SYMPOSIUM: LITIGATING AND LEGISLATING FOR AFFORDABLE HOUSING

ZONING FOR THE GENERAL WELFARE: A CONSTITUTIONAL WEAPON FOR LOWER-INCOME TENANTS

STEVE DOBKIN,* GEOFFREY SMITH,** AND EARLE TOCKMAN***

INTRODUCTION

In 1981, the Board of Estimate of the City of New York approved amendments to the City's zoning resolution that created a Special Manhattan Bridge District ("SMBD")[1] to facilitate the development of new residential housing on the few remaining vacant lots in Chinatown. The construction of two high-rise luxury condominiums within the teeming District has been delayed pending the resolution of lawsuits challenging the District on a variety of constitutional and other grounds.[2]

The authors of this paper are members of the legal team for Asian Americans for Equality ("AAFE"), a community group representing Chinatown res-

* Senior Attorney, South Brooklyn Legal Services; Adjunct Associate Professor of Law, New York Law School; Member, Asian Americans Advisory Board. B.A., City College of New York, 1968; J.D., New York University School of Law, 1971.

** Staff Attorney, Housing Conservation Coordinators; Member, Asian Americans Advisory Board. B.A., University of Rochester, 1967; J.D., New York Law School, 1977.

*** Chief Counsel, Asian Americans for Equality. B.S., University of Illinois, 1966; J.D., Northwestern University, 1969.

1. New York City Zoning Resolution, The City of New York, City Planning Commission, art. XI, ch. 6, at 687 (Special Manhattan Bridge District) [hereinafter SMBD].

2. *Lai Chun Chan Jin v. Board of Estimate*, 115 Misc. 2d 774, 454 N.Y.S.2d 201 (Sup. Ct. 1982), challenged the failure of New York's Uniform Land Use Review Procedure ("ULURP") to provide adequate notice of hearings to the community, required by § 197-c of ULURP. In March 1983, the Appellate Division of the First Department held that community residents did not have a "protected property right in land use in the community" to warrant Chinese language notices. 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). Subsequent motions to amend the special proceeding to include environmental claims were denied. However, the special permit issued to the Overseas Chinese Development Corp. was revoked on other grounds while the proceeding was pending.

On January 10, 1985 Justice Allen Murray Myers granted the City's motion to dismiss Chinese Staff and Workers Ass'n v. City of New York, No. 25498/83 (Sup. Ct., N.Y. County, filed August 11, 1983), N.Y.L.J., Jan. 23, 1985, at 12, col. 1. This article 78 proceeding, now on appeal to the Appellate Division of the First Department, challenges, inter alia, the City's failure to conduct adequate environmental impact studies prior to approval of the SMBD.

See note 3 infra for a description of the third lawsuit.

idents in one of these lawsuits.[3] This paper sets forth the arguments made by AAFE. It reasons that by ignoring the community's critical need for decent, lower-income housing, the Special District runs afoul of the general welfare obligations and civil rights protections afforded by the New York State Constitution. Taking our cue from New Jersey's progressive *Mount Laurel* doctrine, the authors contend that zoning amendments in New York City must provide a realistic opportunity for the construction of lower-income housing. Instead, the SMBD sanctions the exclusive construction of luxury housing. For the lower-income Chinese residents of the District, the SMBD promises only the discriminatory effects of increased congestion and displacement.

Part One of this article presents and analyzes the SMBD and the study on which it is based. Part Two explores the *Mount Laurel* doctrine, the expanding notions of general welfare, and the applicability of these to the situation in Chinatown. Viewing the problem from a different perspective, Part Three offers a possible approach under the anti-discrimination and civil rights protections of the New York State Constitution.

I
THE ORIGINS OF THE SPECIAL MANHATTAN BRIDGE DISTRICT

A. Manhattan Bridge Area Study

Incentive zoning, the process by which developers are granted exceptions to existing zoning limitations in exchange for the provision of public amenities, has become markedly more prevalent in recent years.[4] The New York City Planning Commission has designated deteriorated areas as special purpose districts in an attempt to revitalize them. Their use, however, is often spurred by local officials enticed by the promise of economic growth. The same officials are less willing to defend the public programs that will ensure housing for even moderate-income tenants. Thus, the districts often threaten neighborhoods' residential character and forebode gentrification of communities and the eventual displacement of residents.

The City's most dilapidated and overcrowded housing is in Chinatown, where the "working poor" immigrant population fills the Old Law tenements, concentrated in numbers far exceeding those permitted by zoning laws.[5] The

3. Asian Americans for Equality v. Koch, No. 22491/83 (Sup. Ct., N.Y. County, Feb. 21, 1984). On August 6, 1985, in a landmark 36 page decision, Justice David Saxe denied the City's motion to dismiss AAFE's claims regarding the City's failure to meet its constitutional obligations to zone for lower-income housing. N.Y.L.J., Aug. 14, 1985, at 11, col. 4. This article generally traces the development of the approach taken by the AAFE legal team of volunteer lawyers and law students. Members of the team who contributed significantly include Richard Sussman, Sherry Donovan, Tom Gordon, Doris Koo, and Wayne Saitta. To a great extent, the team, including the authors, was emboldened by their initial unfamiliarity with traditional zoning law.

4. Debate Sharpens on City's Use of Incentives In Zoning, N.Y. Times, Oct. 2, 1983, § 8, at 7, col. 1.

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

recent expansion of the borders of Chinatown, resulting from liberalized immigration laws and an influx of foreign investment, has created a real estate boom.[6] Wasting no time in trying to take advantage of the foreign capital available for redevelopment, the Koch Administration initiated the Manhattan Bridge Area Study (the "Study"),[7] the precursor of the SMBD. The purpose of the Study was to lay the groundwork for economic development. Although lip service was paid to the needs of Chinatown's current residents, the real benefits of the proposed zoning changes inure exclusively to wealthy outsiders. The Study's findings of a housing crisis have only a weak correlation to its ultimate recommendations.

