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# Shattering the Myth of Municipal Impotence: The Authority of Local Government to Create Affordable Housing

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# SHATTERING THE MYTH OF MUNICIPAL IMPOTENCE: THE AUTHORITY OF LOCAL GOVERNMENT TO CREATE AFFORDABLE HOUSING*

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## I. Introduction

The lack of affordable housing is the focus of the debate over balanced growth in most developing communities.[1] A recent report issued by the New York State Governor's Housing Task Force put it succinctly: "[t]he people of New York State face a housing crisis."[2] This lack of affordable housing not only frustrates the underlying purpose of local land use authority,[3] but also amounts to a failure to ac-

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1. *See infra* notes 4, 11 and accompanying text.

2. HOUSING IN NEW YORK, BUILDING FOR THE FUTURE: REPORT OF THE GOVERNOR'S HOUSING TASK FORCE (1988). The report continues:

> [i]t is a crisis that affects the lives of virtually every citizen of the State, and seriously threatens New York's long-term economic health . . . . The dream of owning one's own home is no longer within reach for more than half of all New Yorkers. Many young adults, unable to afford even the down payment on a new home, must either continue to live with their parents or move out of the communities where they were raised. Even those who are fortunate enough to have a decent place to live must often pay dearly for the privilege, frequently spending a disproportionate amount of their incomes on basic housing.

*Id.* at 7.

Interestingly, although the supply of new housing is controlled, in substantial part, by the land use decisions of local governments, the recommendations of the Task Force do not suggest that the state alter or even reconsider the plenary delegation of its land use authority to such governments.

3. All the enabling statutes cited *infra* note 7 base their grant of power to local government on similar language. *See, e.g.*, N.Y. VILLAGE LAW § 7-700 (McKinney

complish several of the fundamental objectives of community planning.[4]

There is a close relationship between the public welfare and an adequate stock of affordable housing. Without affordable housing, the balanced work force needed to attract and retain commercial and industrial development will not exist. Without business development, the community will not enjoy the benefits of a diversified tax base. A diversified tax base eases the pressures on residential taxpayers, creates stability for the municipal corporation, and helps the community weather economic changes. The development of affordable housing for the young and old, for people of low and middle income, breathes fairness into the development pattern of a locality, and provides living accommodations for all segments of the population. This diversified housing stock creates a heterogeneous population and economy and an equitable distribution of housing opportunity, thereby furthering the objectives of comprehensive planning.

The authority to control the development of a diversified housing stock in New York State rests firmly in the hands of local governments.[5] Although the state legislature may rescind or modify this authority, it has rarely exercised this right, preferring to leave control over land use with local governments.[6]

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1987) ("[f]or the purpose of promoting the health, safety, morals, or the general welfare of the community . . . .").

4. All of the enabling statutes discussed *infra* note 7 mandate that zoning regulations (which determine how much land will be devoted to residential uses and at what densities) be in accordance with a comprehensive or well-considered plan. *See, e.g.*, N.Y. GEN. CITY LAW § 20 (25) (McKinney 1968) ("[s]uch regulations shall be . . . in accord with a well considered plan"). State law in New York, as contrasted to that of about 20 other states, does not mandate the adoption of a formal comprehensive plan, nor does it define what the elements of such a plan are. The authority to adopt such plans in New York is permissive, and therefore, there are no standard objectives found in every local comprehensive plan.

Many local plans contain language calling for the maintenance of a socio-economic balance, a diversified demographic base, and an adequate work force. These objectives will be frustrated without a diversity of housing opportunity in the community. For this reason, some plans include achieving such diversity in housing as a separate objective.

5. *See infra* note 6; *see also* Barker v. Switzer, 209 A.D. 151, 153, 205 N.Y.S. 108, 109 (2d Dep't), *appeal dismissed*, 238 N.Y. 624, 144 N.E. 918 (1924); *see also* Adler v. Deegan, 251 N.Y. 467, 167 N.E. 705 (1929) (Cardozo, J., concurring), *reh'g denied*, 252 N.Y. 574, 170 N.E. 148 (1929). "A zoning resolution in many of its features is distinctively a city affair, a concern of the locality, affecting, as it does, the density of population, the growth of city life, and the course of city values." 251 N.Y. at 485, 167 N.E. at 711.

