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To be Argued by:
RICHARD F. BELLMAN
(Time Requested: 30 Minutes)

Suffolk County Clerk's Index No. 75-20017

Court of Appeals
of the
State of New York

SUFFOLK HOUSING SERVICES, BROOKHAVEN HOUSING COALITION, PATCHOGUE-BROOKHAVEN BRANCH NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, JOHN SMITH, KATHLEEN SMITH, MARGARET MELENDEZ, GLORIA YOUNG, ANN TERRY, KENNETH ANDERSON, FRANK MEYERS, VERLYN WARBURTON and CARLTON BROWN,

Plaintiffs-Appellants,

— against —

THE TOWN OF BROOKHAVEN, CHARLES W. BARRAUD, TOWN SUPERVISOR, THE BROOKHAVEN TOWN BOARD, THE TOWN OF BROOKHAVEN PLANNING BOARD, JOHN F. LUCHSINGER, CHAIRMAN, TOWN OF BROOKHAVEN PLANNING BOARD,

Defendants-Respondents.

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STATEMENT OF JURISDICTION

This Court has jurisdiction to entertain this appeal pursuant to CPLR §5602(a) and its granting of appellants' motion for leave to appeal on July 1, 1986 (R2472).

PRELIMINARY STATEMENT

A decades old struggle is being waged in the shadows of America's large cities between those who want to maintain their suburban towns as middle and upper class enclaves and those who claim that these areas must accommodate the needs of lower income persons, minority as well as white. Even when state and federal governments have sought to open up the suburbs through the use of subsidized housing programs, attempts to build the types of suburban housing which could accommodate our less affluent citizens have usually been frustrated. Often, exclusionary zoning and land use practices have been the barriers. As a result, the courts have been called upon to adjudicate these competing interests.

This Court's principal contribution to the development of the law on exclusionary zoning is its landmark ruling in Berenson v. Town of New Castle, 38 N.Y.2d 102 (1975). In rendering that decision, this Court set forth standards applicable in exclusionary zoning challenges, citing "the highly significant public policy considerations involved . . ." Id. at 107. The proper interpretation of the Berenson ruling has been the subject of continuing controversy in the lower

courts and was the focus of the controversy embodied in the instant case.

In the Supreme Court and on appeal to the Appellate Division, the dispute in the instant case centered around whether Berenson imposes upon local zoning authorities the obligation to consider the housing needs of lower income persons and the affordability of the existing housing stock to such persons. In appellants' view, the Town of Brookhaven did not comply with Berenson when it used its zoning powers to exclude lower cost and subsidized forms of housing.

The lower courts in this matter read Berenson differently. The Second Department, in affirming the Supreme Court judgment, held that when a municipality provides for some multi-family housing, regardless of the affordability of that housing, its Berenson obligation is satisfied. Indeed, the Second Department reached its decision notwithstanding its finding that, "the record herein is replete with evidence that town officials, with popular support, made every effort to exclude low-to-moderate-income housing . . . " (R2468-2469). 109 A.D.2d 337-338.

Appellants also contend that Brookhaven's interference with low cost housing efforts was racially discriminatory, in violation of federal civil rights laws. They further assert that the lower courts failed to follow federal judicial interpretations of the Federal Fair Housing Act that require

Brookhaven to justify its interference with several low income housing proposals. That justification was required in light of the disparate impact the Town's actions have had on minority persons and the showing that these projects would have had a racially desegregative effect on a highly segregated community.

Finally, this appeal raises the issue of whether appellants were entitled to maintain this lawsuit as a class action. Appellants' motion to certify the case as a class action resulted in a three to two ruling by the Second Department denying class action status. Appellants contend that the dissent set forth the correct position.

PROCEDURAL HISTORY

This challenge to Brookhaven's zoning and land use policies was commenced in November 1975 by lower income and minority residents of Brookhaven and other towns in western Suffolk County, several Brookhaven taxpayers and several civil rights organizations. The organizational plaintiffs are the Brookhaven Branch of the National Association for the Advancement of Colored People (NAACP), Suffolk Housing Services and the Brookhaven Housing Coalition. In essence, the appellants charged that Brookhaven officials had enacted, perpetuated and enforced a pattern of zoning laws and policies which hampered and prevented construction of housing affordable by lower income and minority citizens in Brookhaven, in violation, *inter alia*, of New York's Town Law §§261 and 263, and the Federal Fair Housing Act, 42 U.S.C. §§3601 *et seq.*

Appellants asserted that Brookhaven did not pre-map land for multi-family use, but rather approved construction of multi-family housing on an application basis only. They further charged that this system was used to block efforts to build low cost housing and discourage proposals for such housing. Appellants sought declaratory and injunctive relief in order to terminate the Town's exclusionary zoning practices and eliminate the adverse effects of those practices on lower income persons.

On June 20, 1977, Justice Leon D. Lazer, sitting in Special Term, denied the appellees' motion to dismiss for failure to state a cause of action and further held that all but the taxpayer plaintiffs had standing to sue. Justice Lazer's opinion is reported at 91 Misc.2d 80. In May 1978, the Appellate Division, Second Department, modified Special Term's order by holding that the taxpayer plaintiffs did have standing to sue and otherwise affirmed the ruling below. That opinion is reported at 63 A.D.2d 731.

On October 12, 1978, Special Term denied appellants' motion to certify this case as a class action (R2493). On July 9, 1979, the Appellate Division, Second Department, in a three to two decision, affirmed the class action ruling (R2475). That opinion is reported at 69 A.D.2d 242. Appellants were unsuccessful in their effort to have this Court review the Appellate Division's class action decision.[1] In the course of all future proceedings, appellants preserved their challenge to the denial of class action status.

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[1] Following the Appellate Division ruling, appellants simultaneously filed a motion in the Second Department seeking leave to appeal to this Court and filed a notice of appeal. On September 18, 1979, this Court entered an order dismissing the appeal <u>sua sponte</u> on the ground that the Appellate Division order did "not finally determine the action within the meaning of the Constitution" (R2509). 48 N.Y.2d 652. On October 22, 1979, the Appellate Division granted appellants' motion for leave to appeal. However, on February 20, 1980, this Court granted Brookhaven's motion to dismiss the appeal on the ground "that the question certified does not present a question of law decisive of the correctness of the determination of the Appellate Division" (R2510). 49 N.Y.2d 799.

Trial in this matter was held before Justice Lester W. Gerard, between June 18 and July 9, 1980. On September 17, 1982, Justice Gerard issued his ruling, which is unreported, upholding Brookhaven's zoning ordinance (R11). Judgment was entered on October 20, 1982 (R8). On July 8, 1985, the Appellate Division, Second Department, handed down a decision affirming the Supreme Court's decision (R2454). That ruling is reported at 109 A.D.2d 323.

On July 1, 1986, this Court granted appellants' motion seeking leave to appeal (R2472).

STATEMENT OF THE FACTS

The Rapid Growth of Brookhaven as a Predominantly White Suburb

Brookhaven is the largest town in the State of New York. Covering nearly one-quarter of Long Island, with a land area of more than 340 square miles, it is larger than any three of its neighboring Suffolk County towns put together, and about the same size as all of Nassau County. At least 28 named communities lie within the Town boundaries (Pl. Ex. 5, p. 8). The Town is served by 22 school districts (Pl. Ex. 5, p. 32).

During the 1960's and continuing up to the time of trial, Brookhaven had been the county's and region's principal growth center. From 1960 to 1970, the Town population increased by 135,360 people (from 109,900 to 245,260), a 123% increase. No current census data was available at the time of trial, but Brookhaven's population as of 1979 was estimated to be nearly 354,000 (Pl. Ex. 49; R893).

By 1973, when data was collected for preparing a Master Plan, about 94,000 acres, or 58% of the Town, had been developed. Industrial development accounted for 1,700 acres, commercial development for 3,100 acres, and the remaining 89,200 acres were residentially developed or public lands. About 69,000 acres, or 42% of the Town, were vacant (R1071-1072; Pl. Ex. 65). By 1979, an additional 11,160 acres were estimated to have been residentially developed (R1087).

Brookhaven's population was and is predominantly white. Black people made up 3.38% of the total population in 1960, and by 1970 the percentage had fallen to 2.61% in comparison to 4.7% for Suffolk County and in contrast to an average of 16% across the region (R900, 931; Pl. Ex. 51). Public school enrollment data showed that in 1978-79, 3.6% of the students were black, down from 4% in 1969-70 (Pl. Ex. 54).

The Town's black population is confined principally to the enclaves of North Bellport and Gordon Heights. It was estimated that up to 80% of the population in North Bellport was black (R263) and Gordon Heights' population was equally segregated (R162, 291, 742). School enrollment data showed that over 61% of Brookhaven's black pupils attended schools in the two districts in which North Bellport and Gordon Heights are located (Pl. Ex. 54; R914-915). In addition, North Bellport and Gordon Heights were both shown to be areas with substantial numbers of persons receiving welfare or earning very low incomes (R269-270; Pl. Ex. 6, p. 90).

The Housing Crisis Confronting Low Income Persons in Brookhaven

The trial court found that there existed a serious housing need among lower income persons throughout Suffolk County (R27). Among the evidence introduced to establish this need was Brookhaven's application for community development funding from the United States Department of Housing & Urban Development (HUD). That document, known as the Housing

Assistance Plan (HAP), showed Brookhaven required 7,242 additional housing units for lower income persons, of which 1,066 units (15%) were for minority households. The overall need for rental units was reported as 5,576, or 77% of the total need (R490; Pl. Ex. 10).

The evidence also showed that several areas of the Town had concentrations of deteriorated structures. At the time of trial, it was estimated that as many as 1,200 units fell in this classification (R1249). The problem of deterioration was most pronounced in North Bellport, an area which has approximately 1,000 homes and an estimated population of 6,000 (R262, 278-280). While Brookhaven is principally a community of homeowners, 60-70% of the residents of North Bellport are renters (R286).