In general, the factual findings of the Study support the conclusion that the most compelling need of the District is for additional lower-income housing. With the exception of a small group of professionals and businesspersons, most of the residents of the Study area "remain at the bottom of the economic ladder."[8] According to the Study, "[t]he upper floors of the tenements in Old Chinatown are generally overcrowded."[9] Moreover, "New York City's Chinese population has a lower income than other Chinese in the United States."[10]

The Study provides the following description of housing within the area:

> There are 675 multi-family structures in the MBSA [Manhattan Bridge Study Area], of which 98 percent are walk-ups; only two percent have elevators. Eighty-five percent of these buildings are Old Law tenements, built prior to 1901. Eleven percent are New Law tenements, constructed between 1901 and 1927 to the slightly higher standards of the 1901 Tenement Act. Only four percent were built to the relatively high standards of the City's 1929 Multiple Dwelling Law. The Old Law tenements in Old Chinatown housed the earliest Chinese population; today's Chinese population is moving to similar buildings in other parts of the MBSA.[11]

In addition, the Study found a heavy demand for low-income housing:

> Old and deteriorated as the tenements are in the CSA [Chinatown Study Area] it is likely that demand for them will continue. The current and expected higher levels of immigration, together with the predominantly low-income status of the MBSA's Chinese households, virtually assure a heavy demand for existing housing in the

6. Gargan, Asian Investors Battle for Footholds in Chinatown, N.Y. Times, Dec. 29, 1981, at A1, col. 1.

7. Have-Nots Fear "Manhattanization" as Developers Size up Chinatown, N.Y. Times, Sept. 21, 1984, at B1, col. 1.

8. Study, supra note 5, at 13.

9. Study, supra note 5, at 17.

10. Study, supra note 5, at 31.

11. Study, supra note 5, at 41. This description euphemizes the truly dilapidated condition of much of Chinatown's housing.

area.[12]

The Study also found that existing zoning regulations stifled the construction of any additional residential housing by imposing restrictions on permissible height, setback, and population density.[13]

Although the factual findings in the Study cry out for a plan to facilitate the construction of lower–income housing, the City Planning Department avoided this obvious conclusion. The Study fails to suggest alternative means which would address lower–income housing needs. Instead, it simply concludes that the rehabilitation of Old Law tenements would require rent increases beyond the means of most of the MBSA's Chinese families unless public subsidies were made available over the next ten years.[14] For the next decade, according to the Study, 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.[15] The Study concludes 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."[16]

The Study recommends zoning changes to permit high–rise development. However, the Study fails to explain how this new development will benefit the predominantly lower–income community within the Special District. Moreover, the Study closes its eyes to the potential use of incentive zoning to foster lower–income housing. It suggests that the market alone must dictate the nature of the housing to be built. This is far from the case, as Part Three of this article describes.

B. The Special Manhattan Bridge District

As a result of the Study, the SMBD[17] was created. The goal of the District is to provide new and renovated housing in Chinatown, with lip service paid to the need for maintaining the character and scale of the community.[18]

---

12. Study, supra note 5, at 44.
13. Study, supra note 5, at 24.
14. Study, supra note 5, at 44.
15. Study, supra note 5, at 45.
16. Study, supra note 5, at 57. The Study made the following recommendation for zoning within the MBSA:

> A special zoning district could be considered for the purpose of 1) preservation of scale in the core and adjacent areas; 2) reevaluation of the residential zoning density as compared to the existing commercial floor area regulations; 3) prohibition of inappropriate uses in new developments such as parking on ground floors in the commercial core area; 4) limiting the maximum amount of transferred Floor Area Ratio (F.A.R.) on adjacent lots based on height limitations; 5) modifying height and setback requirements; 6) establishing guidelines for key sites where new development can occur.

17. See note 1 supra.
18. 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:

To AAFE and other community groups who opposed the SMBD, these are precisely the goals of the real estate developers who seek to displace the poor people of Chinatown. The goals of the existing Chinatown community—decent, affordable housing and services for the lower-income masses of people—are not addressed by this plan.

To accomplish the Study's goals, the District provides a series of "incentives" to further the construction of residential housing accompanied by community amenities. Developers are offered the opportunity to construct higher buildings with greater lot coverage than current zoning permits (so-called "density bonuses") in exchange for providing their choice of three categories of amenities. Bonuses are granted for providing community facility space, rehabilitating substandard apartments within the District, or developing low- and/or moderate-income housing. The size of the bonus depends on the nature of the amenity.[19] The largest bonus is given to the development of community facility space. Developers in that category are allowed seven additional square feet of floor area for each square foot of community facility space they provide.

The bonus for rehabilitated housing is almost as generous. A developer of rehabilitated housing may transfer to the building to be constructed six times as much floor area as is demolished and rehabilitated in another existing structure within the District.[20] However, there is no requirement that the new or rehabilitated housing be affordable to low- or moderate-income persons. The Study admits that rehabilitated housing will be too expensive for the cur-

---

(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.

SMBD, supra note 1, at § 116-00.

A special permit to Overseas Chinese Development Corp. Inc. for the construction of East-West Towers, a luxury condiminium, was approved by the Board of Estimate on August 20, 1981. On August 14, 1983 the Board of Estimate approved a special permit for the construction of Henry Street Towers, a 21 story building with 87 condominium units ranging in price from $170,000 to $500,000.

