Nichols Herkimer Corp. v. Village of Herkimer*, 38 A.D.2d 456, 330 N.Y.S.2d 747 (4th Dep't 1972)).

68. New York General City Law, § 20, subdivision 25, requires that zoning resolutions be "designed to promote the public health, safety and general welfare and shall be made with reasonable consideration, among other thing, to the character of the district . . . in accord with a well-considered plan." N.Y. Gen. City Law § 20, subd. 25 (McKinney 1968 & Supp. 1987).

69. *Asian Americans*, 129 Misc. 2d at 75, 492 N.Y.S.2d at 843 (citing *Udell v. Haas*, 21 N.Y.2d 463, 469, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968)).

70. *Asian Americans*, 129 Misc. 2d at 75, 492 N.Y.S.2d at 843. *See, Kurzius v.*

zoning resolution is designed to promote public health, safety and welfare, and whether it is a proper exercise of police power, is necessary and must be undertaken.⁷¹

The court proceeded to juxtapose the findings of the Study with *Berenson's* two-part test to determine whether this zoning amendment was constitutional.⁷² Although it noted that this zoning amendment was introduced with the purpose of promoting residential construction, and that it included an incentive program to allow an increase in the present density requirements in the SMBD,⁷³ the court nevertheless found enough evidence to place an affirmative duty upon the municipality to assure that the zoning amendment met the stricter standards enunciated in *Mount Laurel I*.⁷⁴

While admitting that New York had not previously accepted a standard which imposed affirmative obligations upon municipalities,⁷⁵ the court held that under the standards set in New York's *Berenson* decision and New Jersey's *Mount Laurel* decisions, the plaintiffs in *Asian Americans* had valid causes of action. Determining that *Berenson* had been ineffective to date, the lower court imposed a heavier burden on municipalities to accept the *Mount Laurel* rationale by imposing upon municipalities in New York an affirmative obligation to provide low- and moderate-income housing.⁷⁶ Thus, the lower court held that the plaintiffs' allegations in their complaint were sufficient to defeat the defendant City's motion to

Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1980), *cert. denied*, 450 U.S. 1042; *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975); *Golden v. Planning Board of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 422 (4th Dep't), *appeal dismissed*, 509 U.S. 1003 (1972).

71. *Id.* (citing *Village of Euclid v. Ambler Realty Corp.*, 272 U.S. 365, 387 (1926)).

72. *Id.* at 85-88, 492 N.Y.S.2d at 849-51.

73. *Id.* at 72, 492 N.Y.S.2d at 841.

74. *Id.* at 82, 492 N.Y.S.2d at 848. The evidence thus suggests that New York's attempts to serve its people's general welfare, particularly the needs for adequate housing by persons of low- and moderate-income, by focusing on whether there exists a properly balanced and well ordered plan for the community, has been unsuccessful in promoting these people's interests.

75. *Id.* at 76, 492 N.Y.S.2d at 844.

76. *Id.* at 82, 492 N.Y.S.2d at 848.

dismiss.⁷⁷

The lower court, however, also had to overcome the presence of a case with similar facts, *Suffolk Housing Services v. Town of Brookhaven*.⁷⁸ Instead of distinguishing *Suffolk Housing* from the case at bar, J. Saxe declared himself not bound by the holding of the former decision because, since the court in *Suffolk Housing* did not have appellate jurisdiction, its decision was not binding upon him under the principles of *stare decisis*.⁷⁹

V. The Appellate Court Holding

A. Plaintiffs' First Cause of Action; Whether the Zoning Ordinance was Constitutional

In May 1987, J. Ross writing for a 3-2 majority of the Supreme Court, Appellate Division, First Department, modified the lower court's holding by dismissing the plaintiffs' first two causes of action, and affirmed the dismissal of the plaintiffs' fourth cause of action.⁸⁰ The majority held that the District zoning amendments conformed to the principles set forth in *Berenson*, and therefore were constitutional.⁸¹

The appellate court began its analysis with the premise that a zoning ordinance carries with it a strong presumption of constitutionality,⁸² and, as the dissent points out, the burden of proof falls on the person challenging the zoning ordi-

77. *Id.*

78. 109 A.D.2d 323, 491 N.Y.S.2d 396 (1985).