The evidence also demonstrated that, as a class, welfare recipients in Brookhaven were experiencing extremely severe housing problems. For instance, substantial numbers of Department of Social Services' (DSS) clients were compelled to pay over the welfare allowances for shelter. Moreover, many of the dwellings occupied by DSS recipients had serious health violations (R1518-1528), were generally deficient or deteriorated, and/or overcrowded. All of these conditions were found to be more severe for black households receiving DSS assistance than white DSS households (R1009-1017; Pl. Ex. 59).

A housing study prepared by Suffolk County (Pl. Ex. 6) also confirmed that large numbers of persons were paying too great a portion of income for shelter. The study showed that among renters in the County, 57% were paying in excess of 25% of their income for shelter (Pl. Ex. 6, pp. 29-33; R1002-1003).

Residential Development Under the Brookhaven Zoning Ordinance

The Brookhaven Town Board zones all vacant residential land for single-family use under nine different single-family residential districts. The single-family zones provide for minimum lot sizes ranging from about one-fourth of an acre up to two acres per dwelling unit.[2] For all practical purposes, the entirety of the Town's land is in the A-2, A, B-1 and B zones (R1088).

A developer may apply to the Planning Board pursuant to Section 281 of Town Law for permission to "cluster" units in single-family zones. The Planning Board may permit the developer to build single-family or multi-family cluster developments so long as the total number of units built does not exceed that permitted by the density of the underlying single-family zone. The procedure requires the Planning Board to hold a public hearing, after which the Planning Board seeks

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[2] Lot size requirements are as follows: A-2 zone (80,000 square feet), A-1 zone (40,000 square feet), A zone (30,000 square feet), B-1 zone (22,500 square feet), B zone (15,000 square feet), C zone (9,000 square feet) and D zone (9,000 square feet). Single family E and F zones are applicable only to a small portion of the Town along the Great South Bay (R1034-1036; Pl. Ex. 62).

Town Board authorization. After receiving authorization, the Planning Board retains final say on whether to grant site plan approval (R617-618).

In order to build multi-family developments at densities higher than allowed in the single-family zones, a developer must apply for a rezoning to the MF-1 or MF-2 district (R1103-1104, 1536-1537).

A developer may build housing restricted to occupancy by senior citizens by applying for rezoning to planned retirement community zones. The PRC zone is for non-subsidized residential development for senior citizens 55 years or older (R1038; Pl. Ex. 62, Art. IXA), while the PRC-3 zone allows for housing under government subsidy programs for persons 62 years or older (R1038-1039).

Specifications for a mobile home district are included in the ordinance, but no land has ever been rezoned to permit this use. Brookhaven's planning consultant testified that he recalled one application for rezoning to the mobile home classification and that application was rejected (R1544-1551).

The evidence established that it is a difficult undertaking to obtain rezoning to a multi-family classification and that in the years immediately preceding the trial, the likelihood of success on such an application had declined substantially. In the eight year period from 1971 to 1977, only 12.8% of all applications for MF-1 or MF-2 rezonings were

approved (R1180). During 1974, the Town in fact imposed a total moratorium on all applications for multi-family rezonings (R1179). From 1972 until trial, there were only six MF approvals (R1179-1180).

The pattern of restriction on multi-family rezonings ensured that residential development in Brookhaven in the years before trial was limited in large part to single family homes. Because single family development thrived between 1973 and 1979, the vacant residential acreage was reduced by 11,000 acres to about 49,000 acres (R1047-1051).[3] During this period, there had been only three rezonings to MF categories, three PRC approvals and three PRC-3 approvals (R1083-1084). Overall, only 124 of the 11,000 acres were shifted from single family to multi-family non-senior citizen uses and 300 acres were put into the PRC (elderly) classifications (R1084). By contrast, in this same six year period, there were 17,917 authorizations for single family construction, principally in areas where the densities were 1.4 to 2 units per acre (R1085-1086).

In granting multi-family rezonings, Brookhaven also followed a policy of strictly limiting construction of apartments with more than one bedroom, often by writing

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[3] Brookhaven's planning consultant had calculated that in 1973 there were approximately 7,000 individual in-fill or pre-existing lots open for single family development on smaller sites. The 1973 calculation of about 60,000 vacant acres of residential land did not include the acreage available in such in-fill lots. The 49,000 vacant acre figure in 1979 also did not include vacant lots (R1088-1089).

covenants into the rezoning ordinance. A common covenant required that 80% of development be one bedroom or efficiency units and only 20% two bedroom units. In some cases, the covenants restricted development exclusively to efficiency and one bedroom units. The evidence established that there had been a total of 35 rezonings to MF categories under the ordinance and that restrictive bedroom covenants had been imposed on 13 of those rezonings (Def. Ex. F). Moreover, where bedroom covenants were not actually written into the rezoning ordinance, developers who applied for MF classifications uniformly provided oral assurances to the Town Board that they would limit the two bedroom units to no more than 20% of their developments (R738).

This policy of limiting bedrooms determined the nature of apartment development in Brookhaven. Of the 5,989 apartments built as a result of MF rezonings, 424 were efficiency units, 4,563 were one bedroom units, 979 were two bedroom units and only 23 were three bedroom units (Pl. Ex. 41; R1182-1183). Thus, 83% of the MF apartments built were efficiency and one bedroom units. In the absence of a practice of imposing bedroom covenants, it normally would be expected that 30-40% of the MF apartments would be constructed as two bedroom units and 10% as three bedroom units (R1183-1185).

The evidence also showed that the 281 process did not provide significant access to multi-family construction.

Rather, it generally was used for clustering single family housing. Nor did the 281 provision serve as a vehicle for the creation of rental housing units. At the time of trial, there had been 41 approvals for clustering. Only eight of these approvals contained some provision for multi-family development and only two of these eight proposed inclusion of rental units. Thus, almost all the 281 process approvals led to costly single family housing marketed as condominium units (R1819-1830; Def. Ex. F).

Brookhaven discouraged creation of rental units in granting approvals of 281 applications. For instance, in approving multi-family clustering for an 866 unit development known as Birchwood at Blue Ridge, the Town imposed a written restrictive covenant mandating that all units be exclusively for sale and not rental (Pl. Ex. 75). Similarly, with respect to another 281 application, Town Board officials asked the developer to provide oral assurance that all units in the project would be exclusively for sale. The developer agreed to this request on the record and subsequently obtained his 281 approval (R2420-2421; Pl. Ex. 81).

<u>Brookhaven's Housing Stock Under the Ordinance</u>

There were approximately 114,000 housing units in Brookhaven in 1979, the vast majority of which were single family houses (Pl. Ex. 57). Only 6,213 were conventional rental apartments, mostly efficiency and one bedroom units. Of

these rental units, fewer than 700 were two bedrooms and only 23 were three bedrooms. There were 4,209 condominiums in 12 developments (R693-710; Def. Ex. F).

The bulk of the single family houses sold for $30,000-$40,000.[4] Using the standard criterion that no more than 25% of income should be spent for shelter and considering typical home carrying charges, a family would have needed an income of approximately $27,000 to afford a $35,000 home (R1157-1163), whereas the 1979 median annual income in Brookhaven was $19,500 (R910).

The median rent for an efficiency apartment was $299, for a one bedroom $338 and for a two bedroom $419. The median rent for the few three bedroom units in existence was $475 (R711-713). Using the same 25% of income affordability criterion applied to these median prices, an approximate income of $14,350 would be required for an efficiency, $16,200 for a one bedroom, $20,100.00 for a two bedroom and $22,800 for a three bedroom apartment.

Brookhaven also has a limited amount of subsidized housing which is discussed <u>infra</u>.

<u>The Need for Multi-Family Rental Units</u>

The evidence established that owner occupied single family housing in Brookhaven was too costly for persons with

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[4] These figures are based on a study of all Brookhaven home sales from March 1979 through March 1980 that had been listed with Multiple Listing Services.

lower incomes and that rental units were necessary to meet the needs of the less affluent residing in Brookhaven and the region. In this regard, the Town's witness, Arthur Kunz, a housing expert with the Long Island Regional Planning Board, testified that there was an inadequate supply of rental housing in Brookhaven and that his agency, since 1968, had been pressing Suffolk County communities to permit construction of more multi-family rental dwellings (R1476-1477).[5]

At trial, appellants' housing expert presented testimony as to anticipated prices of single family homes that could be built under Brookhaven's zoning ordinance, with projections based on land, construction and carrying costs at time of trial. These calculations looked to future development in the undeveloped residential areas of Brookhaven. Appellants' expert concluded that if a typical home were constructed in the A-2 (two acre) zone, it would sell for $83,570. The projected prices for homes in the other single family zones were: $65,410 in the A-1 zone (one acre), $58,420 in the A zone (two thirds acre), $52,000 in the B-1 zone (half acre), and $47,000 in the B zone (one third acre). None of these

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[5] The high cost involved in single family homes was confirmed by the fact that in 1979 alone there were over 600 mortgage foreclosures in Brookhaven (R1008-1009) and that, by the time of trial, approximately 10,000 of the 100,000 single family homes in the Town had been converted illegally into double occupancies (R1498-1500).

homes would have been affordable to lower income persons (Pl. Ex. 66).[6]

The need for additional multi-family rental housing in Brookhaven is confirmed by the low amount of multi-family and rental unit housing in the Town as compared with other communities in the region. For example, the stock of two to four family structures in suburban communities in this area outside of Suffolk County ranges from 10% to over 25% of all housing. Suffolk County has the lowest percentage of two to four family units, with only 5.6% of its stock in this category. With respect to structures of five or more units, only 4.8% of Suffolk's housing stock is in this category, the lowest percentage in the region. By contrast, 9.3% of the housing stock in Nassau County and 33% of the housing stock in Westchester County falls in this category (R967-968; Pl. Ex. 57).[7] In western Suffolk County, 84.5% of the households are owner occupied and in Brookhaven, 82.1% are owner occupied (R955-956).