19. Plaintiffs' Affidavits in Opposition to Defendants' Motion to Dismiss, at ¶ 30, *Asian Americans for Equality*, No. 22941/83 [hereinafter Plaintiffs' Affidavits].

20. Id. at ¶ 32.

rent residents of the Study area.[21] In fact, "[t]his bonus will encourage displacement of current low–income residents, in order to vacate buildings for new construction and to demolish and rehabilitate old tenements for the transfer rehabilitation bonus."[22]

Predictably, the "bonus" for the construction of low– and moderate–income housing has failed to attract a single developer. In affidavits before the New York Supreme Court, New York City Planners explained the reason:

> This bonus allows developers only an additional two square feet of floor area for each square foot of low– and moderate–income housing provided. The other two bonuses offer much higher bonuses for providing amenities that are already more profitable than low– and moderate–income housing. When this bonus is compared with the other two, it is obvious that it was not going to be utilized by developers, and is not a serious alternative.[23]

City Planners Paul Davidoff and Keith Getter, who analyzed the SMBD for AAFE,[24] concluded that "[d]espite the [D]istrict's declared goal of preserving the area's income mix, the [SMBD] regulations will tend to remove existing low– and moderate–income units and produce only new and rehabilitated housing at luxury rates."[25] Indeed, the only special permits to be issued in the SMBD by the Board of Estimate have gone to one hundred percent luxury condominium developments, East–West Towers and Henry Street Towers. In each case the developer chose to provide a community facility rather than new community housing.[26]

Davidoff and Getter also noted the probable displacement effects of the District on the lower–income residents of Chinatown:

> [T]he population moving into the area has the ability to outbid the old residents for the space. While this was not a problem before the zoning regulations made it profitable to put up new buildings, the new construction induced by the [SMBD] will attract high–income persons. This demand, together with the [SMBD] bonuses will provide incentive to more owners to vacate their buildings in order to demolish them and build new developments. This will serve to push out the remaining low–income persons, who will be forced out through demolition and rehabilitation.[27]

The result will be the gentrification of Chinatown.

---

21. Id.
22. Id.
23. Id. at ¶ 33.
24. Plaintiffs' Affidavits, supra note 19, were written by Paul Davidoff and Keith Getter.
25. See Gargan, supra note 6.
26. Plaintiff's Affidavits, supra note 19, at ¶ 34.
27. Id. at ¶ 37.

II
ZONING FOR THE GENERAL WELFARE

* * *

> [I]t is an essential part of the judicial function to watch over the parochial and exclusionist attitudes and policies of local governments, and to see to it that these do not run counter to national policy and the general welfare.
>
> Justice Hall dissenting in *Vickers v. Township Committee of Gloucester Township*[28]

* * *

In its lawsuit, AAFE contended that the City had abdicated a fundamental responsibility to the general welfare by setting aside the few vacant lots remaining in Chinatown for luxury housing development. Traditionally, the concept of zoning for the general welfare had been used to justify the division of a municipality into various restricted use districts. But developing legal interpretations of the general welfare doctrine support AAFE's position.

A. Overcoming Euclid

In the landmark case of *Village of Euclid v. Ambler Realty Co.*,[29] the Supreme Court held that a locality was justified in excluding apartment houses from designated residential districts. Among the appropriate considerations in the exercise of police power for the general welfare were maintaining open spaces and attractive surroundings, and providing children with quiet, safe, and open play areas to be enjoyed in these "favored" localities.

The Court imposed an overwhelming burden on those challenging a municipality's restrictions. To be overturned, the zoning provisions must be found arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.[30] The Court did not examine the rights of those excluded by the zoning ordinances. The *Euclid* principle ultimately was used to support suburban zoning enactments which excluded all types of housing potentially available to lower-income groups.[31]

---

28. 37 N.J. 232, 255, 181 A.2d 129, 141 (1962) (Hall, J., dissenting) (citing Williams, Planning Law & Democratic Living, 20 Law & Contemp. Probs. 317 (1955)), appeal dismissed, 371 U.S. 233 (1963).

29. 272 U.S. 365 (1926).

30. Id. at 395.

31. Even at the time of *Euclid*, "there were those who recognized and bemoaned the existence of a deeper, less benevolent purpose behind some restrictive zoning." Thus, in originally invalidating the *Euclid* ordinance at the trial level, the federal district court noted:

> The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter

In 1962, in his now famous dissent in the *Vickers* case,[32] Justice Hall of the New Jersey Supreme Court challenged the majority's "rubber stamp" approval of a developing municipality's total ban on mobile homes. He rejected the "superficial and one-sided"[33] trend fostered by *Euclid* and called for an approach under which courts would weigh all factors and competing interests to determine if the public welfare had been served.[34]

Although Justice Hall specifically addressed the exclusionary zoning practices in New Jersey, his dissent generates broader application by raising fundamental questions about the valid use of *Euclid*. He asserted that "the leaders of liberal-democratic thought are all too often so confused with abstractions [such as general welfare] . . . and so fearful of judicial review generally, as to be unable to understand the implications of what is going on."[35] Furthermore, he felt, "[i]t has not been generally realized that in many instances the problems arising in [the zoning field] are closely akin to those involved in civil liberties law, and call for similar attitudes toward the exercise of governmental power."[36]

The general welfare notion has been construed to mean that zoning ordinances should be " 'reasonably calculated to advance the community as a social, economic and political unit' or aid in making the community a desirable place in which to work and live."[37] Justice Hall, however, regarded the definition of the term as so broad that one could hardly conceive of any land use regulation which would not fulfill it, especially when the governing body's determination is so controlling. He added that "our courts have in recent years made it virtually impossible for municipal zoning regulations to be successfully attacked."[38] Justice Hall concluded:

> Municipal legislative action is always assumed to have been taken conscientiously, sincerely and honestly. But the test of validity is certainly something much more than bad faith or corruption. Local officials, no matter how conscientious and sincere in their own minds, may be legally wrong in formulating into legislation what they think is best for their community. The only place that question can be

---

inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life.

