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Toward a Housing Imperative and Other Reflections on Balanced Growth and Development

John R. Nolon*

A. *Is There a Right to Housing?*

For a time it was fashionable among housing advocates to claim that all persons of whatever income had a fundamental right to decent housing. In 1974, Congress reaffirmed the national housing goal of realizing a decent home for every American family,¹ but a constitutional right to be housed, running to each citizen of the United States, has never been established.

The purpose of the 1974 reaffirmation may have been to respond to Mr. Justice White who wrote in 1972:

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality Absent constitutional mandate, the assurance of adequate housing . . . [is a] legislative, not judicial, func-

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1. 42 U.S.C. § 1441(a) (1982). Congress finds that the supply of the nation's housing is not increasing rapidly enough to meet the national housing goal, established in the Housing Act of 1949, 42 U.S.C. §§ 1441-1490J (1982), of the "realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family." 42 U.S.C. § 1441. Congress reaffirms this national housing goal and determines that it can be substantially achieved within the next decade by the construction or rehabilitation of twenty-six million housing units, six million of these for low and moderate income families. 42 U.S.C. § 1441(a).

tion²

In a series of recent cases, the New York courts have commented on the legislative acts of the state and local governments which have restricted or expanded the access to housing for limited income households or minorities. From these holdings, we can glimpse the outlines of a housing imperative: an emerging right running generally to low and moderate income households and minorities not to be excluded from living in any given community. As important, there also emerges the understanding that our legislators are empowered to act decisively to solve New York's much-lamented housing problem.³

B. *Municipal Duty Not to Exclude or Discriminate*

The New York Court of Appeals boldly instructed us in these matters by declaring in 1975 that "in enacting a zoning ordinance, consideration must be given to regional needs and requirements There must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional [housing] needs be met."⁴

This view of the housing imperative was affirmed in 1987 by the same court which stated:

Implicit in our rulings is a recognition of the principle that a municipality may not legitimately exercise its zoning power to effectuate socioeconomic or racial discrimination.⁵ [A]lthough we affirm the . . . [dismissal of the complaint] here, we note that today's decision [should

2. *Lindsey v. Normet*, 405 U.S. 56, 74 (1971). Courts have also held that neither the federal nor state governments are under a statutory duty to construct low and moderate income housing. See, e.g., *Acevedo v. Nassau County*, 500 F.2d 1078, 1082 (2d Cir. 1974); *Citizen's Committee v. Lindsay*, 507 F.2d 1065, 1071 (2d Cir. 1974), cert. denied, 421 U.S. 948 (1975).

3. REPORT OF THE GOVERNOR'S HOUSING TASK FORCE, HOUSING IN NEW YORK, BUILDING FOR THE FUTURE 7 (1988).

4. *Berenson v. New Castle*, 38 N.Y.2d 102, 110, 341 N.E.2d 236, 242, 38 N.Y.S.2d 672, 681 (1975).

5. *Suffolk Hous. Servs. v. Town of Brookhaven*, 70 N.Y.2d 122, 129, 511 N.E.2d 67, 69, 517 N.Y.S.2d 924, 926 (1987).

not] be read as revealing hostility to breaking down . . . zoning barriers that frustrate the deep human yearning of low-income and minority groups for decent housing they can afford in decent surroundings.⁶

In perhaps its most dramatic attack on exclusionary zoning in recent years, the New York Court of Appeals struck down the definition of "family" in the Town of Brookhaven's zoning ordinance.⁷ In this case, five unrelated elderly women lived in a single-family house in a district zoned single-family.⁸ Brookhaven's ordinance defined "family" as a maximum of four unrelated adults living together as a unit, but had no numerical limit on the number of related persons who could live together.⁹ The court of appeals affirmed the lower court's ruling that the ordinance violated the due process clause of the state constitution.¹⁰

Baer v. Town of Brookhaven is a logical extension of an earlier decision in which a numerical limit of two persons, sixty-two years of age or older, was held to violate the due process standard, where no comparable limit applied to related individuals living together as a family unit.¹¹ In *McMinn v. Town of Oyster Bay*, the court reasoned that such differentiation is not reasonably related to a legitimate zoning purpose and, therefore, violates the due process clause of the New York State Constitution.¹²

Through these two decisions, New York's highest court affirms the standard by which ordinances which exclude non-traditional families and other special household groups will be measured. In determining who may and may not live in a

6. *Id.* at 131, 511 N.E.2d at 71, 517 N.Y.S.2d at 927 (quoting *Warth v. Seldin*, 422 U.S. 490, 528-29 (1975) (Brennan, J., dissenting)).