79. *Asian Americans*, 129 Misc. 2d at 80, 492 N.Y.S.2d at 846.

80. *Asian Americans*, 128 A.D.2d at 113, 514 N.Y.S.2d at 948. The plaintiffs' third cause of action concerning HSP's special permit was now moot because the Court of Appeals had invalidated the permit on environmental grounds. *Chinese Staff*, 111 A.D.2d 1081, 491 N.Y.S.2d 885 (1st Dep't 1985), *rev'd*, 68 N.Y.2d 359, 502 N. E.2d 176, 509 N.Y.S.2d 499 (1986).

In addition, the plaintiffs reserved their appeal on their fourth cause of action until such time as it became ripe and justiciable. Brief for Respondent at 1, *Asian Americans For Equality v. Koch*, 128 A.D.2d 99, 514 N.Y.S.2d 939 (1st Dep't 1987) (No. 22491/83).

81. *Id.* at 119, 514 N.Y.S.2d at 952.

82. *Id.* at 101, 514 N.Y.S.2d at 941 (citing *Town of Huntington v. Park Shore Country Day Camp*, 47 N.Y.2d 61, 65, 390 N.E.2d 282, 283, 416 N.Y.S.2d 774, 775-76 (1979)).

nance to demonstrate, beyond a reasonable doubt, that such an ordinance is unconstitutional.⁸³

The majority applied the two-part test in *Berenson*⁸⁴ to the zoning ordinance at issue to determine whether the plaintiffs had successfully rebutted the ordinance's strong presumption of constitutionality.⁸⁵ Throughout its opinion, the appellate court utilized the facts it believed were relevant in establishing whether a well-considered plan actually existed.⁸⁶ The majority pointed to the Planning Commission's consultation with urban planners, architects, and engineers.⁸⁷ It also acknowledged the Chairman of the Planning Commission's affidavit as further evidence of a well-considered plan.⁸⁸ The court decided that these acts, coupled with provisions in the zoning amendments that appear to strike a responsive note to the dilemma facing low-income housing, demonstrated that "forethought ha[d] been given to the [*Chinatown*] community's land use problems."⁸⁹ The use by the Planning Commis-

83. *Asian Americans*, 128 A.D.2d at 127, 514 N.Y.S.2d at 957 (citing *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville*, 51 N.Y.2d 338, 344, 414 N.E.2d 680, 682-83, 434 N.Y.S.2d 180, 182 (1980)). Zoning ordinances are susceptible to constitutional challenge if they are "properly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). But as the court in *Berenson* pointed out, "the validity of a zoning ordinance depends on the facts of the particular case and whether it is 'really designed to accomplish a legitimate public purpose.'" *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 107, 341 N.E.2d 236, 240, 378 N.Y.S.2d 672, 678 (citing *Matter of Wulfsohn v. Burden*, 241 N.Y. 288, 299, 150 N.E. 120, 123 (1925)).

84. See *supra* notes 21-33 and accompanying text.

85. *Asian Americans*, 128 A.D.2d at 116-19, 514 N.Y.S.2d at 951-52.

86. *Asian Americans*, 128 A.D.2d at 102-07, 514 N.Y.S.2d at 941-45.

87. *Id.* at 102, 514 N.Y.S.2d at 942.

88. The affidavit stated in part:

At the same time, the . . . Planning Commission recognized that the majority of the area residents are low income people, and realized that the wholesale redevelopment of the area's housing stock would deprive these people of the limited housing opportunities still available to them. Therefore, the District regulations were drafted to provide for development that is infill in nature; that is, limited to vacant or substantially vacant sites, rather than redevelopment oriented.

Id. at 103-04, 514 N.Y.S.2d at 942.