6. This insulation of local authority from state attack is bolstered by the inclusion of the local power to zone in the Statute of Local Governments. The Statute of Local Governments provides in § 10, subdivision 6: "a city, village, or town . . . [has] the power to adopt, amend and repeal zoning regulations." N.Y. STAT. LOCAL GOV'TS § 10 (Consol. 1984). To modify this delegation of authority, the state legislature must enact such an

State statutes delegate land use control and zoning power, including the power to divide the municipality into districts, and, within those districts, to regulate the use of buildings and land.[7] The regional mix of houses, offices, stores, parks and factories results from the actions of the several constituent localities. Development patterns in metropolitan areas, therefore, are dictated by the land use decisions of the many local governments within those areas. This may explain why debates over land use imbalances tend to occur more often in the local forum than in the halls of the state legislature.

The local authority to regulate land use, however, has not gone unchallenged. Over the last fifteen years, there have been several attacks on local zoning ordinances alleged to exclude, unconstitutionally, large segments of the region's population.[8] The courts in these cases have generally limited the scope of their inquiry to whether the challenged ordinance, in restricting certain types of housing, excludes certain groups of people.[9]

Although the New York courts deciding exclusionary cases have not required affirmative action to meet regional housing needs,[10] they

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amendment at regular sessions in two calendar years, with the approval of the Governor. Thus, the state retains a veto over a nominally autonomous local land use authority. Only rarely, however, does the state legislature actually usurp local land use authority.

7. *See, e.g.*, N.Y. TOWN LAW § 262 (McKinney 1987); N.Y. GEN. CITY LAW § 20 (2) (McKinney 1968); N.Y. VILLAGE LAW § 7-702 (McKinney 1987). These provisions, nearly parallel in nature, authorize the three levels of local government to determine the mix of commercial, industrial, institutional, recreational, residential and other types of land uses within each particular locality. The Town Law provision, for example, states "the town board may divide . . . the town . . . into districts . . . and within such districts it may regulate and restrict . . . the . . . use of buildings, structures or land." N.Y. TOWN LAW § 262 (McKinney 1987).

8. *See, e.g.*, Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975); Suffolk Hous. Servs. v. Town of Brookhaven, 70 N.Y.2d 122, 511 N.E.2d 67, 517 N.Y.S.2d 924 (1987); Asian Am. for Equality v. Koch, 72 N.Y.2d 121, 527 N.E.2d 265, 531 N.Y.S.2d 782 (1988); Robert E. Kurzius, Inc. v. Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1980), *cert. denied*, 450 U.S. 1042 (1981); 208 E. 30th St. Corp. v. North Salem, 89 A.D.2d 851, 488 N.Y.S.2d 723 (2d Dep't 1982).

9. Types of housing, such as multi-family housing or mobile homes that are generally regarded as affordable, are often called "uses" in zoning parlance. "Exclusionary zoning may occur . . . because the municipality has limited the permissible uses within a community to exclude certain groups . . . ." *Asian Ams. for Equality*, 72 N.Y.2d at 133, 527 N.E.2d at 271, 531 N.Y.S.2d at 788. The courts have not gone further to require localities to exercise their full authority to actually create affordable housing opportunities from the diverse housing types permitted in their zoning ordinances. *See infra* note 10 and accompanying text.

10. *See supra* note 8. In contrast, New Jersey courts have affirmatively mandated that localities create affordable housing. In 1983, the New Jersey Supreme Court decided the seminal case of Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 158, 336 A.2d 713, 731-32 (1975). Addressing the issue of whether municipali-

have radically changed the perception of whose health, safety and welfare should be advanced by the exercise of local land use authority. Where past opinions reflected the notion that a community's zoning should be introspective in nature, it is now settled law that local zoning decisions must be made with regional needs in mind.[11] The New York Legislature has not responded to judicial pleas for its intervention in these matters,[12] nor has the legislature acted to define local responsibility for regional housing needs.[13]

In the absence of any guidance from the legislature, local officials, in confronting the problem of affordable housing, look to the courts to

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ties had to exercise their police power to create affordable housing, the court held in a previous decision that "a developing municipality . . . *must*, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there," including low-and moderate-income residents. *Id.* at 187, 336 A.2d at 731-32 (emphasis added). *See generally* Fox, *The Selling Out of* Mount Laurel: *Regional Contribution Agreements in New Jersey's Fair Housing Act*, 16 FORDHAM URB. L.J. 535 (1988).

The New York courts have held only that they will "assess the reasonableness of what the locality has done," in light of present and foreseeable local and regional housing needs. *Berenson*, 38 N.Y.2d at 111, 341 N.E.2d at 243, 378 N.Y.S.2d at 682. Thus while the courts have made it clear that a municipality has an obligation to consider the housing needs of low-income families, only New Jersey has required affirmative action to meet those needs. *See* Nolon, *A Comparative Analysis of New Jersey's* Mount Laurel *Cases With the* Berenson *Cases in New York*, 4 PACE ENV. L. REV. 3 (1986).