7. *Baer v. Town of Brookhaven*, 73 N.Y.2d 942, 537 N.E.2d 619, 540 N.Y.S.2d 234 (1989).

8. *Id.* at 943, 537 N.E.2d at 619, 540 N.Y.S.2d at 234.

9. *Id.*

10. *Id.* at 944, 537 N.E.2d at 619, 540 N.Y.S.2d at 235. See N.Y. CONST. art. I, § 6.

11. *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 551-52, 488 N.E.2d 1240, 1244, 498 N.Y.S.2d 128, 132 (1985).

12. *Id.* at 549-52, 488 N.E.2d at 1243-44, 498 N.Y.S.2d at 131-32. See N.Y. CONST. art. I, § 6.

community, there must be a showing that such classifications are calculated to achieve legitimate public purposes.

Additional evidence of this judicial trend has come to us recently from the federal courts, as well. In *Town of Huntington v. Huntington Branch, NAACP*,¹³ the Supreme Court affirmed a court of appeals ruling which invalidated a section of the town's zoning ordinance. The ordinance limited the construction of multifamily housing to designated urban renewal areas, where fifty-two percent of the residents were minorities in a town where ninety-five percent of the population was white.¹⁴ A not-for-profit developer applied to amend the ordinance to allow it to build subsidized multifamily housing outside the urban renewal district.¹⁵ After the town denied the application, the developer challenged the ordinance.¹⁶

The Supreme Court affirmed the court of appeals on narrow grounds, holding that the action of the town was repugnant to federal law.¹⁷ The Court's opinion leaves open the standard that is to be used to determine what proof of disparate impact on minorities is needed in federal cases. The holding of the court of appeals had been explicit on this point, stating that a prima facie case had been established by the plaintiff. This was based on the de facto discriminatory impact of the ordinance, notwithstanding the town's claim that the ordinance was justified by the public purpose of redeveloping a deteriorated section of the community.¹⁸

C. *Municipal Authority to Provide Housing and to Direct the Provision of Housing*

The New York courts have shown extraordinary deference to localities which have used their land use authority for inclusionary purposes. Land use attorneys have grown accus-

13. 668 F. Supp. 762 (E.D.N.Y. 1987), *rev'd*, 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988).

14. 844 F.2d 926, 929-30 (2d Cir. 1988).

15. *Id.* at 931-32.

16. 668 F. Supp. 762 (E.D.N.Y. 1987), *rev'd*, 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988).

17. 488 U.S. 15 (1988).

18. 844 F.2d at 933-42.

tomed to advising municipal clients that zoning may not specify who owns, occupies, or builds under an ordinance. The New York Court of Appeals turned this notion on its ear in the context of an inclusionary housing ordinance in the case of *Maldini v. Ambro*,¹⁹ when it was called upon to review a Huntington retirement district ordinance which allowed the construction of multifamily residences for aged persons to be developed, owned, and operated by not-for-profit corporations.

The court sustained these provisions, noting that "age considerations are appropriately made if rationally related to the achievement of a proper governmental objective. Here . . . meeting the community shortage of suitable housing accommodations for its population, including an important segment of that population with special needs, is such an objective."²⁰ Extending this holding to cover the needs of lower income and minority households is logical in light of what we know about the resiliency of the police power to meet documented public needs.

This tendency to defer to legislative judgments on these matters was evident in a 1988 New York Appellate Division case arising out of a related set of facts. In *Kasper v. Town of Brookhaven*,²¹ the second department sustained an accessory apartment ordinance which allowed only owner-occupants to apply for a permit to add an accessory living unit to existing homes in single-family districts. The court noted the legitimacy of the town's objective of assisting residents of limited economic means,²² and ignored the claim of the plaintiff-investor who challenged the ordinance as regulating the "user" and not the "use" of property.²³

The state legislature has been equally attentive to the matter of empowering cities, towns, and villages to act aggressively to provide housing for those financially unable to cause

19. 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385 (1975).

20. *Id.* at 487, 330 N.E.2d at 407, 369 N.Y.S.2d at 391.

21. 142 A.D.2d 213, 535 N.Y.S.2d 621 (2d Dep't 1988).

22. *Id.* at 218, 535 N.Y.S.2d at 624.