89. *Id.* at 106, 514 N.Y.S.2d at 944 (quoting *Blumberg v. City of Yonkers*, 41 A.D.2d 300, 305, 341 N.Y.S.2d 977, 983, *appeal dismissed*, 32 N.Y.2d 896, 300 N.E.2d

sion of "expert assistance"⁹⁰ was held to be evidence that the proposed zoning change "was the result of comprehensive planning."⁹¹ In addition, HSP's apartment building would allegedly be partially occupied by private medical offices, thus increasing the availability of medical care to the residents of the SMBD.⁹² Thus, the Appellate Court found the HSP permit valid because the availability of these new apartment units would open up older housing now occupied by the upper-middle income people that were to be lured by HSP's project.⁹³ Moreover, the majority found support for their position that the zoning ordinance made provisions to relocate, "to the extent possible," those tenants in the SMBD who may have to be displaced.⁹⁴

Furthermore, the appellate court also relied upon the findings of the New York Court of Appeals in an earlier action concerning this same zoning ordinance, *Lai Chun Chan Jin v. Board Of Estimate of the City of New York (Jin)*.⁹⁵ Specifically, the Court of Appeals in *Jin* found that the creation of the District (and therefore the zoning ordinance) resulted from a well-considered plan.⁹⁶ Although the majority in *Asian Americans* recognized the existence of the *Chinese Staff* decision,⁹⁷ it quickly distinguished its facts from the *Jin* case by interpreting *Chinese Staff* as being "solely limited to annul-

154, 346 N.Y.S.2d 814 (1973)).

90. *Id.* at 102, 514 N.Y.S.2d at 942.

91. *Id.* (quoting *Goodrich v. Town of Southampton*, 39 N.Y. 2d 1008, 1009, 355 N.E.2d 297, 298, 387 N.Y.S.2d 242, 243 (1976)).

92. *Asian Americans*, 128 A.D.2d at 107, 514 N.Y.S.2d at 945.

93. *Id.* at 107, 514 N.Y.S.2d at 944.

94. *Id.* See, New York City Zoning Resolution, *supra* note 7 at § 116-30(a).

95. 115 Misc. 2d 774, 454 N.Y.S.2d 601 (1982), *rev'd*, 92 A.D.2d 218, 460 N.Y.S.2d 28 (1st Dep't 1983), *aff'd*, 62 N.Y.2d 900, 467 N.E.2d 523, 478 N.Y.S.2d 859 (1984).

96. *Asian Americans*, 128 A.D.2d at 118, 514 N.Y.S.2d at 951. The Court of Appeals in *Jin* stated, in part, "that the proposed revision and the effect it would have upon the health, safety and welfare of the affected community was considered before its adoption and that study fulfilled the requirement that the revision be adopted pursuant to a well-considered plan . . ." *Jin*, 62 N.Y.2d at 903, 467 N.E.2d 523, 524-25, 478 N.Y.S.2d 859, 861.

97. 111 A.D.2d 1081, 491 N.Y.S.2d 885 (1st Dep't 1985), *rev'd*, 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986); *see also supra* note 63.

ling the special permit granted to HSP.”⁹⁸

In light of these facts, the majority of the Appellate Division concluded that the zoning ordinance was a product of a well-considered plan that took into consideration, *inter alia*, the regional needs of the SMBD.⁹⁹ Therefore, the District zoning amendments were valid under the standards established by *Berenson*, and hence the plaintiffs’ first cause of action was dismissed.¹⁰⁰

B. *Plaintiffs’ Second Cause of Action: Does the City have an Affirmative Obligation to Provide Affordable Housing to Low- and Moderate-Income People in Exercising Its Power for the General Welfare of the Community?*

The appellate court reviewed the lower court’s adoption and application of the principles established in *Mount Laurel*¹⁰¹ and refused either to adopt or apply them to this case.¹⁰² The majority adamantly stated that the *Mount Laurel* decisions were not based on New York law but rather on “an interpretation of the provisions of the law and Constitution of the State of New Jersey.”¹⁰³ It chastised the lower court not only for applying the affirmative obligation principles enunciated in *Mount Laurel I* and *II*, but also because the fact pattern in the *Mount Laurel* cases was not “by the widest stretch of the imagination applicable to New York City’s record for providing for low and moderate income housing.”¹⁰⁴ Moreover, the appellate court noted that legal commentators have characterized the *Mount Laurel* decisions as “the most extreme treatment of the issue of exclusionary zoning in the country

98. *Id.* at 111, 514 N.Y.S.2d at 947. The majority notes that “nowhere in their [*Chinese Staff*] opinion did the Court of Appeals discuss . . . whether the City of New York properly exercised its zoning power in creating the District” *Id.*

99. *Id.* at 118, 514 N.Y.S.2d at 951.