11. "[I]n enacting a zoning ordinance, consideration must be given to regional needs and requirements . . . . Although we are aware of the traditional view that zoning acts only upon the property lying within the zoning board's territorial limits, it must be recognized that zoning often has a substantial impact beyond the boundaries of the municipality. *Berenson*, 38 N.Y.2d at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.

12. "Zoning . . . is essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the [l]egislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning." *Berenson*, 38 N.Y.2d at 111, 341 N.E.2d at 243, 378 N.Y.S.2d at 682; *see also* Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

> Of course, these problems (of growth) cannot be solved by Ramapo or any single municipality, but depend upon the accommodation of widely disparate interests for their ultimate resolution. To that end, [s]tate-wide or regional control of planning would insure that interests broader than that of the municipality underlie various land use policies.

*Id.* at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150.

13. The state legislature has taken some action to provide a few sources of funding for housing for special population groups, to be developed, by and large, by non-profit developers. However, it has failed to provide guidance to its municipal agents as to the extent of their duty to act. *See* HOUSING PROGRAMS OF NEW YORK STATE: REPORT OF THE DIVISION OF HOUSING AND COMMUNITY RENEWAL, THE HOUSING FINANCE AGENCY, THE MORTGAGE LOAN ENFORCEMENT ADMINISTRATION CORPORATION, THE STATE OF NEW YORK MORTGAGE AGENCY (Mario M. Cuomo, Governor, 1987) (available at Fordham Urban Law Journal office).

define the extent of their responsibility and power. While not providing specific direction, the New York Court of Appeals has clearly outlawed zoning designed to exclude affordable housing.[14] The judiciary has voiced doubts, however, that municipal governments can, through zoning alone, require the development of affordable housing.[15] The view that municipalities lack such power is erroneous. Zoning alone is competent to induce such development.[16] Furthermore, local governments have considerable additional power to induce the creation of such housing. This Article will document this competence and authority of municipal governments to induce the development of affordable housing.

Part II analyzes in detail the use of the traditional zoning powers of local governments to create affordable housing, and examines techniques such as conditional rezoning, floating zones, special permits and the application of a relatively new concept called "density zoning" or "incentive zoning." Part II also considers whether municipalities may meet "local" needs by granting occupancy preferences under such zoning schemes. In addition, this Part examines restrictions on the transfer of title to affordable housing in order to perpetuate that affordability, as well as common law rules such as the rule against perpetuities and the rule against unreasonable restraints on alienation.

Part III looks at the untapped wealth of statutory authority that

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

> 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 . . . . Although we affirm the disposition of the Appellate Division here, we note that today's decision (should not) be read as revealing hostility to breaking down even unconstitutional zoning barriers that frustrate the deep human yearning of low-income and minority groups for decent housing they can afford in decent surroundings.

*Id.* at 131, 511 N.E.2d at 71, 517 N.Y.S.2d at 927.

15. Such doubts are illustrated in language contained in a 1983 Second Department decision sustaining a local zoning ordinance against an attack by a developer plaintiff. Blitz v. Town of New Castle, 94 A.D.2d 92, 463 N.Y.S.2d 832 (2d Dep't 1983).

> [Z]oning ordinances will go no further than determining what *may* or *may not* be built . . . in the absence of government subsidies. Thus in terms of low-to-moderate income rental housing—generally conceded to be the most pressing need . . .—even the most liberal zoning ordinance, in the absence of affirmative governmental action to shift the balance of market forces, will have no success in promoting such housing construction.

*Id.* at 99, 463 N.Y.S.2d at 836. This further illustrates the view of the New York courts that the role of the local government is simply to zone for certain types of housing, such as multifamily, and that higher levels of government must provide subsidies if housing affordable for households of modest means is to be produced by the private sector.

16. *See infra* notes 18-84 and accompanying text.

enables local governments to further reduce the cost of housing.[17] Statutes provide the authority to facilitate affordable housing by granting property tax abatements, acquiring land by eminent domain, selling public land at favorable prices, issuing bonds to provide inexpensive permanent loans for affordable housing, and building supportive infrastructure, such as sidewalks, streets and sewers.

Part IV concludes that an understanding of the plenary nature of this local authority can change the perceptions of the state courts in designing remedies for exclusionary zoning and that the state legislature can act more effectively to guide, encourage and direct local governments in exercising the authority delegated to them.