23. *Id.* at 222-23, 535 N.Y.S.2d at 626-27.

the private market to produce housing affordable to them. These local governments, in the interest of creating affordable housing, have been empowered, *inter alia*, to donate public land, abate real property taxes, issue bonds to provide low-cost mortgages, pay the costs of community buildings in senior citizen projects, construct off-site improvements, and fully subsidize construction and operating costs in senior citizen and homeless housing projects.²⁴

D. *The Power of County Government to Provide Housing for the Homeless*

The burgeoning number of homeless households in New York has created great pressure on the courts to define and delineate the authority of the state and municipal governments to prevent homelessness and provide housing to the homeless. The state scheme for housing the homeless in New York is based on article seventeen of the state constitution which allows the legislature to authorize such of its subdivisions as it determines to provide for the "aid, care and support of the needy."²⁵ The state legislature has placed that responsibility on county government.²⁶

With state and federal assistance, our counties pay in excess of three thousand dollars per month for housing homeless families in temporary shelters.²⁷ In 1975, the New York Court of Appeals found that counties have a "duty" under state law to provide assistance to destitute persons which may not be avoided by claims that state and federal reimbursement programs are insufficient to pay the costs associated with that

24. See Nolon, *Shattering the Myth of Municipal Impotence: The Authority of Local Government to Create Affordable Housing*, 17 *FORDHAM URB. L.J.* 383, 405-15 (1989).

25. See N.Y. CONST. art. XVII, § 1. "In New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution." *Tucker v. Toia*, 43 N.Y.2d 1, 7, 371 N.E.2d 449, 451, 400 N.Y.S.2d 728, 730 (1977).

26. N.Y. SOC. SERV. LAW §§ 61-62 (McKinney 1990).

27. Westchester County, New York is currently paying one hundred dollars per night to homeless families in hotels and motels. *Addressing the Problem of Homelessness in Westchester County*, A Pro Bono Report Provided by Skadden, Arps, Slate, Meagher & Flom and McKinsey & Company, Inc. 5 (March 29, 1990).

duty.²⁸

As the pressures grow to meet the dramatic housing needs of the homeless, an important legal issue has emerged: What corresponding "powers" do counties have to discharge their duties in this arena? New York's Local Finance Law,²⁹ makes it clear that the expenditure of county funds for these purposes is a legitimate exception to the constitutional prohibition on giving or lending public funds for the benefit of private individuals.³⁰

If the county's duty here is a governmental one, authorizing the expenditure of general tax revenues, then can the county condemn land and use its funds to pay for that land and to construct housing for public assistance recipients? As a statutory scheme carried out under a discrete provision of the state constitution, would such an initiative preempt local zoning, allowing the county to build multifamily housing at any reasonable density? If cities, towns, and villages are vulnerable to such overriding action by counties, then does this duty fall, in some sort of derivative way, on them as well?

E. *State Responsibility and Authority for Housing Special Population Groups*

The New York constitutional and statutory scheme imposes duties for housing the homeless on the state and county governments. New York's Social Services Law has been construed by the New York Court of Appeals "as manifesting the Legislature's determination that family units should be kept together in a home-type setting and *imposing a duty on the (State) Department of Social Services to establish shelter allowances adequate for that purpose.*"³¹ The plaintiffs in this

28. *Jones v. Berman*, 37 N.Y.2d 42, 55, 332 N.E.2d 303, 310, 371 N.Y.S.2d 422, 431 (1975).

29. N.Y. LOCAL FIN. LAW § 101(b)(4) (McKinney 1990).

30. N.Y. CONST. art. VIII, § 1. No municipality "shall give or loan any money or property to or in aid of any individual . . ." *Id.*

31. *Jiggets v. Grinker*, 75 N.Y.2d 411, 553 N.E.2d 570, 554 N.Y.S.2d 92 (1990) (interpreting N.Y. Soc. SERV. LAW § 350 (1)(a) (McKinney 1983) and N.Y. COMP. CODES R. & REGS. tit. 18, § 352.3 (1987)). Having established the state's duty to designate adequate shelter allowances, the court of appeals remanded the case for a trial

case claimed that the maximum shelter allowance of two hundred and fifteen dollars per month for a family of one, increasing to four hundred and twelve dollars per month for a family of eight or more, was not adequate to pay rents in the New York City market.³²

In addition to this statutory duty, the state has the authority to preempt restrictive local zoning which frustrates the provision of state-sanctioned housing for other special population groups. The courts have invalidated local zoning ordinances which prevented the construction of a residential facility for drug abusers³³ and local building restrictions which prevented the construction of a community residence for the mentally ill.³⁴

The state, pursuing similar and related purposes, has enacted laws providing financial assistance to create housing opportunities for the homeless and a broad range of other persons of moderate means.³⁵ Rather than leave its intent dependent upon judicial interpretation, could the state legislature act directly to amend each of its housing statutes to make it clear that projects assisted by the state preempt local

on the factual issues. *Jiggets*, 75 N.Y.2d at 415, 553 N.E.2d at 575, 554 N.Y.S.2d at 93.

32. *Jiggets*, 75 N.Y.2d at 416, 553 N.E.2d at 571, 554 N.Y.S.2d at 93.