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[6] According to appellants' expert, affordability of such housing would depend on whether 25% or 30% of income is to be allotted for shelter and whether the home is situated in the high or low property tax rate area of Brookhaven. For example, the typical home in the A-2 zone, allowing for 30% of income for shelter in a low tax area, would require a minimum income of $47,000. In the high tax area, and allowing only 25% for shelter, a $69,000 income would be required (Pl. Ex. 66, p. 4).

[7] In the United States as a whole, approximately 56% of all housing is owner occupied. In New York City SMSA, over 63% of the units are renter occupied, an exceptionally high percentage because of the pattern in New York City.

Subsidized Housing in Brookhaven

Virtually every witness at trial agreed that there was a pressing need for the construction of subsidized or below market rate housing for families in Brookhaven.[8] Notwithstanding this need, the record demonstrates that Brookhaven, and other Suffolk communities, have studiously avoided the construction of such housing for families. Thus, from 1975 to the date of trial there had been a total of 2,003 subsidized units constructed in the entire County, of which 1,985 were for senior citizens and only 18 for families. All 18 family units were built in the Town of Islip under HUD's public housing program (R1245). Most importantly, from 1974, when HUD began its Section 8 program (the agency's principal low cost housing construction program) until trial, absolutely no Section 8 projects for families had been built in the entire County (R1246). Furthermore, in every year from 1974 to trial, Suffolk communities, including Brookhaven, failed to make use of HUD-allocated Section 8 monies. This failure to use the Section 8 funds resulted in a loss of about 1,500 subsidized units for Suffolk County families (R1510, 1222).

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[8] For example, appellees' witness Kunz testified that his agency, the Long Island Regional Planning Board, continually had called for more Section 8 housing units, especially for families in Brookhaven and in Suffolk County (R1483, 1493-1494). Section 8 was the principal form of subsidy available from the United States Department of Housing & Urban Development.

There was no low income public housing in the Town. Only one assisted housing development with rental units for families has been built in Brookhaven. This development, Homestead Village, was constructed in 1971 under the old HUD Section 236 program (the predecessor to Section 8) and is located in the predominantly black Gordon Heights section (R522-523). Homestead Village has a total of 431 units open to both families and senior citizens (R705-706). On June 30, 1978, there were 411 units actually occupied: 325 by families and 86 by elderly persons. Of the 325 family tenants, 123, or 37.8%, were minority. Of the 86 elderly tenants, only six, or 7%, were minority (R664-666; Pl. Ex. 40).

By contrast, Brookhaven had permitted construction of three Section 8 developments with a total of 1,035 units exclusively for the elderly.[9] These projects are located in virtually all white areas. To accommodate these developments, the Town rezoned land to the PRC-3 classification. Occupancy reports for 1979 on these projects showed that the black populations in each of these developments was about 2% (R640, 671, 916-918, Pl. Ex. 39).[10]

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[9] These projects are Brookwood on the Lake in Ronkonkoma, with 336 units, Avery Village in East Patchogue, with 300 units, and St. Josephs Village in Seldin, with 399 units (Pl. Ex. 6, p. 99).

[10] On June 30, 1979, 289 units were occupied at Avery Village. The percentage of occupancy by minority citizens was 3.7 and by black persons 2.3 (Pl. Ex. 38, R640). On November 8, 1979, 336 units were occupied at Brookwood on the Lake. Thirteen persons

Brookhaven's Interference with Efforts to Secure Subsidized Housing Units for Families

Critical to any effort to build subsidized or lower cost housing in Brookhaven is the ability to obtain approval from Town officials for multi-family construction, either through an MF rezoning or possibly through a 281 approval.[11] The rezoning application process, however, inevitably provokes concerted community opposition and such opposition constitutes an impossible barrier for the private developer, a fact admitted by one of the Town's experts (see R1170-1171, 1482-1484).[12]

Notwithstanding the availability of HUD Section 8 funds for construction of family units in Suffolk County, between the construction of Homestead Village in 1971 and trial of this case, proposals for Section 8 developments in Brookhaven were extremely limited. Only two, the Auerbach project and the Metro House project, actually proceeded to the point where

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(3%) were minority, of whom 10 (2%) were black (Pl. Ex. 39). One hundred ninety nine units were occupied at St. Josephs Village. Nine of the occupants (4.5%) were minority residents, of whom four (2%) were black (R671).

11 Brookhaven's housing expert testified "Today, for all practical purposes, the only way that a municipality can have existing within its borders, housing for low and moderate income, is if there is zoning for multi-family development" (R2321-2322; see also R1171-1172).

12 Mr. Kunz not only acknowledged the need for more subsidized housing units, but also confirmed that community opposition represented the major impediment to its construction (R1482-1484).

developers were moving ahead with construction plans. In both cases, Brookhaven officials acted to block those developments.

(a) The Auerbach Project

In August 1978, a local Brookhaven developer, Harvey Auerbach, advised Town officials of a plan to construct a 240 unit Section 8 project principally for families on land he owned in the virtually all white community known as Ridge (R624, 633). Four years earlier, on October 1, 1974, Auerbach had received a 281 cluster approval from Brookhaven for his Ridge parcel authorizing both single-family and multi-family development (R621; Pl. Ex. 30). At the time Auerbach secured this 281 approval, low cost housing was not on his agenda.

The Auerbach site in Ridge included two parcels known as Ridgehaven and Newbrook. Under the 281 authorization in place in 1978, the multi-family units were slated for the Ridgehaven section. In order to accommodate his Section 8 proposal, Auerbach requested that the Town Board revise the 281 authorization, so as to allocate 426 single family units to the Ridgehaven portion and 240 multi-family units to the Newbrook portion, with the Section 8 units to be located on the Newbrook parcel. The Planning Board approved this change and the Town Board granted the revision on December 5, 1978.

At the time of the December 5, 1978 approval, there was no community awareness of the pending Section 8 proposal. In early 1979, however, word of the proposal spread throughout the

Ridge community and substantial opposition developed. The opposition came primarily from persons residing in single family homes located in an area adjacent to the Newbrook parcel and from residents of a nearby senior citizen development known as Leisure Village.

The opposition forces had an opportunity to publicly assert their case at a Town Planning Board meeting held on February 26, 1979. The purpose of that meeting was for the Planning Board to consider whether to recommend to the Town Board approval of Auerbach's Section 8 project (Pl. Ex. 35). A large group of Ridge residents appeared at this meeting and vehemently stated their opposition. The opponents made clear that their overriding concern related to the future residents of the development. Town residents repeatedly claimed that the project would bring undesirable poor people into the community and would lead to increased crime, vandalism and rapes (Pl. Ex. 35A).[13] A petition signed by more than 360 residents of the

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[13] For example, a resident of Leisure Village, Vincent Jeffers, told the Planning Board that Mr. Auerbach "has no regards [sic] for the community and we are concerned that if things do not work out this development could be a slum. What has happened in other areas to such low income housing?" A second resident of Leisure Village, Harry Wolf, stated that Mr. Auerbach would "have to guarantee that the welfare poverished [sic] families who would flock here would practice contraception and not produce because wherever they live they have another child every year so as to get a bigger welfare check." A Ridge resident, Bob Jones, stated "I'd hate to have to afford my daughter . . . the opportunity . . . to be raped at school on her lunch hour instead of somewhere else." Mr. Farrantello, another area resident, stated that there were many young people in the Ridge area struggling to make a living who should not "have to worry about subsidizing public housing, now let's be

Ridge area stating opposition to the project also was submitted to the Planning Board (Pl. Ex. 35A).

At the conclusion of the meeting, the Planning Board Chairman asked for a show of hands by those in the audience as to whether they were for or against the project (Pl. Ex. 35, p. 26). The Planning Board then voted to advise the Town Board that it opposed the Section 8 housing (Pl. Ex. 35A). This change in the Planning Board's position effectively halted the Auerbach project, notwithstanding the original 281 approval.

The Planning Board set forth three reasons for its negative recommendation in a letter to the Town Board dated March 21, 1979 (Pl. Ex. 37). First, the Planning Board claimed that local residents who had purchased properties in the adjacent development had relied on maps showing that a public park had been planned for the Newbrook property. Second, no public support had been voiced at the February 26 meeting for the proposal. Third, the project was not located near mass transportation or shopping facilities.

No Town Board or Planning Board member testified at trial concerning the blockage of the Auerbach Section 8 project. The only witness to testify for Brookhaven on this

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honest and let's be truthful, we are talking about welfare, we are talking about a slum area that is going to come into Ridge which I really, really hate to see anywhere in the world." Mr. Farrantello also stated that with the proposed project, the people in the Ridge area would have to fear "thieves [and] vandalism of automobiles. We know what the element is going to be, gentlemen" (Pl. Ex. 35A, pp. 17, 18, 20, 24, and 26).

matter was Norman Gerber, an independent consultant to the Planning Board. Mr. Gerber stated that the Planning Board had had a "second thought" about its original endorsement of the Auerbach plan for subsidized housing after community opposition was voiced. According to Gerber, the principal reason for this was that homeowners had relied on Auerbach's commitment to dedicate land for a public park in the Newbrook section (R1554-1557).