Ambler Realty Co. v. Village of Euclid, 297 F. Supp. 307, 316 (N.D. Ohio 1924), rev'd, 272 U.S. 365 (1926).

32. 37 N.J. at 252, 181 A.2d at 140.

33. Id. at 259, 181 A.2d at 143.

34. Id. at 260, 181 A.2d at 144. As Justice Hall stated:

Of course, such a process involves judgment and the measurement can never be mathematically exact. But that is what judges are for—to evaluate and protect all interests, including those of individuals and minorities, regardless of personal likes or views of wisdom, and not merely to rubber-stamp governmental action in a kind of judicial laissez-faire.

35. Id. at 255, 181 A.2d at 142 (citing Williams, supra note 28).

36. Id.

37. 37 N.J. at 256, 181 A.2d at 142.

38. Id. at 259, 181 A.2d at 143.

tested and where individual rights and privileges are safeguarded is in the courts."[39]

B. *The* Mount Laurel *Doctrine*

Twelve years after his dissent in *Vickers*, Justice Hall wrote the landmark decision in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel* (*Mount Laurel I*).[40] For the first time, the general welfare concept was used as a sword to attack exclusionary zoning ordinances rather than as a shield for their defense. The township of Mount Laurel was a typical example of a suburban community which had excluded multiple dwellings from its zoning ordinance, and in doing so, had excluded lower-income residents.[41]

Noting that shelter is a basic human need, Justice Hall wrote that "[i]t is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation."[42] A municipality, having been delegated the power to zone by the state, must affirmatively plan and provide a reasonable opportunity for a variety of housing, including low- and moderate-income housing, to meet the needs of all prospective residents. The goal of increasing the tax base would not excuse this obligation to the general welfare.

Mount Laurel I introduced the concepts of "fair share" and "regional needs." Broadly speaking, these terms were meant to point the way to some

39. Id. at 261, 181 A.2d at 145. Justice Hall was also a strong advocate for shifting the presumption of validity of zoning ordinances from the plaintiff to the municipality. This presumption, however, is high and therefore seldom overcome. Thus, Justice Hall believed that "it seems only fair to private citizens seeking judicial determination of their rights to require the municipality, with all its resources, to assume the burden of going forward to justify its action when the challenged measure gives good possibility on the surface of going to a doubtful extreme." Id. at 260, 181 A.2d at 144.

What apparently raised Justice Hall's dissent was the fact that the plaintiff in *Vickers* was without the resources or financial means to marshal and present the multi-faceted evidence needed to meet the heavy burden the majority imposed upon him.

Given the extremely limited financial resources of the organizations and individuals who have challenged the SMBD, the question of how to allocate the burden of proof takes on great importance.

In defense of the SMBD, relying heavily on *Euclid*, the City has argued that the economic revenues associated with luxury housing provide a sufficient rational basis for the Special District. Under the test suggested by Justice Hall, this defense would not meet the City's burden of proof. Rather, having demonstrated the Special District's failure to address its own documented need for lower income housing, those challenging the District would make out a *prima facie* case. The burden of proof would then shift to the City to demonstrate that the SMBD does in fact promote the general welfare of New York City and the Chinatown community. From the standpoint of an equitable allocation of litigational resources to permit a full airing of the issues, once the challenges have established an inconsistency in the District, the City should bear the burden of justifying the ordinance.

40. 67 N.J. 151, 336 A.2d 713 (1975), dismissed, 423 U.S. 808 (1975) [hereinafter *Mount Laurel I*].

41. 37 N.J. at 266, 181 A.2d at 147.

42. 67 N.J. at 179, 336 A.2d at 727.

quantifiable definition of a municipality's obligations to house a given percentage of the state's low– and moderate–income residents. The decision, however, stopped short of directing the municipality to provide a specific number of lower–income housing units. Rather, the court placed its trust in the municipality to revise its zoning ordinance to provide a realistic opportunity for the construction of low– and moderate–income housing.

In *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel* (*Mount Laurel II*), the court would cite concepts of "fundamental fairness and decency" in support of this rule:

> The basis for the constitutional obligation is simple: the State controls the use of land, *all* of the land. In exercising that control it cannot favor rich over poor. It cannot legislatively set aside dilapidated housing in urban ghettos for the poor and decent housing elsewhere for everyone else.[43]

Although the *Mount Laurel* litigation focussed upon developing suburban communities where lower–income housing had often been entirely excluded, the court recognized that general welfare obligations must logically apply to the inner city as well:

> 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.[44]

Having scanned New Jersey's sweeping land use horizons, the AAFE litigation team turned its attention back across the Hudson. New York's zoning law offered a more uncertain and undeveloped path some distance from the farthest reaches of *Mount Laurel II*. Nevertheless, the lower–income people in desperate need of decent, affordable housing in Chinatown could not wait for further definition; the gaps would have to be filled by analogy and argument.

On both sides of the Hudson, zoning as an exercise of the police power must serve the "general welfare" of residents of the state and not just members of the limited community.[45] But in New York, litigation had not yet expanded the application of the "general welfare" to assist lower–income individuals effectively. The New York courts have recognized the importance of examining New Jersey's "advanced body of law," but the last time they had looked, *Mount Laurel II* had not yet been decided.[46] In dicta, the New York

43. 92 N.J. 158, 209, 456 A.2d 390, 415 (1983) [hereinafter *Mount Laurel II*].