100. *Id.* at 119, 514 N.Y.S.2d at 952.

101. *Mount Laurel I* and *II*, among other things, placed the responsibility for providing a realistic opportunity for low- and moderate-income housing on municipalities. See *supra* notes 11-19 and accompanying text.

102. *Asian Americans*, 128 A.D.2d at 115, 514 N.Y.S.2d at 950.

103. *Id.* at 116, 514 N.Y.S.2d at 950.

104. *Id.* at 119, 514 N.Y.S.2d at 952.

. . . ."¹⁰⁵ and labeled those decisions as essentially legislative judgments.¹⁰⁶

The majority distinguished the *Mount Laurel* cases from *Asian Americans* by pointing out that New Jersey case law had established that the "applicable housing region or regions to which the *Mount Laurel* obligations apply was larger than four counties."¹⁰⁷ Thus, the majority held that *Mount Laurel* was inapplicable here since the size of the District was but a fourteen block area, and "every area as small as the District need not contain specific provisions for the construction of low-and moderate-income housing."¹⁰⁸ The appellate court further stated that it found "the applicable zoning district may well be the entire City of New York, not a 14 to 20 block District."¹⁰⁹

The appellate court then turned its attention to New York case law. Once again, it relied on *Berenson* to justify its conclusion and cited a passage which hence has become well-settled law: zoning is a legislative matter and courts should not become regional planners.¹¹⁰ The majority also relied upon the fact that *Berenson* imposed no requirement that each district must contain some sort of housing balance.¹¹¹ Rather, the concern was directed toward whether the town itself was a

105. *Id.* at 115, 514 N.Y.S.2d at 950 (quoting Rice, *Zoning and Land Use*, 37 Syracuse L. Rev. 747, 750 (1986)).

106. *Id.* at 116, 514 N.Y.S.2d at 950.

107. *Id.* (quoting Morris City Fair Housing Council v. Boonton Township, 209 N.J. Super 393, 422, 507 A.2d 768, 784 (1985)).

108. *Asian Americans*, 128 A.D.2d at 118, 514 N.Y.S.2d at 952.

109. *Id.*

110. *Id.* at 117, 514 N.Y.S.2d at 951 (citing *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 243, 378 N.Y.S.2d 672, 682 (1975)).

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

. . . .

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

111. *Asian Americans*, 128 A.D.2d at 117, 514 N.Y.S.2d at 951.

"Our concern is not whether the zones, in themselves, are balanced communities, but whether the town itself, as provided for by its zoning ordinances, will be a balanced and integrated community" *Berenson*, 38 N.Y.2d 102, 109, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 680.

balanced and integrated community.¹¹²

In this light, the appellate court dismissed the plaintiffs' second cause of action¹¹³ on the grounds that the *Mount Laurel* decisions were essentially legislative judgments, and expressed support for the lower court decision reached in *Suffolk Housing*.¹¹⁴

VI. The Dissent

A. *The Constitutionality of the Zoning Ordinance*

The dissent, written by J. Carro,¹¹⁵ relied heavily on the factual findings of the Study,¹¹⁶ as opposed to the majority's substantial reliance on how the Study was conducted,¹¹⁷ and vehemently disagreed with the majority's holding that the plaintiffs had failed to state a valid cause of action.¹¹⁸

Although zoning ordinances are accorded a strong presumption of constitutionality, and their unconstitutionality must be demonstrated "beyond a reasonable doubt,"¹¹⁹ the dissent points out that the Court of Appeals in *Kurzius v. Upper Brookville* stated that a zoning ordinance may be invalidated "if it is demonstrated that . . . it was enacted without giving proper regard to local and regional housing needs and has an exclusionary effect."¹²⁰ It is in this light that the dissent intertwines the factual findings of the Study with *Ber-*

112. *Asian Americans*, 128 A.D.2d at 117, 514 N.Y.S.2d at 951.

113. *Id.* at 119, 514 N.Y.S.2d at 952.

114. *Id.* at 116, 514 N.Y.S.2d at 950.

115. The remaining Justice, J. Asch, dissented from the majority opinion but only partly concurred with the dissent of J. Carro. J. Asch would have remanded the case for trial, but only on the limited issue of "whether New York City gave adequate consideration to the need for low-cost housing." *Id.* at 146-47, 514 N.Y.S.2d 969.