All of the Town's asserted justifications for blocking the Auerbach project were shown to be pretextual. As to the issue of park land dedication, contrary to Brookhaven's claim, the December 5, 1978 revision of the 281 authorization actually had the effect of increasing the amount of land dedicated for park use on the Newbrook parcel. When Auerbach initially obtained his 281 cluster approval he had agreed to dedicate 100 acres for park land in the Newbrook section. On December 20, 1977, however, the dedication was cut back, with Town approval, to 41 acres (Pl. Ex. 37A; R1691). That action occurred prior to the construction and sale of most of the single family homes to the people who later claimed that they had relied on the 100 acre figure (R1700-1701, 1706).[14] More importantly, the Town Board's action on December 5, 1978 resulted in an increase in

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[14] Moreover, the few persons who had purchased homes in the adjacent areas before December 20, 1977 did not protest at the time of the reduction from 100 to 41 acres. Protest occurred only after Section 8 housing appeared in Auerbach's plans.

the amount of dedicated park land in Newbrook from the 41 acres set in 1977 to 62 acres (R1691-1692).

Concerning the claim of lack of public support for the project, the appellees were fully aware of the overwhelming need for the Section 8 family housing, as attested to by the HAP figures. See discussion,pp, 8-9 supra. As for Brookhaven's claim that the Auerbach development was removed from mass transportation and/or shopping facilities, the only testimony presented was that of Gerber who acknowledged there was public bus service to the site (R1560).

(b) The Metro House Project

In late 1976, Metro House Construction, Inc., another private developer, announced plans to build a 14 unit Section 8 development for families on a site in the predominantly white Port Jefferson Station area of Brookhaven. Metro House had decided not to seek rezoning, but instead to proceed under the existing single family classification (R566, 604, 609-610).

The Metro House project was specifically noted in the Suffolk County HAP for 1976-77 as a committed location for Section8 new construction (R604; Pl. Ex. 9).[15] Notwithstanding

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[15] Under federal law, communities applying for HUD community development grants must set forth in the HAP the number of households needing assisted housing and the established goals for meeting that need (Pl. Ex. 9). Aside from the Port Jefferson Station project, the only other new construction project listed for Brookhaven was a 20 unit Section 8 family development to be built on a scatter site basis throughout three separate hamlets by a group known as BKR Housing Assocations (Pl. Ex. 9). Ultimately, this project did not get

Notwithstanding the HAP commitment, Town officials actively worked to block the Metro House project by requesting HUD not to provide Section 8 funds for the development. The officials took this position because residents living in the vicinity of the proposed project had expresed their opposition at a special Town Board meeting (R610).[16] In hopes of defeating the Metro House proposal, Brookhaven's Supervisor wrote the HUD Area Director on January 5, 1977 (Pl. Ex. 23B) stating that the Town was against the project and did not want it funded. He further advised that the Town's principal objection was that the proposed units violated Town Building Code, Article 29, Section 85-198 (which requires units to be a minimum of 1,000 square feet).

The Supervisor's assertion was patently incorrect. From the outset, the Metro House proposal totally complied with the Town's building code requirements (Pl. Ex. 29, pp. 196-197). When Metro House demonstrated to Brookhaven that the units were in compliance with the code, the Supervisor's letter to HUD was nevertheless allowed to stand uncorrected.

The Town's deep rooted opposition to low income housing, and specifically the Metro House project, was further

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off the ground.

[16] The local opposition to the Metro House project was so intense that following HUD funding approval for these units, 68 local residents undertook a federal court challenge to HUD's determination (Singer v. United States, 78 Civ. 454, E.D.N.Y.; see also R610-612, Pl. Ex. 45).

evidenced by the position it took in Rodriguez v. Hills, 76 Civ. 5773 (S.D.N.Y), which was heard by the Hon. Thomas P. Griesa. That litigation challenged HUD's approval of the 1976-77 community development grant to Suffolk County and to the participating local governments. Judge Griesa found that the cooperation agreement between Suffolk County and the participating local governments was insufficient as the County had not obtained adequate authority from the individual communities to move forward with proposed HAP housing projects. To remedy the situation, Judge Griesa ordered the participating communities to sign statements agreeing to use their best efforts to make possible the various housing projects listed in the County HAP (R508-509; Pl. Ex. 22).

Brookhaven was the only Suffolk County community to refuse to sign this statement. After a series of hearings before the Court, Judge Griesa issued an injunction barring HUD from transferring $863,000 in community development funds to Brookhaven. In issuing this order, Judge Griesa referred to Brookhaven's open opposition to the Metro House project (R603-604; Pl. Ex. 28, pp. 138-141).

Following imposition of this injunction, Brookhaven officials concluded that they did not wish to forfeit the Town's community development funds for that year. Thus, at a March 25, 1977 court hearing, the Town Attorney acknowledged that the Metro House project met building code requirements and

that the Town had no legal basis to interfere with its construction. Judge Griesa then lifted the injunction (R604-608; Pl. Ex. 29).

Ultimately, the Port Jefferson site was not developed for Section 8 housing (R613). During the trial of the instant case, Brookhaven presented no testimony whatsoever concerning the Town's actions with respect to the Port Jefferson Station project.

(c) Additional Evidence of Brookhaven's Hostility to Subsidized Housing for Families

In addition to the proof of antipathy toward the Auerbach and Metro House Section 8 proposals, evidence was presented that Brookhaven officials have for years catered to local oppostion to low cost housing proposals. In this regard, the appellants traced the unsuccessful effort to establish a public housing authority in Brookhaven. This effort was undertaken in 1963 by local civil rights advocates and groups. Initially, the proponents were successful in having the Town Board pass a resolution requesting the State Legislature to enact enabling legislation to permit Brookhaven to create a housing authority (Pl. Ex. 11A). Following approval of this resolution, however, community opposition emerged and Town Board minutes of June 4, 1963 reflect that the Town Clerk had received numerous letters "expressing opposition to the Public Housing Authority being created in the Town of Brookhaven" (Pl.

Ex. 11B). At a Town Board meeting of August 27, 1963, the Supervisor stated that since the time of the first resolution, the Board had received "many, many letters from people, organizations and associations in opposition to such a housing authority." The Board then passed a resolution rescinding its original resolution requesting enabling legislation (Pl. Ex. 11C).

The issue of a public housing authority resurfaced in the summer of 1970. At that time, Town officials were attempting to convince officials of the United States General Services Administration (GSA) to locate a major Internal Revenue Service processing facility in the Holtsville section of Brookhaven. In order to comply with GSA bid and federal site selection requirements, Brookhaven officials had to show GSA that the Town was responding to the need for lower income housing units (R514-516). Civil rights organizations called upon GSA to insure that the Town, in fact, complied with this GSA bid requirement and asserted that GSA should require the Town to approve a housing authority if the IRS center was to be located at Holtsville (R515-516).

In response to GSA inquiries, the Town Board on August 18, 1970 adopted a resolution which called for an investigation into the possibility of establishing a housing authority. The Town Clerk immediately forwarded a copy of this resolution to

GSA (Pl. Ex. 12, R517). On September 4, 1970, GSA awarded the IRS facility to Brookhaven (R518).

Thereafter, throughout the Fall of 1970, the issue of a housing authority was pressed by housing advocates at Board meetings (R520-521). However, on December 15, 1970, the Town Board adopted a resolution stating it would not be "in the best interests of all the residents of the Town" to establish a housing authority (Pl. Ex. 13).

Another example of the Town's deep rooted antagonism to low income housing were the events surrounding the construction of Homestead Village -- the only subsidized low cost housing project in Brookhaven for families. The FHA 236 program which was used to finance the Homestead Village project was geared to provide rent levels affordable only by families with moderate incomes. An additional rent supplement was needed to lower rents to a level affordable to low income families. In order for HUD to provide these rent supplements, a Town Board resolution endorsing the use of the rent supplement program was needed (R530-531). HUD had reserved sufficient funds to supplement 40% of the Homestead Village units. For a period of approximately a year and a half, however, the Town Board steadfastly refused to pass the necessary resolution (R526-538).

Ultimately, HUD found a means to circumvent Brookhaven's obstinacy by waiving the requirement of the resolution.

Brookhaven's refusal to act, however, and the long delays, did result in HUD cutting back to 20% the number of units for which supplemental payments would be made available for Homestead Village residents (R537-540; Pl. Ex. 18, 19, 20).

Evidence was also presented showing that Brookhaven officials were extremely wary of accepting federal community development funds because of the possibility that receipt of such money would obligate the Town to agree to construction of low cost housing. Thus, Brookhaven decided not to participate in the first year of the community development program, thereby foregoing the Town's share of the grant funds (R547). In November 1975, John Randolph was elected Supervisor, and asserted that Brookhaven should no longer forfeit its community development funds. In response to statements by community leaders that Brookhaven would be faced with the need to construct low cost housing if it accepted this money, Mr. Randolph stated that the HAP was the responsibility of Suffolk County and that Brookhaven need not provide low cost housing (R557-558). It was decided that the Town should accept the community development funds and it was awarded $863,000 by HUD in the second year of the program. The Randolph position ultimately led to the intervention of the federal court and Brookhaven's agreement that it would not interfere with the housing projects proposed in the County HAP. See pp.27-28, _supra_. However, after the federal court had clarified

Brookhaven's responsibility to provide low income housing, the Town refused to participate in the program for the following year (R612-613).

ARGUMENT

I.

BROOKHAVEN'S EXCLUSION OF LOW COST MULTI-FAMILY HOUSING THROUGH ITS DISCRETIONARY REZONING PROCESS VIOLATES BERENSON

Brookhaven's zoning ordinance on its face does not betray the Town's opposition to multi-family or lower income housing, since the ordinance permits construction of such housing. It is in the implementation of the ordinance that Town officials have chosen to impede construction of multi-family units. Although specific land has been designated and mapped for various types of single family residential development, the Town does not, prior to an application, pre-map land for multi-family use. This practice constitutes the exclusionary land use device which is at the heart of this litigation.