## II. Using Zoning Affirmatively to Create Affordable Housing

The misconception of the New York courts, that amendments to local zoning ordinances alone are not competent to produce housing affordable to moderate and low income households, was disproved several years ago in New Jersey. There, within three years of the *Mount Laurel* decision,[18] local governments, reacting to the affirmative mandate of their highest court, rezoned sufficient land at higher densities to produce 1, 754 units of low and moderate income housing, amounting to thirty percent more units than fifty years of federal subsidy programs had provided.[19]

When land is rezoned to permit higher density for residential uses, developers realize more profit on their developments.[20] Such rezoning is often conditioned on the agreement of a developer to offer a percentage, generally twenty percent, of the completed houses to households of moderate means at lower prices.[21] The increased profit realized on the additional market-rate units can be used to lower the cost of the affordable homes.

Other things being equal, the per-unit cost of residential construc-

17. Beginning at *infra* note 110, the reader will note a relative paucity of citations to cases involving this statutory authority or to scholarly articles discussing them. Although these statutes would be significantly useful in providing affordable housing, their use at the local level has been infrequent.

18. Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983); *see supra* note 10 and accompanying text.

19. *See* D. KINSEY, AFFORDABLE HOUSING IN CENTRAL NEW JERSEY: THE CONSEQUENCES OF MOUNT LAUREL II (Report prepared by Kinsey & Hand, Princeton, N.J. for Middlesex Somerset Mercer Regional Council, Inc., Princeton, N.J., April 30, 1986) (available at Fordham Urban Law Journal office); *see supra* note 10 and accompanying text.

20. Bonus densities are awarded to developers to internally subsidize the lower cost units.

21. *See* BEDFORD, N.Y. ch. 125, § 125-29.2(B).

tion varies directly with the density at which land may be developed—greater density means reduced land costs per unit, increased numbers of units, and hence higher profits to the developer. Although affordable housing does not automatically result from these increases in development densities, the use of increased density along with clustering and attached housing can provide a municipality with an opportunity to induce affordable housing.[22]

Zoning ordinances can be amended in several different ways to ex-

22. AFFORDABLE HOUSING ISSUES, REPORT OF THE WESTCHESTER COUNTY PLANNING BOARD (1987) (available at Fordham Urban Law Journal office).

> The key to producing housing for moderate income households lies in carefully controlled rezoning that allows greater density on the land and encourages more cost-effective types of housing to be built . . . . The chart that follows shows how the price of housing may be reduced by increasing the density of development and reducing the size of the house. Note how these changes reduce the price of the house and make it available to more households with lower incomes.

*Id.* at 2. This concept is demonstrated in the Westchester report by the following chart, which illustrates the potential cost reduction associated with greater density:

*Typical Subdivisions and Cost Components Related to Size of Development*

| Description | Ten Units per unit | Ten Units extended | Twenty Units per unit | Twenty Units extended | Thirty Units per unit | Thirty Units extended |
|---|---|---|---|---|---|---|
| Raw Land | $15,000 | $150,000 | $ 7,500 | $ 150,000 | $ 5,000 | $ 150,000 |
| Site Improvement | 9,000 | 90,000 | 9,000 | 180,000 | 9,000 | 270,000 |
| Hard Construction | 34,000 | 340,000 | 34,000 | 680,000 | 34,000 | 1,020,000 |
| Finance Cost | 4,500 | 45,000 | 4,500 | 90,000 | 4,500 | 135,000 |
| Sales Marketing Cost | 3,500 | 35,000 | 3,500 | 70,000 | 3,500 | 105,000 |
| Overhead/Administration | 15,000 | 150,000 | 7,500 | 150,000 | 5,000 | 150,000 |
| Miscellaneous Cost | 4,050 | 40,000 | 3,300 | 66,000 | 3,050 | 91,500 |
| **Totals** | **$85,050** | **$850,050** | **$69,300** | **$1,386,000** | **$64,050** | **$1,921,500** |
| **Profit @15 percent** | **$12,757** | **$127,575** | **$10,395** | **$ 207,900** | **$ 9,609** | **$ 288,225** |
| **Per unit sales price** | **$97,807** | — | **$79,695** | — | **$73,657** | — |

> The private sector is ready to deliver. Our arithmetic shows, that given the proper incentives, we *can* build affordable housing *right now.* We cannot wait for the government to do what is the responsibility of the business community at large. We must adopt legislation to provide the appropriate economic incentives which will galvanize our builders. If this is done, I guarantee you there will no longer be a shortage of affordable housing here. Furthermore, it will mean greater and more solid economic health for Long Island.