116. *Id.* at 120-24, 514 N.Y.S.2d at 952-55.

117. *Id.* at 102-05, 514 N.Y.S.2d at 941-44.

118. *Id.* at 126, 514 N.Y.S.2d at 956. It must be remembered that this matter reached this court on the question of whether the plaintiffs have valid causes of action. The dissent fervently argued that plaintiffs had "cogently demonstrated that a question of fact exist[ed]" since the plaintiffs had illustrated serious deficiencies in the Study and whether it satisfies the *Berenson* test. *Id.* at 146, 514 N.Y.S.2d at 969.

119. *Id.* at 127, 514 N.Y.S.2d at 957.

120. *Id.* at 131, 514 N.Y.S.2d at 960; see *Kurzius v. Upper Brookville*, 51 N.Y.2d at 345, 414 N.E.2d 680, 683, 434 N.Y.S.2d 180, 183.

enson's two-part test.

The dissent proceeded to examine the numerous facts and figures established by the Study. The Study analyzed data on expected immigration levels of Chinese to New York City,¹²¹ on income of New York City's Chinese population,¹²² and on Chinatown's housing facilities.¹²³ The Study concluded, *inter alia*, that additional and rehabilitated housing was needed by low- and moderate-income people in the area.¹²⁴ Nevertheless, the Study cautioned that further study was necessary prior to any long-range planning.¹²⁵

Next, the dissent perused the zoning amendment and found that, notwithstanding the various provisions contained therein to stimulate development within the SMBD, the amendment itself provides no requirement that new or rehabilitated housing be set aside for low- and moderate-income people in the area.¹²⁶ In particular, the dissent appeared astonished that, despite the Study's prediction, absent public subsidies rehabilitated units will be beyond the means of low- and moderate-income families.¹²⁷ The dissent expressed concern that the status of such housing in the amendment was relegated to mere "amenities."¹²⁸ Moreover, noting that the Study made only a passing reference to community facilities,

121. *Asian Americans*, 128 A.D.2d at 122, 514 N.Y.S.2d at 954; *see also* Study, *supra* note 8, at 9-14.

122. *Asian Americans*, 128 A.D.2d at 122, 514 N.Y.S.2d at 954; *see also* Study, *supra* note 8 at 31-38.

123. *Asian Americans*, 128 A.D.2d at 122, 514 N.Y.S.2d at 954; *see also* Study, *supra* note 8 at 41-45.

124. *Asian Americans*, 128 A.D.2d at 122, 514 N.Y.S.2d at 954; *see also* Study, *supra* note 8, at 57.

125. *Asian Americans*, 128 A.D.2d at 122, 514 N.Y.S.2d at 954; *see also* Study, *supra* note 8, at 56-57.

126. *Asian Americans*, 128 A.D.2d at 122, 514 N.Y.S.2d at 955; *see also* Zoning Resolution, *supra* note 7.

127. *Asian Americans*, 128 A.D.2d at 123, 514 N.Y.S.2d at 955.

128. *Id.* at 124, 514 N.Y.S.2d at 955.

While the stated purposes nowhere mention the goal of providing low- and moderate-income housing, despite the Study's documentation of that need, specific mention is made in the regulations' purposes of providing community facility space. Even more disturbing is the fact that the most generous bonus incentive granted to developers is the bonus for developing community space. . . . Yet, the 1979 Study made only a passing reference to community

J. Carro was disturbed by the fact that the bonus F.A.R. provisions lean least towards providing incentives to developing dwelling units for low and moderate-income facilities, while providing the "most generous" provisions towards community facilities.¹²⁹

In its application of *Berenson's* two-part test to these findings, the dissent noted the Study's "absolute failure" to take into account the regional needs for housing.¹³⁰ J. Carro also expressed skepticism that the provision in the zoning amendment to provide dwelling units for low- and moderate-income families would actually provide such units.¹³¹ Furthermore, J. Carro was concerned over the possible displacement of families in the SMBD. He found that, although the ordinance provided that any developer's relocation plan be within the SMBD "to the extent possible," it was "highly unrealistic" that relocation would occur within the SMBD due to the low vacancy rate.¹³² The dissent concluded that there was evidence that the zoning ordinance was "poorly thought-out," and therefore not a well-considered plan.¹³³

Finally, the dissent dismissed the statement by the Court of Appeals in *Lai Chun Chan Jin v. Board of Estimate*,¹³⁴ that the SMBD was adopted in conformance with a well-considered plan.¹³⁵ J. Carro distinguished *Jin* by noting that the SMBD was not the subject of litigation in that case and, since petitioners had not presented any arguments to that end, the Court of Appeals remark was deemed not to have a preclusive

facilities. . . .