Brookhaven's failure to designate and pre-map multi-family vacant land, combined with the obligation it imposes upon developers to convince Town officials that they should be granted such multi-family zoning, has created an environment whereby each application for multi-family rezoning and low cost development provokes a political debate. In this atmosphere, only proposals which are the most politically acceptable have any chance of prevailing. This zoning scheme has led invariably to the defeat of virtually every proposal for low

cost housing for families, while luxury housing and some senior citizen housing obtain Town sanction. In essence, Brookhaven maintains a facially neutral statute, but engages in a zoning practice which effectively bans low cost multi-family housing. This zoning policy cannot withstand scrutiny under this Court's decision in Berenson v. Town of New Castle, 38 N.Y.2d 102 (1975).

The record here shows that there existed a severe and critical need for low cost family housing in Brookhaven, that this need could only be satisfied through multi-family residential developments, that subsidized housing for families was virtually non-existent in this very large town, that federal subsidies existed for the construction of such housing but went unused for lack of a sponsor and that Brookhaven had made it abundantly clear -- both directly and indirectly -- that proposals for lower cost housing which provoked community opposition would not be approved. In summary, appellants demonstrated that Town officials were prepared to go to extreme lengths to block the few low cost housing proposals for families that managed to progress to the point where the sponsor was openly proceeding with the development and/or seeking Town land use authorization.

The proof did not focus exclusively on the Town's response to subsidized housing proposals. Rather, appellants established that the discretionary rezoning system was

problematic for developers of market rate multi-family housing as well. In effect, Town officials were loath to grant multi-family rezoning approvals. The Town Board articulated its aversion to renter families with children by limiting approvals primarily to efficiency and one bedroom units and through the device of bedroom covenants. In addition, it secured controls on who would occupy the housing actually built by requiring, in certain cases, sale rather than rental of the multi-family housing. Not surprisingly, the Appellate Division found that:

> It is clear from the evidence adduced at trial that perfection of an application for multifamily rezoning in the Town of Brookhaven is a long, cumbersome, expensive, and, to say the least, risky process. It is further clear that the rigidity of this process, together with the low and steadily declining rate of approvals, is, at least, a contributing cause of the declining rate of applications under the "MF" provisions of the Brookhaven zoning ordinance (R2463). 109 A.D.2d at 332.

When the potential for subsidized or below market rate housing was added to the multi-family rezoning equation, the obstacles facing the private developer became virtually insurmountable and only the foolhardy would venture forward (see R379-381, 1167-1172). Indeed, the record could not be clearer that Brookhaven officials were solicitous of community opposition which invariably arose when lower cost housing was proposed. It is not surprising, therefore, that private developers shied away from using the available government

subsidies for fear that this would doom their applications for rezoning.

Appellants' proof was accepted by the lower courts. The trial court unequivocally found that a serious shortage of affordable housing existed throughout Suffolk County (R27), and the Appellate Division, as already noted, found that Town officials, with popular support, deliberately excluded low-to-moderate-income housing (R2468-2469). 109 A.D.2d at 337-338. According to the lower courts, however, the restrictions imposed on construction of lower cost housing, even in light of the clear housing need, did not rise to the level of a Berenson violation.

The Appellate Division's first step in reaching this conclusion was to find that the Town's zoning ordinance was facially valid. That is, that the language of the ordinance itself passed constitutional muster because it provided for a variety of different residential types and densities of development and had not been used "as a ruse to prevent the construction of multi-family housing . . ." (R2459-2560). 109 A.D.2d at 328-329 (emphasis added). The Appellate Division also held that the existence of a substantial amount of remaining vacant land, with the "possibility" of additional rezonings for multi-family use, assured that "more than adequate consideration" was being given to local and regional housing needs (R2461). 109 A.D.2d at 330.

Satisfied that the ordinance was facially valid, the Appellate Division then considered whether a Berenson violation existed in the implementation of the ordinance. In this regard, the Appellate Division concluded that Berenson did not deal with the economics of housing and that a municipality's obligation is limited to permitting a variety of housing types. Thus, it held that Brookhaven carried no burden to justify its exclusion of lower cost housing.

The Appellate Division stated:

> A careful reading of the Court of Appeals' decision in Berenson v. Town of New Castle, (supra), makes clear that the court therein was not attempting to address the types of questions sought to be raised by the plaintiffs at bar, since it approached the problem of exclusionary zoning solely in terms of traditional zoning and planning considerations, e.g., population density, infrastructure, rural/urban/suburban character, environmental amenities, etc., to the exclusion of the type of social and economic implications which plaintiffs now urge upon us. Thus, Berenson does not address the question of how such housing is to be built; what it will cost to develop; whether governmental subsidies will be necessary and/or available; how much it will cost to sell and/or rent; and who, if anyone, will be able to afford the kinds of housing which are ultimately built, nor does it purport to mandate that a zoning ordinance makes it possible for people of all classes to live in a given community. It merely requires that a town allow for the construction of different types of housing in sufficient numbers for those people who want and can afford it (R2462). 109 A.D.2d at 331.

This construction simply does not comport with the language or intent of Berenson. In addressing the issue of exclusionary zoning, the Berenson Court made clear that it was confronting a problem which primarily affects low and moderate income persons. The Court's establishment of a two prong test to evaluate a local zoning ordinance only has meaning within the context of the affordability, as well as the quantity, of the housing ultimately authorized.

The first prong of the Berenson test acknowledges that the housing existing in the community may well be inadequate to meet the current needs of an indigenous population and that plans for construction may be necessary to fill the present and/or future needs of that population. The Court set forth the first part of its test as follows:

> [W]hether the [zoning] board has provided a properly balanced and well ordered plan for the community. . . . [T]he court must ascertain what types of housing presently exist in New Castle, their quantity and quality and whether this array adequately meets the present needs of the town. Also, it must be determined whether new construction is necessary to fulfill the future needs of New Castle residents, and if so, what forms the new developments ought to take. 38 N.Y.2d at 110.

The last sentence of this test implicitly acknowledges that lower income residents could well generate a unique housing need which must be met. The affordability of that

housing for this group necessarily is intertwined with any question of compliance.

In structuring the second part of its test, the Berenson Court advised local communities that their zoning practices must also address regional housing shortages. The Court stated:

> [I]n enacting a zoning ordinance, consideration must be given to regional needs and requirements. It may be true, for example, that New Castle already has a sufficient number of multiple-dwelling units to satisfy both its present and future populations. However, residents of Westchester County, as well as the larger New York City metropolitan region, may be searching for multiple-family housing in the area to be near their employment or for a variety of other social and economic reasons. There must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met. 38 N.Y.2d at 110.

This judicial elaboration of a concept of regionalism necessarily responded to the many problems of lower income people locked in the inner cities. Obviously, in referring to the search for multi-family housing in the suburbs, the Court was focusing on the affordability of such housing and, especially, on lower income groups. Thus, construction of expensive multi-family condominium units priced beyond the means of those involved in the search does not address the Court's concern.

The Berenson Court's intent to protect low and moderate income persons from exclusionary zoning is further evident from the ruling's historical context. First, the Berenson ruling followed not long after the decision in Matter of Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359 (1972) in which a system of timed growth restrictions was upheld. In approving the Ramapo ordinance, however, the Court warned that "[w]hat we will not countenance, then, under any guise, is community efforts at immunization or exclusion." Id. at 378. The Berenson Court specifically referred to this language of the Golden ruling. 38 N.Y.2d at 108.

The Berenson opinion also followed closely after Maldini v. Ambro, 36 N.Y.2d 481 (1975), in which the Court upheld a special multiple residential zone exclusively for the elderly. In Maldini, the Court held that a community could, consistent with its obligation to zone for the health and general welfare, respond to the housing needs of a particular class of citizens, i.e., the aged. The very thrust of the Maldini ruling was that inclusionary zoning for the elderly was permissible only because it did not involve an invidious classification such as "economic status." Id. at 488.

At the same time as Golden, Berenson and Maldini were decided, several other states were grappling with the impact of exclusionary zoning on lower income people. The Berenson Court took note of this fact and cited to the holdings in Southern

Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I), 67 N.J. 151, 336 A.2d 713 (1975); In re Girsh, 437 Pa. 237, 263 A.2d 395 (1970); and Bristow v. City of Woodhaven, 35 Mich.App. 205, 192 N.W.2d 322 (1971), with implicit approval and as support for the course it was undertaking. 38 N.Y.2d at 108-109.

In these decisions, the New Jersey, Pennsylvania and Michigan courts, each viewed the issue of exclusionary zoning as a problem affecting primarily lower income persons. The New Jersey court in Mount Laurel I most clearly and forcefully articulated this fact. That Court stated:

> The legal question before us . . . is whether a developing municipality like Mount Laurel may validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby, as Mount Laurel has, exclude such people from living within its confines because of the limited extent of their income and resources. 67 N.J. 173.

It was with this language of its sister state in mind, that the Berenson Court issued its ruling.

The subsequent history of Berenson is also instructive. The case was remanded for trial to the Supreme Court, which ultimately concluded that New Castle's zoning ordinance failed both branches of the Berenson test. In structuring a remedy, the Supreme Court ordered New Castle, among other things, to provide zoning for construction of 3,500 units of multi-family

housing over a ten year period. On appeal, the Appellate Division affirmed the Supreme Court's holding, but set aside the relief mandating 3,500 units on the grounds that the lower court had exceeded its authority. In criticizing the lower court, the Appellate Division specifically noted that there was no proof that the 3,500 unit figure "was geared to the needs of lower income groups in particular." 67 A.D.2d at 520 (emphasis in original). Continuing with its criticism, the Appellate Division stated::

> [T]he [Supreme] court apparently failed to appreciate that the figure itself was referable to the housing market in general, both as to income groups and the type of housing (single- or multifamily) to be provided, and was not directly referable to the needs of the low income groups with which the court was primarily concerned . . . . Special Term's judgment cannot and does not insure that any of the multifamily units to be constructed will be anything other than luxury condominiums, with which the market may already be saturated. Id. at 520-521 (emphasis added).