44. 92 N.J. at 214, 456 A.2d at 418.

45. N. Y. Gen. City Law, § 20, subdiv. 25; Coley v. Campbell, 126 Misc. 869, 215 N.Y.S. 679 (Sup. Ct. 1926).

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

Court of Appeals said that "community efforts at immunization or exclusion will not be countenanced,"[47] and therefore normal presumptions of constitutionality would not apply. But New York courts were slow to apply that mandate.[48] Almost no reported litigation involved direct challenges to exclusionary ordinances by lower–income people.[49]

The traditional New York notion of a "well–considered plan"[50] required that zoning authorities act for the benefit of "the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even a majority of the community."[51] However, no authority yet existed for the proposition that a "well–considered plan" must address the needs of lower–income people, or, having done so, could not override their interests in favor of income generating proposals. Standing by itself, "the well–considered plan" raised more questions than it answered.

C. Community and Regional Needs

More promising is the recently articulated decision by the Court of Appeals in *Kurzius v. Incorporated Village of Upper Brookville*,[52] that a zoning ordinance will be invalidated if it was enacted without giving proper regard to local and regional needs and has an "exclusionary purpose".[53]

The City's Study documented Chinatown's desperate local need for lower–income housing. The Study then ignored this community's needs. However one defines the locality or the region, whether the SMBD, old Chinatown, lower Manhattan or even the City and its suburbs, there is an overriding need for lower–income housing.[54] The exclusion of lower–income housing from Chinatown cannot be justified by availability in other sections of the City. The situation in New York parallels that described by Justice Wilentz in

47. Id. at 108, 341 N.E.2d at 241, 378 N.Y.S.2d at 679 (citing In re Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 378, 285 N.E.2d 291, 302, 334 N.Y.S.2d 138, 152 (1972)); see also Marcus Associates, Inc. v. Town of Huntington, 57 A.D. 116, 120, 393 N.Y.S.2d 727, 730 (2d Dep't 1977), aff'd, 45 N.Y.2d 501, 382 N.E.2d 1323, 410 N.Y.S.2d 546 (1978).

48. In his sharp partial dissent in Berenson v. Town of New Castle, 67 A.D.2d 506, 524, 415 N.Y.S.2d 669, 681 (2d Dep't 1979), Justice Shapiro criticized the court's granting a further extension to a municipality to reamend its exclusionary zoning ordinance. Terming the town's amended ordinance "a derisive mockery" he concluded his opinion with "[e]nough is enough."

49. For a good discussion of group standing to bring this kind of challenge, see Suffolk Housing Services v. Town of Brookhaven, 91 Misc. 2d 80, 397 N.Y.S.2d 302 (Sup. Ct. 1977), aff'd and modified, 63 A.D.2d 731, 405 N.Y.S.2d 302 (2d Dep't 1978).

50. For the most complete discussion of this doctrine see Udell v. Hass, 21 N.Y.2d 463, 469, 235 N.E.2d 897, 900, 288 N.Y.S.2d 888, 893–94 (1968).

51. Id. at 469, 235 N.E.2d at 900, 288 N.Y.S.2d at 893 (citing De Sena v. Gulde, 24 A.D.2d 165, 265 N.Y.S.2d 239 (2d Dep't 1965)).

52. 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1984).

53. Id. at 346, 414 N.E.2d at 682, 434 N.Y.S.2d at 184.

54. See Failure of Plan for Homeless Reflects City Housing Crisis, N.Y. Times, Feb. 19, 1985, at A1, col. 5; see also N.Y. Pub. Hous. Law § 2 (McKinney Supp. 1984–85) ("there is not an adequate supply of adequate, safe and sanitary dwelling accommodations for persons of low income . . . ;")

New Jersey: "Upper- and middle-income groups may search with increasing difficulty for housing within their means; for low-income and moderate-income people, there is nothing to search for."[55]

D. Housing or Paper?

The most troubling distinction between New York's exclusionary zoning decisions and *Mount Laurel II* is that in New York it is not yet clear that the obligation is to produce housing, rather than paper. No New York court has gone so far as to nullify an ordinance which *on its face* appears to offer some encouragement to low- or moderate-income housing. No New York court has ordered a municipality to guarantee lower-income housing in a hostile economic market.

In *Blitz v. Town of New Castle*,[56] one appellate court pointed the misguided way to a laissez-faire approach to affirmative zoning:

> Essentially, however, zoning ordinances will go no further than determining what may or may not be built; market forces will decide what will actually be built in the absence of government subsidies. Thus, in terms of low- to moderate-income rental housing—generally conceded to be the most pressing need—even the most liberal zoning ordinance, in the absence of affirmative governmental action to shift the balance of market forces, will have no success in promoting such housing construction. Thus, our concern is to determine whether, on its face, the amended ordinance will allow the construction of sufficient housing to meet the town's share of the region's housing needs, particularly for multi-family housing, *assuming that such construction be both physically and economically feasible.*[57]

The broad dicta in *Blitz*, which seem to equate any affirmative approach with the adoption of socialism, greatly oversimplify the issue.[58] Even if luxury housing is favored for its economic return, it does not necessarily follow that the construction of some measure of lower-income housing is not economically feasible.

A variety of affirmative *Mount Laurel II* tools remain to be employed before any court can conclude that the construction of some lower-income housing in Chinatown is not economically feasible.[59] The SMBD could be

55. *Mount Laurel II*, 92 N.J. at 212, 456 A.2d at 416-17.