Id. at 141, 514 N.Y.S.2d at 966 (Carro, J. dissenting).

129. *Id.* at 122, 514 N.Y.S.2d at 954.

130. *Id.* at 144-45, 514 N.Y.S.2d at 968.

131. *Id.* at 141, 514 N.Y.S.2d at 966. J. Carro goes so far as to state that "it is highly questionable that the incentive provided in the regulations for furnishing low-income housing is a meaningful and realistic zoning measure, one 'really designed to accomplish a legitimate public purpose.'" *Id.* (quoting *Berenson*, 38 N.Y.2d at 107, 378 N.Y.S.2d at 678).

132. *Asian Americans*, 128 A.D.2d at 140, 514 N.Y.S.2d at 966.

133. *Id.* at 145, 514 N.Y.S.2d at 968.

134. 115 Misc. 2d 744, 454 N.Y.S.2d 601 (1982), *rev'd*, 92 A.D.2d 218, 460 N.Y.S.2d 28 (1st Dep't 1983), *aff'd*, 62 N.Y.2d 900, 467 N.E.2d 523, 478 N.Y.S.2d 859 (1984).

135. *Asian Americans*, 128 A.D.2d at 136, 514 N.Y.S.2d at 963.

effect.¹³⁶ In fact, the dissent points out that the Court of Appeals recognized in *Chinese Staff* that a "separate constitutional challenge to the SMBD regulations . . . is *sub judice* in the Appellate Division, First Department [*Asian Americans*]." ¹³⁷

B. *The Affirmative Obligation*

The dissent found it unnecessary to study New Jersey's case law to determine whether New York municipalities have an affirmative obligation to provide housing to low- and moderate-income families. J. Carro found such an obligation in *Berenson*.¹³⁸

Specifically, the dissent interpreted the second part of the *Berenson* test to require "a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs are met."¹³⁹ Coupled with *Berenson's* emphasis that the locality assess both the "quantity and quality" of needed housing¹⁴⁰ and the "social and economic" considerations of the community,¹⁴¹ J. Carro determined that *Berenson* imposed an affirmative obligation to provide low-income housing to those who needed it.¹⁴² Thus, he concluded that there were "substantial deficiencies" in the amendment because many of the provisions were "irrational" and did "not appear to meet even the stated goals" of the amendment.¹⁴³

Furthermore, J. Carro pointed to the majority's sole attention to one prong of the two-part test in *Berenson*.¹⁴⁴ While the majority concentrated on attempting to establish

136. *Id.*

137. *Id.* at 137, 514 N.Y.S.2d at 963 (citing *Chinese Staff*, 68 N.Y.2d at 362 n.1, 502 N.E.2d 176, 177, 509 N.Y.S.2d 499, 500 (1986)).

138. *Asian Americans*, 128 A.D.2d at 130-31, 514 N.Y.S.2d at 959.

139. *Id.* at 130, 514 N.Y.S.2d at 959 (quoting *Berenson*, 38 N.Y.2d 102, 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 681 (1975)).

140. *Id.*

141. *Id.*

142. *Id.* at 130-31, 514 N.Y.S.2d at 959.

143. *Id.* at 146, 514 N.Y.S.2d at 969.