Thus, it is clear that the Appellate Division viewed the Court of Appeals' ruling as requiring New Castle to specifically zone for lower income families.

After Berenson, this Court next considered the issue of exclusionary zoning in Kurzius v. Village of Upper Brookville, 51 N.Y.2d 338 (1980). In Kurzius, a corporate landowner was unsuccessful in challenging a five acre minimum lot requirement. The Court upheld the zoning provision because plaintiffs

offered no proof that the large lot zoning had foreclosed persons of low and moderate income from finding housing in the general region or, more importantly, that there was a need in the Village for lots of less than five acres. Thus, the Court held, "plaintiffs failed to prove that the two-pronged Berenson test had not been met." Id. at 346. In explaining its ruling, the Court stated:

> We realize, of course, that large-lot zoning may also be used as a means to exclude persons of low or moderate income; and as we have stated before, we will not countenance community efforts at exclusion under any guise [citing Golden]. Id. at 344-345.

The clear line of Court of Appeals' rulings from Golden through Kurzius has been ignored by the lower courts in the instant case. Despite multiple pronouncements from this Court that towns cannot use their zoning authority to exclude low income families, the Appellate Division arrived at the virtually incomprehensible conclusion that housing affordability is irrelevant in an exclusionary zoning challenge in New York. Indeed, as the Second Department's ruling stands, a town can, consistent with Berenson, arbitrarily bar low income housing with impunity as long as it allows for the construction of an adequate supply of costly multi-family housing. In addition, a town that shows it already has a moderate supply of higher cost multi-family housing can defeat an exclusionary zoning challenge even where there is overwhelming proof of a

housing need among lower income families and a record "replete with evidence that Town officials, with popular support, made every effort to exclude low-to-moderate income housing . . ." This restrictive, and indeed tortured, reading of Berenson will, if allowed to stand, sound the death knell for any effort to address the housing needs of the poor and constitute a stamp of approval for the parochial and exclusionary interests of many local communities.

II.

UNDER BERENSON, BROOKHAVEN MUST ASSURE THAT ITS ZONING ORDINANCE PROMOTES HOUSING CONSTRUCTION WHICH WILL MEET THE NEEDS OF LOW INCOME TOWN RESIDENTS AND IS RESPONSIVE TO LOW INCOME HOUSING NEEDS IN THE REGION

In Point I, appellants maintain that the blocking of low cost housing projects and maintenance of a discretionary rezoning system which caters to community opposition to lower cost housing cannot withstand attack under _Berenson_. These discriminatory acts and procedures are fundamentally inconsistent with the health and general welfare of the community.

Brookhaven's _Berenson_ violation is even more far reaching, however. The Town also has failed to meet its broader affirmative obligation to insure that its zoning practices promote a resolution of the housing needs confronted by lower income persons. In this regard, appellants showed that Brookhaven had no meaningful zoning plan or provision responsive to the enormous unmet need among Brookhaven residents and persons in the metropolitan area for lower cost housing. The absence of an affirmative response to this demonstrable need is a violation of the Town's broader obligation under _Berenson_.

More specifically, under the first prong of the _Berenson_ test, Brookhaven was obligated to determine whether new construction was necessary to meet the future needs of lower income Town residents and, if so, what construction would

be necessary and how it was to be accommodated under the zoning ordinance. Under the second prong of the Berenson test, Brookhaven was required to zone in a manner that accommodates, to some extent, the needs of persons in the larger New York City metropolitan region searching for lower cost housing opportunities in the Town. Since the lower courts in this case held that Berenson does not require considerations of housing economics, they did not even consider the Town's obligation to promote construction of low cost housing responsive to area needs.

Berenson mandates a process whereby a local community must ascertain the housing needs of its own lower income residents, assess its responsibilities for the regional lower cost housing need and then adopt a zoning plan conducive to meeting that need. Articulation of the need and the plan to be undertaken in response to that need should be included in a Town's Master Plan and be accorded recognition in a statement of purpose in the zoning ordinance itself. Where a substantial need for lower cost housing exists, the ordinance should provide mechanisms to encourage private developers to propose lower cost housing projects and/or multi-family developments for lower income persons. These are the essentials of an inclusionary zoning ordinance designed to meet the Berenson obligation.

Brookhaven at time of trial did, in fact, have at least one authoritative statement on the housing needs confronted by lower income persons residing in or seeking to reside in Brookhaven. That number was found in the HAP which specified the need to be in excess of 7,000 units. See,pp, 8-9, supra. The Town's revised Master Plan also acknowledged, in a cursory review, a serious lower income housing need "sufficient to justify public concern" (Pl. Ex. 5, p. 44). The planners had recommended a more precise study to determine the extent of the need in a Townwide housing program, but the Town elected not to follow up (R362, 546).

The ordinance itself, of course, contains no statement of purpose directed at resolving the lower income housing need; nor does it contain any provisions which would serve as an incentive to the construction of housing responsive to those needs.

The obligation imposed upon communities to respond to the local and regional lower cost housing need as set forth in the two prong test in Berenson is not unique to New York. The New Jersey Supreme Court in Mount Laurel I, supra, also spoke to this approach to correct the impact of exclusionary zoning. The Court stated:

> We conclude that every such [exclusionary] municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes

> of people mentioned for low and moderate income housing, and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor. 67 N.J. at 173-174.

The New Jersey Supreme Court reaffirmed this holding in Southern Burlington NAACP v. Township of Mount Laurel (Mount Laurel II), 92 N.J.2d 158 (1983). Once again, the New Jersey court decisively held that municipalities carry an affirmative responsibility to meet lower income housing needs and discussed at length the methods which were to be used in achieving solutions. A fundamental component of the Mount Laurel II decision is the so-called "builder's remedy." This remedy assures developers that they will obtain multi-family zoning when they undertake projects that set aside a portion of the units for lower income persons in response to an unmet fair share obligation.

In response to the Mount Laurel II holding, the New Jersey Legislature recently enacted a statute establishing specific standards by which local communities are to meet their responsibilities.[17] The new legislation requires, among other things, that all municipalities include within their master plans a housing program which meets certain specific statutory criteria. These criteria include a consideration of those parcels of land that are most appropriate for the construction

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[17] New Jersey Fair Housing Act, N.J.S.A. 52:27D-301, et seq., enacted July 10, 1985.

of low and moderate income housing and an evaluation of plans proposed by developers who have expressed a commitment to build low and moderate income housing.[18] The constitutionality of this legislation was upheld in Hills Dev. Co. v. Township of Bernard, 103 N.J. 1 (1986).

In discussing this new legislation, the New Jersey Supreme Court in Bernards expressed satisfaction that the legislature had finally accepted its obligation to fashion a comprehensive statewide standard implementing the constitutional obligation to meet the housing needs of lower income people. The court further noted that while a legislative response to exclusionary zoning was preferable to judicial intervention, the courts had no choice but to fill the gap where a constitutional violation remained uncorrected.

This Court, like the New Jersey Supreme Court prior to Mount Laurel II, unsuccessfully called upon New York's Legislature to enact a remedy for exclusionary zoning. In 1975, this Court "look[ed] to the Legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning." Berenson, supra, 38 N.Y.2d at 111. The Legislature's failure to take on this task leaves this Court, more than a decade later, with no choice but to clearly define the meaning of the general welfare as it applies to lower income housing needs and

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[18] Id., §10(f).

the responsibility of local communities to zone in a fashion which addresses those needs.

III.

BROOKHAVEN'S EXCLUSION OF LOWER COST HOUSING THROUGH THE DISCRETIONARY REZONING PROCESS VIOLATES THE FEDERAL FAIR HOUSING ACT

Appellants have also charged that Brookhaven's interference with lower cost housing projects and maintenance of a discretionary rezoning system which caters to community opposition to lower cost housing violates the Federal Fair Housing Act, adopted as Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601, et seq. Title VIII has long been held to apply to claims of racial discrimination where local officials have interfered with efforts to build lower cost or subsidized housing projects. See Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. den., 434 U.S. 1025 (1978); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. den., 401 U.S. 1010 (1971).

In a case of this nature -- a challenge to governmental practices which interfere with the construction of housing for lower income and minority persons in predominantly white communities -- a prima facie case of violation of Title VIII is established by a showing of discriminatory racial impact or effect; no showing of racially motivated intent is necessary. Arlington Heights, supra; Betsey v. Turtle Creek Associates, 736 F.2d 983, 986 (4th Cir. 1984); Smith v. Town of Clarkton,

682 F.2d 1055, 1065 (4th Cir. 1984); Robinson v. 12 Lofts Realty, 610 F.2d 1032, 1038 (2d Cir. 1979); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-149 (3d Cir. 1977), cert. den., 435 U.S. 908 (1978); United States v. Housing Authority of City of Chickasaw, 504 F.Supp. 716, 726-727 (S.D. Ala. 1980); United States v. City of Parma, 494 F.Supp. 1049, 1053-1055 (N.D. Ohio 1980), appeal dismissed without opin., 633 F.2d 218 and 661 F.2d 562 (6th Cir. 1980), cert. den., 456 U.S. 926, reh. den., 456 U.S. 1012 (1980).

The prima facie showing of impact or effect is established in a Title VIII action by proof that the challenged governmental decision or course of action has a greater adverse impact on one racial group than on another, or that the challenged act has a segregative effect on the community. Thus, the Seventh Circuit in the leading case of Arlington Heights, supra, stated:

> There are two kinds of racially discriminatory effects that a facially neutral decision about housing can produce. The first occurs when that decision has a greater adverse impact on one racial group than on another. The second is the effect that the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups. 558 F.2d at 1290.