*Reprinted from* AFFORDABLE HOUSING FOR LONG ISLAND, CONSTRAINTS AND SOLUTIONS 12 tbl.3 (Oct. 10, 1985) (conference proceedings); BUCKHURST, FISH, HUTTON, KATZ AND URBANOMICS, ORANGE COUNTY, NEW YORK, HOUSING NEEDS STUDY 81-85 (1986) (both available at Fordham Urban Law Journal office).

change higher density for the production of affordable housing. A specific parcel may be rezoned to a higher density, conditioned on the production of a stated percentage of units priced for moderate income families.[23] More generic programs such as special permits or floating zones for affordable housing can be created.[24] These initiatives, although limited to specified districts or to parcels of land of certain sizes and types, articulate a municipal policy of encouraging affordable housing. The private market may respond to that policy, sensing that project approval may be more likely, or that profitability may be enhanced.

Of course, local governments must regulate the housing produced by such devices to insure that it is indeed affordable, addresses defined needs, and remains affordable over time. In taking action to ensure such results, a municipality must move carefully to avoid the legal constraints on local land use actions. These legal constraints include limitations on the delegated authority to zone, prohibitions against spot and contract zoning,[25] the rule against unreasonable restraints on the alienation of real property and the rule against perpetuities. Accordingly, after first setting out the available zoning techniques, this Part of the Article will examine these constraints and show that if properly managed, they present no bar to zoning by a municipality in order to create affordable housing.

### A. Conditional Rezoning of Individual Parcels

Typically, municipalities employ conditional zoning of individual parcels to control development when an applicant proposes the rezoning of property at a greater density than currently allowed. Conditions are imposed to enable the municipality to control the increased density and its impact on the public. For example, conditions may be

23. The technique of conditional rezoning typically is applied on a case-by-case basis. It is generally less effective than a comprehensive program of awarding density bonuses because fewer affordable housing projects are stimulated by such an ad hoc approach. Nevertheless, the New Jersey courts have made a state-wide affordable housing program out of the conditional rezoning method by using it as the judicially prescribed remedy for curing exclusionary zoning ordinances. *See supra* note 9.

24. *See infra* notes 32-56 and accompanying text.

25. *See* R. ANDERSON, NEW YORK ZONING LAW AND PRACTICE § 9.15, at 415 (3d ed. 1984) [hereinafter R. ANDERSON]. Anderson defines contract and spot zoning as follows: "[i]t is clear that if 'contract zoning' means a contract whereby a municipality bargains away its zoning power, such zoning is unlawful . . . . [Local] legislatures are without authority to exercise [zoning authority] through a contract with a landowner. But the New York courts rarely have detected "contract zoning" in this sense, in the cases where zoning ordinances have been attacked on this ground." *Id.* The term "spot zoning" is used by the courts to describe a zoning amendment which is invalid because it is not in accordance with a comprehensive or well-considered plan. *Id.* § 5.04 at 164.

employed to protect the character of the neighborhood[26] or to achieve a balanced population as articulated in the community's master plan.[27]

The courts have accepted conditional zoning on the theory that the authority to rezone to a greater density encompasses the authority to allow a more limited or restricted development through the imposition of conditions.[28] The standards used to determine the validity of conditional zoning are the same as those standards applied when testing the validity of any zoning ordinance:[29] both the zoning ordinance and the imposed conditions must be within the police power of the municipality, and the municipality must pass the ordinance and impose the conditions in order to promote the health, safety, and general welfare of its citizens.[30] It follows that a court reviewing a conditional zoning amendment will consider not only the reasonableness of the zoning change, but also the effect on adjacent properties, the effect on the community and region, the benefit to the public, the reasonableness of the conditions, and whether the change conforms to the comprehensive plan.[31]

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26. The town of Islip rezoned one parcel of land located in a residential district to allow the property to be used as a business. The town imposed conditions on the rezoning, which required the owner to execute restrictive covenants limiting the maximum building area and requiring the maintenance of shrubbery and a fence. Church v. Town of Islip, 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960).

27. For a discussion of master or comprehensive plans, see *supra* note 4 and accompanying text.

When a developer proposes that the density of a parcel in a residential district be increased, the normal result in a high cost housing market area will be the production of additional expensive homes. Although the density increase will tend somewhat to limit the cost of the resultant houses, market conditions will keep the prices high unless somehow controlled by the rezoning resolution. The resulting pattern of development runs counter to comprehensive planning objectives which call for a balanced demography and its attendant virtues. When the local government, which could deny the requested rezoning, conditions the rezoning on the provision of some affordable housing for the specific purpose of furthering the comprehensive plan, the constitutionally required "nexus" between the condition imposed and the burden created by the development is found. For a discussion of the nexus theory, see, *e.g.*, Nollan v. California Coastal Comm., 483 U.S. 825 (1987).