33. *Town of Oyster Bay v. Syosset's Concern About Its Neighborhood (SCAN)*, N.Y.L.J., Jan. 6, 1989, at 30, col. 2. The court concluded that the state legislature had intended to occupy and control the field of providing drug abuse facilities as a matter of state policy. *See also* *People v. St. Agatha Home*, 47 N.Y.2d 46, 389 N.E.2d 1098, 416 N.Y.S.2d 577, *cert. denied*, 444 U.S. 869 (1979); *Unitarian Universalist Church v. Shorten*, 63 Misc. 2d 978, 314 N.Y.S.2d 66 (Sup. Ct. Nassau Co. 1970).

34. *Community Resource Center for the Developmentally Disabled, Inc. v. City of Yonkers*, 140 Misc. 2d 1018, 532 N.Y.S.2d 332 (Sup. Ct. Westchester Co. 1988). The city's zoning was held to violate section 141.34 of the State Mental Hygiene Law because it was inconsistent with a state legislative scheme for providing for the mentally ill. *Id.* at 1022, 532 N.Y.S.2d at 335.

35. *See, e.g.*, N.Y. SOC. SERV. LAW §§ 41-43 (McKinney Supp. 1990) (making state grants available to eligible developers to provide housing to homeless persons of low income); N.Y. SOC. SERV. LAW § 461-i (making state financing available to not-for-profit developers and to others to establish adult care residences for senior citizens); N.Y. PRIV. HOUS. FIN. LAW §§ 1001-1010 (McKinney Supp. 1990) (creating a grant program to finance rural preservation companies to facilitate housing for persons of low income); N.Y. PRIV. HOUS. FIN. LAW §§ 1110-1113 (providing grants and loans to not-for-profit entities which use the funds to provide down payment grants to homebuyers who cannot afford unassisted private-market housing).

development regulations? In the face of a self-pronounced "crisis" in housing, is it incumbent on the state legislature to make it clear that projects assisted by the state preempt local development regulations?

F. *An Emerging Housing Imperative*

The cases and statutes discussed previously, in the aggregate, define a rudimentary housing imperative by clarifying that state, county, and local governments have far-reaching authority to respond to individual housing needs. This realization gives greater meaning to a 1972 mandate of the court of appeals: "What we will not countenance, then, under any guise, is community efforts at immunization and exclusion."³⁶

This analysis removes any doubt that our legislators have the ability, should they choose to use it, to insure that the state's collective housing supply is shaped to provide for all its citizens. In future discussions regarding housing problems, the electorate should countenance no disclaimers by public officials that they lack the requisite legal authority to act. This will force the debate into the realm of finances, politics, and social values where decisions whether to support housing proposals are made in actual practice.

G. *Balanced Growth and Development*

The topic raised by this discussion is a general one of much concern to land use decision makers. Do they have the authority to shape development to respond to urgent public needs? Can they influence land development so that it is balanced, equitable, economic, and environmentally sound? What limits have the courts, constitutions, and statutes imposed on this authority?

Several other articles in this volume address the legal constraints on public efforts to regulate private development in the public interest. How far can such regulations go without violating the takings clause of the federal or state consti-

36. *Golden v. Ramapo*, 30 N.Y.2d 359, 378, 285 N.E.2d 291, 302, 334 N.Y.S.2d 138, 152 (1972).

tutions? Can citizen's groups use multiple law suits to prevent development from occurring without fear of liability? Can land use regulators use innovative techniques, such as imposing impact fees on private developments, to pay for the costs allegedly created by them?

These subjects were addressed by distinguished speakers at a conference sponsored by the Pace Real Estate Law Society in November of 1989. Among the speakers were Professor Bernard V. Keenan, and attorneys Eric J. Lobenfeld and Eugene J. Morris who agreed to write articles for the *Pace Environmental Law Review* on these subjects. We thank them for helping us to search for creative responses to the limits and liabilities of land use regulation.

As the task of creating and preserving livable communities becomes ever more complex and urgent, attorneys have greater responsibility to inform public regulators and property owners of their reciprocal rights and responsibilities. The tension reflected here between private and public interests in property is as old as the common law.³⁷ We are grateful to our authors for enhancing and informing this ongoing debate.

37. *Sic utere tuo ut alienum non laedas*, "Use your own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY 1626 (3d ed. 1933) (citing 1 Comm. 306, reprinted in, GARLAND ENGLISH LEGAL HISTORY IN THE MODERN ERA (1978); 5 Ex. 797, reprinted in, 155 Eng. Rep. 349 (1916); 9 Coke 59, reprinted in, V Coke's Reports (1826)).