56. 94 A.D.2d 92, 463 N.Y.S.2d 832.

57. Id. at 99, 463 N.Y.S.2d at 836; see also Suffolk Housing Services v. Town of Brookhaven, N.Y.L.J., July 26, 1985, at 1, col. 6, in which the court respectfully declined "to work a change of historic proportions in the development of New York zoning law."

58. The *Blitz* dicta can be distinguished from the Court's finding that it was "satisfied that the amended ordinance facilitates the development of a sufficient number of housing units" to satisfy the town's share of regional need. Id. Surely the Court cannot have intended to advocate a superficial approach limited to examining an ordinance "on its face" alone.

59. See Northern Westchester Professional Park Associates v. Town of Bedford, 60 N.Y.2d 492, 458 N.E.2d 809, 470 N.Y.S.2d 350 (1983) for a discussion of the heavy burden

amended to include *real*, rather than illusory bonuses for low– and moderate–income housing. Use of available state or federal subsidies could be encouraged or required. If developers did not take the incentive hook, mandatory set–asides of lower–income units, cross–subsidized by market price units, could be *imposed*. Innovative ideas for "least" cost housing offer a final fallback.

Given the spiralling demand for luxury housing in Chinatown, it seems inconceivable that a profitable plan for new residential housing could not include some lower–income units. The City Planners working with AAFE have volunteered to show the City the many different ways this could be accomplished.

The distinguishing feature of *Mount Laurel II* is the New Jersey Supreme Court's refusal to tolerate "meaningless" zoning amendments which on paper permit the construction of lower–income housing, but in fact produce none. Justice Wilentz noted that the mere removal of "restrictions and exactions" was not enough. Without compulsion or real incentive, developers would consistently favor the higher profits of upper–income housing:

> 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.[60]
>
> . . . .
>
> . . . Satisfaction of the *Mount Laurel* doctrine cannot depend on the inclination of the developers to help the poor. It has to depend on affirmative inducements to make the opportunity real.[61]

Since "enforcement of constitutional rights cannot await a supporting political consensus,"[62] the court in *Mount Laurel II* vowed to apply a firm judicial hand. Specially designated courts would oversee all *Mount Laurel* litigation, quantifying the precise number of low– and moderate–income units required for each municipality to meet its "fair share" of the "regional need." If a locality failed to revise its zoning ordinance within ninety days to meet its *Mount Laurel* obligations, the court would prescribe the necessary affirmative measures. Since this complex and sophisticated judicial apparatus resulted from the New Jersey high court's frustration with prolonged noncompliance with its original mandate, it would be unrealistic to expect the New York courts to grant this kind of comprehensive relief at this stage.

AAFE has limited its request for relief to nullification of the SMBD and a referral to the appropriate planning bodies with a direction to provide a realistic opportunity for the construction of lower–income housing. This remedy for

---

normally applied to claims of economic unfeasability by property owners faced with restrictive zoning ordinances. The same standard should apply to a municipality attempting to evade its responsibility to provide some measure of lower–income housing.

60. 92 N.J. at 198–99, 456 A.2d at 410.

61. Id. at 260–61, 456 A.2d at 442.

62. Id. at 212, 456 A.2d at 417.

revising an exclusionary zoning ordinance has already been approved in New York. It was never the intention of the community plaintiffs, who have sought broader access to the planning process, to have the courts dictate the exact means by which the obligation must be met. But this group will never be satisfied with paper, only with housing.

III
FIGHTING ZONING DISCRIMINATION WITH THE NEW YORK STATE CONSTITUTION

A. Approaching the SMBD From a Civil Rights Perspective

* * *

> Because things in this world are complicated and involve many factors, we should view problems from different perspectives, rather than a single one.[63]

* * *

When AAFE first planned its challenge to the SMBD, the decision was made to focus on the *Mount Laurel* connection and the government's responsibility to provide lower-income housing, rather than on civil rights claims of discrimination based on race and national origin. While the negative effects of the SMBD would fall entirely on the Asian population of Chinatown, in the final analysis the struggle for decent lower-income housing cuts across racial and ethnic lines. AAFE sought to emphasize the broadest principles of unity and tried to appeal to a multi-ethnic coalition.

Nevertheless, the attack on lower-income housing unquestionably falls most heavily on minorities. Planned shrinkage of lower-income minority neighborhoods is an undisputed phenomenon, and the racist overtones of the SMBD were apparent to the members of AAFE:

> [T]here is nevertheless a significant correlation between racial minority status and poverty; classification based on income can easily mask racial discrimination and even where such motivation is absent, the effect of the regulation may result in minority disqualification to an identical extent.[64]

Thus, when the supreme court judge considering the City's motion to dismiss asked the parties to brief the equal protection implications of the Special District, the AAFE legal team focused on the progressive language of the New York State Constitution.

The second sentence of article I, section 2 of the New York State Consti-

63. 4 Mao Tse-Tung, Selected Works 54 (1945).

64. J. A. Kushner, Fair Housing Discrimination in Real Estate, Community Development and Revitalization 31 (1983).

tution provides: "No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation or institution, or by the state or any subdivision of the state."[65] The term "civil rights" is intended to be coterminous with applicable civil rights laws, making the enforcement of those laws a matter of constitutional concern.[66] Of course the scope of civil rights protection has undergone a judicial and legislative revolution, and the State Constitution must grow accordingly. As stated in *Euclid*, "while the meaning of constitutional guaranties [sic] never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In the changing world, it is impossible that it should be otherwise."[67]

The "civil rights" embodied in section 2 must now include the wide ranging protection against housing discrimination afforded by Title VIII of the United States Code, the so-called "Fair Housing Law,"[68] and the State Human Rights Law,[69] which prohibits all forms of discrimination in the provision of housing accommodations.