28. *See* Collard v. Flower Hill, 52 N.Y.2d 594, 421 N.E.2d 818, 439 N.Y.S.2d 326 (1981); D'Angelo v. DeBernardo, 106 Misc. 2d 755, 455 N.Y.S.2d 106 (1980).

29. *Collard*, 52 N.Y.2d 594, 421 N.E.2d 818, 439 N.Y.S.2d 326 (1981).

30. *See* Point Lookout Civic Ass'n, Inc. v. Town of Hempstead, 22 Misc. 2d 757, 200 N.Y.S.2d 925 (Sup. Ct. 1960), *aff'd*, 11 A.D.2d 731, 205 N.Y.S.2d 890 (2d Dep't 1960), *aff'd*, 9 N.Y.2d 961, 176 N.E.2d 203, 217 N.Y.S.2d 227 (1961); *see also* Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

31. For example, the conditional zoning ordinance at issue in *Church v. Town of Islip* was held to be reasonable because it comported with the town's master plan and was consistent with the surrounding commercial growth. 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960). Furthermore, the court found that the conditions imposed in the

## B. Generic Zoning for Affordable Housing

In articulating a town-wide policy of encouraging the production of affordable housing, a municipality may consider using more generic and predictable methods of zoning.[32] A town may pass an ordinance authorizing the construction of high density housing in certain areas,[33] without predetermining or "mapping" the precise parcels on which affordable housing may be located. Instead, parcels are identified when a developer makes an application for permission to build affordable housing under the ordinance. Two examples of this type of zoning are "special permit" zoning[34] and "floating zone" zoning.[35]

### *1. The Special Use Permit*

The special use permit is a flexible zoning device which expressly allows a use under specified circumstances. The municipality may impose conditions upon that use.[36]

Typically, communities employ special use permits to control uses that are desirable yet potentially incompatible with existing surrounding uses.[37] Using this technique, some localities permit the construction of churches, funeral parlors, or filling stations in residential areas. When included in the zoning code, such uses are found to be consistent with the comprehensive plan and, with the imposition of appropriate conditions, they do not adversely affect the neighborhoods in their zoning districts.[38] Recently, special use permits have been employed to permit greater density as a bonus to the developer who ful-

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zoning ordinance preserved the character of the neighborhood and benefitted the surrounding property owners. *Id.* Thus, the court concluded that the conditions were reasonable in light of the zoning change. *Id.*

32. *See* A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 41.05(3) (4th ed. 1975) [hereinafter A. RATHKOPF].

33. *Id.*

34. *See generally* R. ANDERSON, *supra* note 25, §§ 24.01-.26.

35. *See id.* § 5.12.

36. *See* A. RATHKOPF, *supra* note 32, § 40.01-.06. The special use permit differs from conditional zoning in that with the permit the necessary zoning is created by an amendment to the zoning ordinance which contains the detailed requirements for the production of affordable housing. In conditional zoning, the legislation creating the zoning arises initially with the application of a developer to rezone a specific parcel to suit his projected needs.

37. *See id.* § 41.01.

38. *See* Penny Arcade, Inc. v. Town Bd. of Oyster Bay, 75 A.D.2d 620, 427 N.Y.S.2d 52 (2d Dep't 1980); North Shore Equities, Inc. v. Fritts, 81 A.D.2d 985, 440 N.Y.S.2d 84 (3d Dep't 1981); R. ANDERSON, *supra* note 25, § 24.03. Although all of these uses are desirable, each creates a specific problem—generally, that of traffic congestion. The inconveniences created by the granting of the permit, however, can be minimized through the imposition of conditions. *See* Coon, *Plan Approval Procedures, reprinted in* P. BUCK, MODERN LAND USE CONTROL 101 (1978); R. ANDERSON, *supra* note 25, § 24.17.

fills the social need of providing affordable housing for policemen, firemen, the elderly, and the young people of the community.[39]

The authority of a municipality to grant or deny special use permits is implied from the general statutory power to regulate land use for the public health, safety, morals, and general welfare.[40] Original jurisdiction in granting special use permits may be given to the Planning Board or the Zoning Board of Appeals.[41] Although no statutes expressly authorize special use permits, courts have long upheld their use, with minimal restrictions.[42]

Examples of this use of the special permit abound. In New Jersey, the Supreme Court upheld the application of a special use permit to provide housing for the elderly;[43] the Massachusetts Enabling Statute specifically allows towns to issue special use permits to induce developers to provide housing for people of low and moderate income;[44] and the City of New York used the special permit to control development in the Manhattan Bridge District.[45]

The New York Appellate Division, First Department, upheld a challenge to the Manhattan Bridge District ordinance in *Asian Ameri-*

39. *See* A. RATHKOPF, *supra* note 32, § 41.03.