144. *Id.* at 137-38, 514 N.Y.S.2d at 964.

the existence of a well-considered plan, it did not discuss what the region consisted of nor what regional considerations were made, pursuant to *Berenson's* second prong.¹⁴⁵ In applying the *Berenson* test, the majority argued that the relevant "community" was New York City, not the SMBD.¹⁴⁶ In addition, the majority stated that in New York City any established special district need not contain a housing balance as long as the City of New York, as a whole, provided such.¹⁴⁷ The dissent ridicules the majority's declaration that a study based on only a 14-block area of the city satisfied the *Berenson* requirement of a well-considered plan encompassing all of New York City.¹⁴⁸ Hence, the dissent concluded that the plaintiffs had demonstrated that a material question of fact existed via valid causes of action, and thus the plaintiffs deserved their day in court.¹⁴⁹

VII. Analysis

The plaintiffs in *Asian Americans* challenge the constitutionality of the zoning ordinance at bar by offering substantial evidence that alleges that the ordinance did not meet the standards established in *Berenson*. They point to the Study's finding that there is a critical need for affordable housing in Chinatown,¹⁵⁰ and to the Study's failure to adequately address these needs.¹⁵¹ In addition, the plaintiffs point out that the zoning ordinance provides only a de minimus provision for the construction of housing for low- and moderate-income hous-

145. *Id.* In its concluding remarks, the majority states that they "find the applicable zoning district may very well be the entire city of New York, not a 14 to 20 block District, or even a borough, within the entire City."

146. *Id.* at 137, 514 N.Y.S.2d at 964.

147. *Id.*

148. *Id.*

149. *Id.* at 146, 514 N.Y.S.2d at 969.

150. Brief for Respondent at 3, *Asian Americans For Equality v. Koch*, 128 A.D.2d 99, 514 N.Y.S.2d 939 (1st Dep't 1987) (No. 22491/83). See also Study, *supra* note 8.

In particular, the Study predicted that the demand for low-income housing would increase over the years in view of expected higher levels of immigration into Chinatown. Study, *supra* note 8, at 13.

151. Brief for Respondent at 4, *Asian Americans*.

ing, and an optional provision at that.¹⁵² Meanwhile, the most generous bonus provision is for community facility space,¹⁵³ a need not documented in the Study.

In applying the *Berenson* test, the Appellate Court majority concentrated on the "extensive" effort behind the Study and certain provisions found in the ordinance to protect the low- and moderate-income families.¹⁵⁴ A close examination of the zoning resolution though, reveals that despite New York City's insistence that the zoning resolution here was well-considered by virtue of the Study, such a causal connection does not necessarily translate into *Berenson's* "properly balanced and well-ordered plan." Here, the incentives for lower-income housing are so inadequate that no developer in the SMBD will opt to exercise the option to develop lower-income housing when he can opt to build community space for a larger F.A.R. bonus.¹⁵⁵ In effect, the incentives are grossly inadequate in furthering housing for low- and moderate-income families. All this supports the logic that the Appellate Division's reliance upon *Chinese Staff* was erroneous and should be rejected.

Furthermore, there is no need to analyze any case law other than that of New York. New York case law, liberally interpreted under *Berenson*, adequately supports imposing an affirmative obligation upon municipalities to meet the needs of low- and moderate-income families. According deference to the legislature cannot justify an abdication of judicial responsibility to determine whether the zoning power has been exercised fairly and rationally.¹⁵⁶ Zoning provisions must have a substantial relationship to the public health, safety or general

152. Brief for Respondent at 6, *Asian Americans*.

153. See *supra*, note 58.

154. *Asian Americans*, 128 A.D.2d at 102-04, 514 N.Y.S.2d at 942-43.

155. J. Asch, concurring in part in the dissent, wryly commented:

It seems fairly obvious that any real estate developer who can read a profit and loss statement is going to choose the plan which gives the larger bonus of floor space. Thus, in the alternatives presented by the zoning resolution there is a built-in financial prejudice against the building of low-cost housing.

Id. at 147, 514 N.Y.S.2d at 970.

156. *Golden v. Planning Board of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 422 (4th Dep't), *appeal dismissed*, 409 U.S. 1003 (1972).

welfare.¹⁵⁷ The zoning power must be exercised in pursuit of some valid public purpose and cannot serve to justify arbitrary exclusionary efforts.