In part, Title VIII provides that "[I]t shall be unlawful—(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex or national origin."[70] Under Title VIII, "[E]ffect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme."[71] Zoning ordinances which have the effect of excluding racial and national minorities are therefore prohibited by Title VIII,[72] and by extension, by article I, section 2 of the New York State Constitution.

Without question, the negative effects of the SMBD, including increased

65. Adopted Nov. 8, 1938, eff. Jan. 1, 1939. The first sentence of article I, section 2 states that "[n]o person shall be denied the equal protection of this state or any subdivision thereof."

66. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950).

67. 272 U.S. at 387.

68. 42 U.S.C. §§ 3601–3619 (1968).

69. N.Y. Exec. Law § 290 (McKinney 1982) provides that the Legislature "hereby finds and declares that the state has the responsibility to act to ensure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such an equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing, or health care not only threatens the rights and proper privileges of its inhabitants but menaces the peace, order, health, safety and general welfare of the state and its inhabitants . . . ." Exec. Law § 291.2 makes the opportunity to obtain, inter alia, the ownership, use, and occupancy of housing accomodations, without discrimination because of age, race, creed, color, national origin, sex, or marital status, a civil right.

70. 42 U.S.C. § 3604(a) (1968) (emphasis added).

71. Smith v. Anchor Bldg. Corp. 536 F.2d 231, 233 (8th Cir. 1976).

72. See, e.g., Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); Park View Heights Corp. v. City of Black Jack, 605 F.2d 1033 (8th Cir. 1979), cert. denied, 445 U.S. 905 (1980).

congestion and probable displacement, will be experienced entirely by the Asian Americans who live in Chinatown.[73] No other groups are directly affected by this redistricting. The fact that the existing housing in Chinatown is already occupied primarily by Asian Americans does not address the claim that the redistricting has a racially discriminatory effect.

Racial discrimination can manifest itself in many guises other than the usual one of exclusion from a white community. For instance, the well known case of *Yick Wo v. Hopkins*[74] dealt with discriminatory enforcement of San Francisco's building code in an unconstitutional attempt to close Chinese laundries. One federal court of appeals stated: "[n]or are we suggesting that desegregation is the only goal of the national housing policy. There will be instances where a pressing case may be made for the rebuilding of a racial ghetto."[75]

In *Hunter v. Erickson, Mayor of Akron*,[76] the Supreme Court recognized "the social and economic losses to society which flow from substandard ghetto housing and its tendency to breed discrimination and segregation contrary to the policy of the city to assure equal opportunity to all persons to live in decent housing facilities . . . ."[77] The fact that the plaintiffs in the Chinatown litigation do not wish to relocate to the suburbs, but rather are compelled by jobs and cultural and family ties to remain in the inner city, should not preclude a claim of zoning discrimination.[78]

Title VIII has supported orders for broad affirmative relief.[79] Section 812 "gives the district court the power it needs to fashion affirmative equitable relief calculated to eliminate as far as possible the discriminatory effects of violation[s] of the Fair Housing Act."[80] In *Park View Heights Corp. v. City of Black Jack*,[81] the Eighth Circuit vowed to put "teeth" into the Title VIII remedy, just as the New Jersey Supreme Court in *Mount Laurel II* has promised to put "steel" into the *Mt. Laurel* doctrine.

---

73. Complainants in *Asian Americans for Equality* have also alleged a conscious "master plan" by the City to exclude minorities through a policy of "planned shrinkage." Their supplemental brief dated November 13, 1984 suggests that the SMBD is part of a historical pattern of discrimination against Asian Americans. To satisfy a claim of housing discrimination made under the federal equal protection clause, the Supreme Court requires proof of discriminatory intent. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

74. 118 U.S. 356 (1886).

75. Shannon v. Department of Hous. and Urban Dev., 436 F.2d 809, 822 (3d Cir. 1970).

76. 393 U.S. 385 (1969).

77. Id. at 386; see also South East Chicago Comm'n v. Department of Hous. and Urban Dev., 488 F.2d 1119 (7th Cir. 1973), in which the court recognized that a glaring need for decent housing can justify subsidized housing site selection within a ghetto community.

78. To limit claims of zoning discrimination to suburban housing development would in itself be discriminatory. The constitutional mandate is binding on all of New York State. The *Mt. Laurel II* doctrine specifically applies to the indigenous needs of lower-income inner city residents. If neither the inner city nor the suburbs have any affirmative obligation to see that lower-income housing is made available, where are lower-income people supposed to go?

79. See note 72 supra.

80. *Park View Heights*, 605 F.2d at 1036.

81. See note 72 supra.

The City of Black Jack was created out of a virtually all-white unincorporated area of St. Louis County, Missouri. Faced with a proposal for racially integrated townhouse development, the new city immediately enacted a zoning ordinance which barred all further apartment construction and made existing apartments non-conforming uses.

Partly as a result of the discriminatory zoning ordinance, the municipality lost the opportunity for federal subsidies to complete the low- and moderate-income housing development. The city argued that once the zoning ordinance was invalidated, the plaintiff class was in the legal position that it had been in prior to the enactment of the ordinance, and was therefore made whole. The circuit court disagreed, and ordered the district court to fashion an equitable remedy requiring the city to take affirmative steps to bring low-cost housing to Black Jack.[82] This is precisely the relief sought for Chinatown by AAFE in their challenge to the SMBD.