40. N.Y. TOWN LAW § 261 (McKinney 1932, amended 1956); N.Y. VILLAGE LAW § 7-700 (1972); *see* North Shore Steak House v. Board of Appeals, 30 N.Y.2d 238, 243, 282 N.E.2d 606, 609, 331 N.Y.S.2d 645, 649 (1972).

41. *See* R. ANDERSON, *supra* note 25, § 24.08.

42. *See, e.g.*, Simensky v. Mangravite, 16 A.D.2d 977, 230 N.Y.S.2d 170 (2d Dep't 1962), *aff'd*, 12 N.Y.2d 908, 188 N.E.2d 270, 237 N.Y.S.2d 1007 (1963) (Second Department holding that a special use permit procedure may be applied only to uses permitted by the zoning ordinance subject to approval by official body); *see also* Bernstein v. Board of Appeals, 60 Misc. 2d 470, 302 N.Y.S.2d 141 (N.Y. Sup. Ct. 1969) (town board's power to impose conditions only as broad as power to regulate the use).

43. *See* Shepard v. Woodland Township Comm. & Planning Bd., 71 N.J. 230, 364 A.2d 1005 (1976).

44. MASS. GEN. L. ch. 40A, § 9 (1985).

45. *See* Asian Ams. for Equality v. Koch, 128 A.D.2d 99, 514 N.Y.S.2d 939 (1st Dep't 1987), *aff'd*, 72 N.Y.2d 121, 527 N.E.2d 265, 531 N.Y.S.2d 782 (1988). The City created a Special Manhattan Bridge District in its Chinatown area to preserve the residential character of the Chinatown community, to permit new construction within an area sensitive to the existing urban design character of the neighborhood, to provide an incentive for a mixture of income groups, to encourage development of new community facility space, to promote the rehabilitation of the existing older housing stock, to cause minimal residential relocation, and to facilitate housing accommodations for residents close to their places of employment. *Id.*

In order to control the development in this district, the City incorporated regulations which employed the discretionary power of the Planning Commission to issue special use permits. In issuing special use permits for new construction, the Planning Commission had the ability and the discretion to increase the density (through an increase in the floor area ratio) if the developer furnished space for community facilities, provided dwelling units for low and moderate income families, and rehabilitated existing substandard housing. *Id.*

*cans for Equality v. Koch*.[46] The court found that the special use permit regulations incorporated in the City Zoning Code were within the bounds of the city's police power.[47] In so determining, the court stated:

> [the] decision as to how a community shall be zoned or rezoned, as to how various properties shall be classified or reclassified, rests with the local legislative body; its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary, and the burden of establishing such arbitrariness is imposed upon him who asserts it.[48]

Clearly, municipalities may employ the special use permit to increase developmental density and to provide affordable housing. In so doing, however, the town must articulate a use that the zoning ordinance allows and that is consistent with the town's comprehensive plan.[49] Furthermore, the municipality must specify a procedure for applying for a special use permit,[50] including the scope of the application, notice of the application, time and place of a public hearing, and the appropriate findings that must be made. Finally, the municipality must set out standards for granting or denying special use permits.[51] If a municipality follows these procedures, makes findings in accordance with the standards set out in the zoning ordinance, and imposes conditions reasonably related to the findings and to the project, then a court will uphold the use of the special permit as a valid assertion of a municipality's police power.[52]

### 2. *Floating Zone*

The floating zone operates in two distinct stages: first, the municipality enacts a floating zone ordinance complete with the zone's own use, area and bulk requirements, but not imposed on any specific parcel; later, the municipality votes to apply the floating zone to a particular parcel of land upon the request of a developer. The floating zone then, in theory, "floats above the landscape in anticipation of being

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46. *Id.*

47. *Id.*

48. *Id.* at 101, 514 N.Y.S.2d at 941 (quoting Rodgers v. Village of Tarrytown, 302 N.Y. 115, 121, 96 N.E.2d 731, 733 (1951)).

49. *See supra* note 4 and accompanying text.

50. *See, e.g.*, N.Y. TOWN LAW § 274-a(1)(a) (McKinney 1987).

51. *See* A. RATHKOPF, *supra* note 32, § 41.08; *see also* R. ANDERSON, *supra* note 25, at § 24.12 n.4.