It is unclear whether the Appellate Division, in denying appellants' Title VIII claim, first took the required step of determining that a _prima facie_ case had been established before analyzing the Town's rebuttal. The Appellate Division did find that appellants' showing of the Town's interference with multi-family projects, coupled with the racial statistics in the record, proved "some racially discriminatory impact" (R 2468). 109 A.D.2d at 337. Presumably, this showing was sufficient to satisfy the appellants' initial burden as the Appellate Division thereafter engaged in an analysis of the record, focusing in part on the Town's defense.

Because neither the trial court (R29) nor the Appellate Division made findings as to the sufficiency of the _prima facie_ case (other than the Appellate Division's conclusory finding of some discriminatory impact), appellants will briefly summarize the facts relevant to their Title VIII argument.

Appellants showed that Brookhaven is a predominantly white community, having a black population of under 3%. Notwithstanding the massive amount of land in Brookhaven, the Town's black population is confined principally to the two economically depressed enclaves of North Bellport and Gordon Heights.

Appellants also showed that minority households constituted a substantially disproportionate (15%) share of the

low cost housing need. The only lower cost housing development in the Town with units for families, Homestead Village, was located in the predominantly black Gordon Heights section. The occupied family units in the project had a minority population of almost 38%. Thus, it is clear that lower cost housing for families in Brookhaven was housing which disproportionately met the needs of minority families and was occupied disproportionately by minority families.

The evidence could not have been clearer, and the Appellate Division so found, that Brookhaven opposed and sought to block construction of lower cost housing for families -- projects that were to be located in white communities. The events surrounding the Auerbach and Metro House proposals have been set forth in some detail. The repeated fiascos resulting from efforts to create a public housing authority also have been traced. What is particularly significant about these events is that Brookhaven's actions either prevented or contributed to preventing the introduction of racially integrated housing into overwhelmingly white parts of the Town. In addition, to the extent that any other HUD subsidized housing development might have been proposed, the developers would have had to comply with federal site selection criteria which mandate that HUD projects be located outside areas of minority concentration in the absence of any overriding justification (R1493; Pl. Ex. 76).

In considering this evidence, it is clear that the Appellate Division ignored the accepted method of legal analysis by which racial effect cases are determined and applied totally incorrect legal standards. While professing to follow the four part method of analysis posited by Arlington Heights, it is evident that the lower court did not understand how it was to reach a proper determination under these standards.

These four Arlington Heights factors are: (1) the strength of the showing of discriminatory effect; (2) whether there is some evidence of discriminatory intent; (3) what interest a defendant has in maintaining the challenged practice; and (4) whether the plaintiff seeks to compel the defendant affirmatively to provide housing for members of minority groups of merely refrain from interfering with private efforts to provide such housing. 558 F.2d at 1290.

The Appellate Division's analysis of the first factor, appellants' showing of discriminatory effect, establishes that the lower court applied a totally incorrect standard of law. In essence, the Appellate Division held that because appellants challenged governmental interference with housing which would have promoted intra-Town residential desegregation as compared with the inter-Town desegregation that was at issue in Arlington Heights, appellants' showing of racial impact was less significant. In this regard, the Appellate Division began

its analysis by stressing that the Village of Arlington Heights was over 99% white and adjacent to the Chicago metropolitan area with an 18% black population. The situation in Brookhaven, however, was no different. Brookhaven was a 97% white suburb located in the New York City metropolitan region, which had a 16% minority population and an inner city core of over 40% minority persons (R899-900). Thus, while minority people may have been able to find housing in small enclaves in Brookhaven, their numbers remained very small and the percentages overall did not differ materially from those in the Arlington Heights situation. Nor does the fact that some blacks found housing outside of North Bellport and Gordon Heights alter the reality that Brookhaven remained a predominantly white segregated community.[19]

In any event, there is not the slightest indication that the legal principles articulated in Arlington Heights apply only to inter-municipality desegregation. To the

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[19] The Appellate Division noted that "there were also significant numbers of blacks in other areas of the Town (e.g., the enrollment in the Bellport school district was 22.5% black, Center Moriches was 15.1% black, Middle Island was 14.1% black and South Haven was 5.8% black, as compared to the Townwide figure for blacks of approximately 3.6%)" (R2468). 109 A.D.2d at 337. However, the court's discussion in this regard is totally baffling as the Bellport school district is the district which contains the North Bellport enclave and the Middle Island district is the district which contains the Gordon Heights enclave. The high percentage of black students in these larger districts confirms appellants' position. On the other hand, the Center Moriches and South Haven districts are both extremely small districts, with the former having only 162 black children and the latter having only five black children (see Pl. Ex. 54).

contrary, Resident Advisory Bd. v. Rizzo, supra, another leading case, presented a situation of intra-city desegregation in which the court found a Title VIII violation where there was governmental interference with an effort to build a public housing project in a white section of Philadelphia. There is no justification for drawing a distinction with respect to a Title VIII challenge between an effort to build a low cost housing project in the 99% white Village of Arlington Heights and an effort to build lower cost housing in a virtually all white section of Brookhaven.

Additionally, the Appellate Division's assertion that "plaintiffs do not allege that the Town of Brookhaven's zoning practices have operated to exclude minorities from the town . . ." is simply inaccurate (R2468). 109 A.D.2d at 337. The amended complaint clearly alleged that a black plaintiff who resided outside of Brookhaven could not find housing in the Town, in violation of Title VIII (see Amend. Compl., ¶¶13 and 15; R38, 50). Moreover, appellants presented the uncontroverted testimony of Kenneth Anderson, Chapter President of the Brookhaven Branch of the NAACP, who stated that one of his organization's goals was to open up Suffolk County housing, including housing in Brookhaven, to blacks, and that Town officials had told him that they were opposed to lower cost housing because "that kind of housing opportunity . . . would

open up the floodgates for the influx of black people into the town, and as a consequence, they wouldn't do it" (R137).

The Appellate Division's handling of the second Arlington Heights factor -- the possible presence of evidence of racially discriminatory intent -- also deviates from accepted legal standards. In this part of its analysis, the Appellate Division apparently believed that only "direct evidence" of racial discrimination was probative and that the record had no such evidence (R2468-2469). 109 A.D.2d 337-338. Again, the Appellate Division stated the law incorrectly. Insistence on a showing of direct evidence to prove racial intent runs contrary to the common judicial understanding that those engaging in discrimination hardly ever publicly admit it. Rather, the courts must look to the sequence of events to determine intent and undertake a subtle and sophisticated analysis of the evidence. See, e.g., Robinson v. 12 Lofts Realty, Inc., supra, at 940-942; Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970). Contrary to the holding of the Appellate Division, community opposition against lower cost housing, and specifically the community opposition to the Auerbach and Metro House projects, was probative of intent.[20]

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[20] It has long been recognized that the practices of local governments to frustrate efforts to build low and moderate income housing is, in fact, a reflection of racial animus and the desire for exclusivity. See "Developments in the Law -- Zoning," 91 Harv.L.Rev., 1427, 1618-1635 (May 1978); U.S. Commission on Civil Rights, Equal Opportunity in Suburbia (1974); Danielson, The Politics of Exclusion, Columbia University Press, 1976, especially pp. 79-106; Brooks, Housing

Moreover, even if the standards adduced by the Appellate Division were correct, appellants did present uncontroverted evidence of discriminatory intent through the testimony of NAACP Chapter president Anderson.

The third Arlington Heights factor dealing with the defendants' interest in maintaining its challenged practice, is a critical inquiry, which the Appellate Division completely sidestepped. In essence, the court must weigh the governmental interest involved against the impact of a perpetuation of residential segregation and denial of interracial associations. Indeed, such an inquiry is undertaken in all Title VIII impact cases. Thus, the Third Circuit in Resident Advisory Bd. v. Rizzo, supra, held that in the face of a showing of discriminatory impact resulting from interference with the construction of a lower cost housing development, a municipal defendant's burden of justification is such that it has no realistic alternative course of action:

> [A] justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and must show that no alternative course of action could be adopted that would enable

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Equity and Environmental Protection: The Needless Conflict, American Institute of Planners, 1976, especially pp. 36-53; Rabinowitz, "A Question of Choice: Access of the Poor and the Black to Suburban Housing," Masotti & Hadden, Ed., The Urbanization of the Suburbs, 1973; Housing and Suburbs: Fiscal and Social Impact of Multi-Family Development, New Jersey County and Municipal Government Study Commission with U.S. Department of Housing & Urban Development, 1974, principally Chapter 6.

> that interest to be served with less discriminatory impact. 564 F.2d at 149.

Similarly, the Fourth Circuit in Betsey v. Turtle Creek Associates, supra, in holding that an impact standard applied to a Title VIII challenge to a landlord's decision to convert an apartment building to an all adult residence, set forth a compelling business necessity test that the defendant must meet to justify and overcome the prima facie case of discriminatory impact:

> The burden confronting defendants faced with a prima facie showing of discriminatory impact is different and more difficult than what they face when confronted with a showing of discriminatory intent. Defendants may overcome a prima facie showing of discriminatory intent by articulating some "legitimate non-discriminatory reason for the challenged practice." McDonnell Douglas v. Green, 411 U.S. 792, 802 . . . (1973). However, when confronted with a showing of discriminatory impact, defendants must prove a business necessity sufficiently compelling to justify the challenged practice. 736 F.2d at 988.