Unfortunately, the New York Appellate Court's refusal to impose an affirmative obligation to provide housing for low- and moderate-income families in *Asian Americans* has already influenced the New York Court of Appeals in *Suffolk Housing*. That court affirmed the lower court's holding by not ordering the Town of Brookhaven to affirmatively facilitate development of low- to moderate-income housing within its geographical area.¹⁵⁸ Nevertheless, it is worthy of note that the Court of Appeals specifically pointed out that its holding was predicated on the "affirmed findings" of the Appellate Division of the Supreme Court.¹⁵⁹ The court indicated that this decision should not "be read as revealing hostility to breaking down even unconstitutional zoning barriers that frustrate the deep human yearning of low-surroundings."¹⁶⁰ The court pointed to the abstract character of the case because individual plaintiffs could not be located and their corresponding housing needs could not be determined.¹⁶¹ Thus, it would appear that under the right factual circumstances, the court would be willing to entertain the thought of interpreting *Berenson* as imposing an affirmative obligation upon municipalities to provide low-income housing. The facts here at bar appear to be sufficiently persuasive as to be the "right factual circumstance."¹⁶²

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

158. *Suffolk Housing*, 70 N.Y.2d 122, 517 N.Y.S.2d 924 (1987).

159. *Id.* at 131, 517 N.Y.S.2d at 926.

160. *Id.* at 131, 517 N.Y.S.2d at 927.

161. *Id.*

162. Alan Mallach, author of *Inclusionary Housing Programs: Policies and Practices* (1984), and numerous scholarly and legal articles on housing and planning issues, opines that:

[i]t appears that the appellate division has come to believe in a Platonic ideal of land use planning in which the physical uses of the land have been severed from their social and economic implications and in which two different housing types - single-family and multi-family - exist as generic ideal types independent of any relationship to people or housing needs. This position, however, as reflected in *Suffolk Housing Services*, exists in a legalistic vacuum ignorant of or uninterested in social and economic reality, as well as the real-

VIII. Conclusion

For *Asian Americans* to be decided on the merits, it must first hurdle the obstacles of New York civil procedure. It should have been sufficient for the plaintiffs in *Asian Americans* to demonstrate, as they did, that material questions of fact exist concerning the validity of the zoning ordinance developed from the Study. When the Study's conclusions, reached by the defendant City agency, are largely ignored by the City's agencies themselves, a question arises as to whether such ordinance is the product of a well-considered plan. *Asian Americans* is at a point in the litigation process where the plaintiffs only need to demonstrate that valid causes of action exist, not the resolution of those causes of action on their merits. This is critical to reversing the Appellate Division's holding. The Appellate Court majority chose to ignore most of the procedural issues in order to decide the causes of action meritoriously; instead, they should have limited themselves to the much narrower issue of simply whether a valid cause of action existed.¹⁶³ All of the recent exclusionary zoning cases without exception were resolved after a trial on the merits,¹⁶⁴ indicating that a valid cause of action had been successfully alleged.

Once *Asian Americans* successfully passes the procedural issue, it can then concentrate on the facts at issue and demonstrate that New York case law has been previously interpreted with sufficient liberality to impose an affirmative obligation on municipalities. Where adverse exclusionary effects of the challenged zoning resolution have a severe impact on an inner-city

ity of land use regulation. To ignore realities which are as fundamental as the nature of housing needs and the economics of housing is likely to result in bad law.

Mallach, *The Tortured Reality of Suburban Exclusion: Zoning, Economics, and the Future of the Berenson Doctrine*, 4 Pace Env't'l L. Rev. 37, 65 (1986).

163. *Id.* at 146, 514 N.Y.S.2d at 969. It is worthy of note that J. Carro never determined whether a "well-considered" plan actually existed. Instead, he properly narrowed his scope to the motion at hand: a motion to dismiss.

164. *Robert E. Kurzius v. Village of Upper Brookville*, 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1980), *cert. denied*, 450 U.S. 1042 (1981); *Blitz v. Town of New Castle*, 94 A.D.2d 92, 463 N.Y.S.2d 832 (2d Dep't 1983); *Suffolk Housing Services v. Town of Brookhaven*, 109 A.D.2d 323, 491 N.Y.S.2d 396 (1985), *aff'd*, 70 N.Y.2d 122, 517 N.Y.S.2d 924 (1987).

community in terms of displacement and where a critical need for lower-income housing has been demonstrated, remedial zoning amendments must reflect a well-balanced plan which adequately considers community needs and thereby realistically encourages the construction, rehabilitation and preservation of such housing. The Court of Appeals should utilize *Asian Americans* as a conduit to facilitate this long-needed change in land-use policy in New York.

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