B. The New York State Constitutional Mandate to Provide for the Needy

Although wealth has generally not been treated as a suspect classification by federal courts,[83] strict scrutiny has been applied to classifications which impact on "fundamental rights." As used by the Supreme Court, the term "fundamental rights" refers to those rights which have their source, explicitly or implicitly, in the United States Constitution.[84]

The New York State Constitution holds out the promise and protection of affirmative economic rights not provided in the Federal Constitution. Beyond the general welfare obligation and the civil rights protections of Title VIII, articles XVII and XVIII of the State Constitution support the fundamental nature of the right of lower-income persons to have their housing needs addressed. In pertinent part, section 1 of article XVII provides: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions and in such manner and by such means, as the legislature may from time to time determine."[85] The history of article XVII, section 1, "is indicative of a clear intent that state aid to the needy was deemed to be a *fundamental* part of the social contract."[86]

The legislative history of the Constitutional Convention of 1938 establishes that this provision is a mandate to the legislature to provide for those whom it has defined as "needy":

Here are words which set forth a definite policy of government, a

82. It seems only fair to note that the *Park View Heights* court added that "the district court should not order relief that is more intrusive on governmental functions than is necessary to achieve the goals of the Fair Housing Act." 605 F.2d at 1040.

83. See, e.g., *Arlington Heights*, 429 U.S. at 252; James v. Valtierra, 402 U.S. 137 (1971).

84. Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982).

85. N.Y. Const. art. XVII, § 1.

86. Tucker v. Toia, 43 N.Y.2d 7, 8, 371 N.E.2d 449, 451, 400 N.Y.S.2d 728, 730 (1977) (emphasis added); accord, Lee v. Smith, 43 N.Y.2d 453, 460, 373 N.E.2d 247, 250, 402 N.Y.S.2d 351, 355 (1977).

> concrete social obligation which no court may ever misread. By this section, the committee hopes to achieve two purposes: First: to remove from the area of constitutional doubt the responsibility of the State to those who must look to society for the bare necessities of life; and, secondly, to set down explicitly in our basic law a much needed definition of the relationship of the people to their government.[87]

Accordingly, in *Tucker v. Toia*, the Court of Appeals construed section 1 of article XVII as placing an affirmative duty on the state to provide aid to the needy. "In New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution."[88] This constitutional provision "unequivocally prevents the Legislature from simply refusing to aid those whom it has classified as needy."[89]

In *Block v. Hirsh*,[90] Justice Oliver Wendell Holmes stated an indisputable truth when he wrote that "[h]ousing is a necessary of life." So far, the reported cases interpreting article XVII have focused on the obligation to provide public assistance payments. The application of these principles to housing, a basic human necessity, remains to be developed.

The commitment to decent housing for lower–income people is also embodied in article XVIII which provides explicit constitutional authority for the construction of lower–income housing projects, and for urban renewal projects for the reconstruction and rehabilitation of substandard and unsanitary areas. Programs conducted by the state in furtherance of these purposes take precedence over local zoning ordinances.[91] If these multifarious provisions mean anything, surely they prohibit a zoning authority from creating housing for only the rich and turning its back on the housing needs of the poorest members of the state's family.[92]

CONCLUSION

As the crow flies, Chinatown is only a short distance from suburban New Jersey, but for the moment, the rules that oversee their development are a world apart. New York City has a Special District where new housing will be built for the rich alone. Yet in the Jersey suburbs, the *Mount Laurel* rule requires the provision of housing for poor persons.

At a time when the federal courts are retreating in the field of civil

87. 3 Revised Record of the Constitutional Convention 2126 (1938) (comments by Edward Corsi, Chairman of the Committee on Social Welfare).

88. 43 N.Y.2d at 7, 371 N.E.2d at 451, 400 N.Y.S.2d at 730.

89. Id. at 8, 371 N.E.2d at 452, 400 N.Y.S.2d at 731.

90. 256 U.S. 135, 156 (1921).

91. See Peters v. New York State Urban Dev. Corp., 41 A.D.2d 1008, 344 N.Y.S.2d 151 (3d Dep't 1973).

92. Governor Mario Cuomo often refers to the people of New York as a "family"; see, e.g., N.Y. Times, July 17, 1984, at A16, col. 1 (keynote address to 1984 Democratic Convention).

rights,[93] the *Mount Laurel* doctrine offers a beacon of hope for progressive change. In an era of devastating attacks on lower-income housing, including the virtual elimination of federal housing subsidies, there are constitutional burdens on the state and its subdivisions to provide housing for the needy.

No one can deny the comprehensive role of the state in every aspect of the provision of housing. Zoning can and must do more than merely unleash the forces of the free market.[94] If the New York courts reject the *Mount Laurel* mandate for affirmative zoning, then current development trends will ensure that sooner or later, there will be no more lower-income housing. The New York State Constitition prohibits the City from zoning for the benefit of the rich alone; the New York Judiciary may not build housing, but it must enforce the Constitution.

Must the day come when the former residents of Chinatown join with other displaced ethnic groups as homeless nomads? The threat to the general welfare seems clear.

---

93. See, e.g., Brennan Laments Changes In Court, N.Y. Times, May 5, 1985, § 1, at 42, col. 3 (reporting a speech in which Justice Brennan decried the recent tendency to uphold the state's position in the vast majority of constitutional challenges).

94. In New York City the government impacts directly on rental housing through, inter alia, control and stabilization; subsidization; tax exemptions; housing, health, and building codes; criminal sanctions; cooperative and condominium conversion laws; human rights laws; the housing court apparatus; public housing programs; and city-owned housing. The "free market" is nothing more than a myth and a slogan.