Notwithstanding the importance of the third factor, the Appellate Division avoided making any findings in this area. Instead of engaging in an analysis as to Brookhaven's interest, or whether it had an available non-discriminatory alternative course of action, the Appellate Division merely stated that a governmental body "exercising its zoning authority, is entitled to greater deference than a private individual or a govern-

mental body acting outside of or in abuse of its lawful authority" (R2469). 109 A.D.2d at 338.

Even if a Title VIII defendant enjoys some deference in the land use area, the courts must nevertheless review the interests asserted by local officials. Yet, neither lower court considered Brookhaven's interest in interfering with the Auerbach and Metro House developments or its interest in maintaining a discretionary rezoning procedure which caters to community opposition to lower cost housing. The Town itself in fact did little to explain its actions as not a single former or present Town official testified at trial. If Title VIII defendants were not required to justify their land use and zoning determinations, then plaintiffs would be hard pressed ever to prevail.

The fourth Arlington Heights test focuses on relief. Appellants, in their amended complaint, requested both an injunction halting discriminatory conduct and various types of affirmative relief. The relief requested applied to both the state and federal claims. There was no request that Brookhaven be directed to undertake construction of low cost housing or expend large sums of public money in furtherance of developing such housing. In essence, all of the relief was directed at removing the impediments to construction of lower cost housing, primarily through efforts by the private sector. Thus, while the relief requested did not narrowly focus on a particular

housing project as in Arlington Heights, contrary to the Appellate Division's holding, the relief sought was not so burdensome as to relieve Brookhaven from its obligations under Title VIII.

Finally, the Arlington Heights court cautioned that a plaintiff need not prevail on all the four critical factors. Rather, the court indicated trial courts must weigh the evidence with the goal of furthering the purposes of Title VIII and should "decide close cases in favor of integrated housing." 558 F.2d at 1294.

In summary, the Appellate Division's rejection of appellants' Title VIII case was based upon a faulty review of the parameters of appellants' case and a flawed understanding of how to determine racial impact and intent. Most significantly, the lower court relieved Brookhaven of its burden of establishing its interest in maintaining policies and practices which have a racially discriminatory impact on housing opportunities for minority citizens and which perpetuate residential segregation.

IV.

PLAINTIFFS WERE ENTITLED TO MAINTAIN THIS CASE AS A CLASS ACTION

The Appellate Division divided three to two on the issue of class certification (R2474). All five Justices agreed that the first four requirements for certifying a class under CPLR 901(a) were met, i.e., numerosity, common questions of law and fact, typicality of claims and fair and adequate representation. The sole bone of contention was over the fifth requirement of whether a class action in this case would be superior to other available methods for the fair and efficient adjudication of the controversy.

The majority held that the fifth requirement was not satisfied, based on its reading of Matter of Rivera v. Trimarco, 36 N.Y.2d 747 (1975) and subsequent cases from this Court holding that class actions are generally not maintainable against governmental entities. The policy underlying this line of cases is that if plaintiffs are successful in obtaining an injunction against a governmental agency, then all other putative class members will be protected by the principle of stare decisis.

The dissent, which was equally aware of these precedents, nevertheless contended that important policy considerations tipped the balance in favor of class action certification in this case. Justices Margett and Hopkins

reviewed the affidavits of the individual plaintiffs and concluded that due to their personal circumstances, they were transient and could require substitution in the future. Indeed, they found several of the individual plaintiffs who were students at Stony Brook had already graduated and that the remaining plaintiffs were required to substitute other students for them. The minority wisely pointed out that the defendants' willingness to allow liberal substitution might well change. They further emphasized that while the organizational plaintiffs were presumably bona fide and very competent representatives, the individual plaintiffs lent an element of specificity, immediacy and direct human need to what otherwise might be viewed as an academic exercise in theoretical swordplay (R2486). 69 A.D.2d at 253.

Seven years later, the 1979 predictions of the Second Department dissenters have come true. If this Court were to remand this case for further evidence or a remedy hearing, plaintiffs' counsel would be hard pressed to locate the individual plaintiffs. The existence of organizational plaintiffs is no guarantee either. It is common knowledge that many housing advocacy groups have been folding in the face of budget cutbacks and increased difficulty in obtaining charitable funding. Thus, while Suffolk Housing Services continues to maintain its office, there is no guarantee that it will in the future. Maintenance of this action as a class

action would eliminate this worry and lead to a more efficient result. For even if liberal substitution were allowed and appropriate plaintiffs were to step forward, it is unncessarily burdensome on plaintiffs' counsel to continue dealing with this procedural quagmire. Moreover, precious court time is also consumed dealing with these issues.

The Appellate Division dissenters made another insightful argument. They stated that "[t]he possibility that these plaintiffs may be entitled to attorneys' fees in the event they can maintain this as a class action is also to be taken into account in assessing the superiority of the class form" (R2489). 69 A.D.2d at 256 (emphasis in original). The Justices quoted at length from 2 Weinstein-Korn-Miller, N.Y. Civ. Prac., ¶909.01, which states, inter alia, that "[t]o provide the incentive to competent and experienced attorneys to handle the complex problems which are inherent in class actions and to assure forceful prosecution of such actions, it is essential that the court have power to award appropriate counsel fees" (R2490). 69 A.D.2d at 257.

The minority then noted that CPLR 909, which authorizes counsel fees in successful class actions, "dovetails" with the criteria employed by the courts in assessing whether a class action would be superior to other methods of adjudication. They found that it was doubtful whether the individual plaintiffs would have pressed their claims without the class

action form with its attendant possibilities for recovery of attorneys' fees. While this case has proceeded without class action status, its 11 year history to date must serve as a deterrent to other public interest minded attorneys who might contemplate future litigation in this area.

Appellants are not unmindful of this Court's recent pronouncement in Rivers v. Katz, 67 N.Y.2d 485 (1986). In Rivers, several involuntarily committed mental patients sought a declaration of their right to refuse anti-psychotic medication. During the course of that litigation, plaintiffs unsuccessfully attempted to have a class certified.

That case is distinguishable on several grounds that relate back to the Appellate Division dissenters' concerns. First, the involuntarily committed patients in Rivers were stationary and could be counted upon to portray fair examples of the considerations at hand through the life of the lawsuit. In addition, the Rivers, plaintiffs' counsel must have relied primarily on medical and psychological expert testimony to establish the effects of anti-psychotic drugs on the plaintiffs. Finally, the plaintiffs in Rivers were the same individuals to whom the benefits would inure.

By contrast, in the instant lawsuit, the individual plaintiffs are highly mobile due to their circumstances, leading to the cumbersome process of constant resubstitution. Moreover, as the Appellate Division dissenters found, each of

the plaintiffs before this Court has a distinct, illustrative story that helps to round out the picture of the impact of Brookhaven's zoning policies. Maintenance of a class action would better enhance the opportunity to portray the full picture. Finally, in the case sub judice, some members of the class would benefit if low cost housing were built as a result of this litigation, but there is no guarantee that the named plaintiffs would be among them.

The important policy considerations which were emphasized by the Appellate Division dissenters and apparently never raised before this Court in previous cases, warrant certification of a class in the instant matter. Some lower courts have recently come to a similar conclusion. For instance, in Matter of Goodwin v. Gleidman, 119 Misc.2d 538 (Sup. Ct. N.Y. Co. 1983), Justice Freedman relied on Matter of Eisenstark v. Anker, 64 A.D.2d 924 (2d Dept. 1978) and Doe v. Greco, 62 A.D.2d 498 (3d Dept. 1978) for the proposition that the principal of stare decisis does not always protect the rights of potential petitioners. In Goodwin, plaintiffs challenged non-compliance by the Department of Housing Preservation & Development with its own regulations. Justice Freedman granted class action status to all persons who then resided at the Fox Street shelter or would do so in the future, noting:

> [W]hile there are already a number of individual petitioners, the claims of individual petitioners could well become

> moot during the course of the proceedings, as petitioners find satisfactory housing or leave the shelter for other reasons. A class action avoids the possibility that the important claims raised by petitioners will become moot. (See Greklek v. Toia, 65 F.2d 1259, cert. den. sub nom., Blum v. Toomey, 436 U.S. 962) (footnote omitted). 119 Misc. 2d at 546.

In addition, Justice Freedman wrote:

> [C]lass certification will assure that the claims raised by petitioners are judicially determined, and that all potential petitioners will be protected, whether or not they have access to the courts. At the same time the resources of the judicial system and counsel for both sides will be efficiently expended. Id. at 547.

Of special interest to Justice Freedman was a Law Review article entitled "Class Certification in State Court Welfare Litigation: A Request for Procedural Justice," 28 Buffalo L.Rev. 57, which, she noted, provided an "excellent discussion" of the need to certify class actions in welfare cases and other cases affecting poor people. 119 Misc. at 546, note 10. Justice Freedman's reasoning applies with equal force to the matter before this Court and the same rationale was repeated in the case of Matter of Lamboy v. Gross, 129 Misc.2d 564 (Sup. Ct. N.Y. Co. 1985); but see McCain v. Koch, 117 A.D.2d 198 (1st Dept. 1986).

The Appellate Division has, at other times, granted class action status where governmental action was at issue. See, e.g., Felder v. Foster, 71 A.D.2d 71 (4th Dept. 1979);

Eisenstark v. Anker, supra; Doe v. Greco, supra; Knapp v. Micheaux, 55 A.D.2d 1025 (4th Dept. 1977).

Accordingly, appellants urge that this Court consider the significant policy issues raised by this case, especially judicial economy in avoiding frequent substitution of parties and the possibility of private counsel obtaining attorneys' fees when representing low income class members, and remand with directions to certify the class.

CONCLUSION

For all the foregoing reasons, appellants respectfully urge this Court to reverse the Appellate Division and remand this case to the Supreme Court with directions to certify the class and fashion an appropriate remedy.

Dated: New York, New York
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Yours, etc.

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