52. *See* R. ANDERSON, *supra* note 25, §§ 24.02-.05, at 265-71. Conversely, a municipality may not withhold a special use permit for reasons unrelated to the public health and welfare. *Id.* § 24.14, at 289 & n.6 (citing Green Point Sav. Bank v. Board of Zoning Appeals, 281 N.Y. 534, 24 N.E.2d 319, *appeal dismissed*, 309 U.S. 633 (1939)).

brought down to earth by an amendment rezoning the area in question. It is a use classification which is not employed until needed nor pinned down to any area until the necessity arises."[53]

Such a zoning device facilitates the creation of affordable housing while avoiding the typical economic constraints of Euclidian zoning.[54] With floating zoning, developers first purchase land at prevailing prices and then apply for increased density, which the municipality will grant in return for a commitment to build affordable housing. This scheme enables the developer to avoid the impact on prices sometimes associated with rezoning for higher density uses.

The use of the floating zone, however, may be considered unfair to those property owners who purchased in reliance on a particular zoning scheme, and subsequently face the possibility that the area will be developed at higher densities. In the seminal case of *Rodgers v. Village of Tarrytown*, New York's highest court sustained the floating zone technique in the face of such objections.[55] Thus, when a municipality enacts such a zone, the courts, following *Rodgers*, will uphold it so long as it is done in conformance with the comprehensive plan.[56]

The floating zone technique is especially useful to a town experiencing population growth and seeking not only to retain housing for existing middle income residents but also to develop new moderate income housing. The floating zone encourages the private sector to provide housing for the full range of income groups, in conformance with the objectives of the comprehensive plan.[57] It also helps to integrate income groups throughout the community, thereby avoiding

53. R. WRIGHT & M. GITELMAN, LAND USE 719 (3d ed. 1982) (citing Comment, *Zoning—the Floating Zone: A Potential Instrument of Versatile Zoning*, 16 CATH. U.L. REV. 85, 87 (1966)).

54. Euclidean zoning refers to a rigid form of zoning by which density, land use, and lot size are regulated uniformly throughout a zoning district. *See* Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926).

55. 302 N.Y. 115, 96 N.E.2d 731 (1951). In 1947, Tarrytown enacted an ordinance establishing a floating zone which, upon application by a developer, could be applied to areas of 10 acres or more. The resulting rezoning enabled more units to be built on a particular parcel than its current zone allowed. The ordinance creating the floating zone and the subsequent amendment rezoning a piece of land was challenged as being illegal spot zoning. The court focused not on whether the area rezoned within a larger area was of different use, but instead on whether the rezoning was for the benefit of an individual land owner or for the benefit of the entire community pursuant to the comprehensive plan. Because the town was empowered to adopt such amendments and did so according to appropriate procedures, the zoning amendments were upheld as a valid exercise of the municipality's police power.

56. *See* Nappi v. LaGuardia, 184 Misc. 775, 55 N.Y.S. 80 (1944), *aff'd*, 269 A.D. 693, 54 N.Y.S. 722, *aff'd*, 295 N.Y. 652, 64 N.E.2d 716 (1945); Tata v. Town of Babylon, 52 Misc. 2d 667, 276 N.Y.S.2d 426 (1967); *see also* R. ANDERSON, *supra* note 25, § 24.12.

57. *See supra* notes 53-56 and accompanying text.

concentrations of lower income groups in discrete neighborhoods. This technique, however, along with special permits and conditional zoning, often encounters claims that it constitutes illegal "spot" or "contract" zoning.[58]

### C. Common Law Restraints on the Creation of Affordable Housing: Spot and Contract Zoning

Zoning to create affordable housing may be challenged as "spot" or "contract" zoning if it singles out a particular parcel or landowner for special treatment. Zoning of this sort may exceed a municipality's authority if it is adopted without consideration of, or is at variance with, the municipality's comprehensive plan.[59]

Spot zoning singles out one small parcel of land for a use classification totally different from the surrounding area,[60] and confers a benefit to one landowner to the detriment of his neighbors.[61] Spot zoning is not, however, per se illegal; it is illegal only if it is inconsistent with the municipality's comprehensive plan.[62] Zoning not in conformance with the plan is "ultra vires," that is, in excess of the municipality's statutory authority to zone.[63] Thus, a proposed zoning amendment is illegal as spot zoning if it is designed to benefit only the owner of the rezoned property. On the other hand, courts will uphold zoning which benefits the community by furthering the objectives of its comprehensive plan. Additionally, courts will approve zoning which is reasonable in light of the surrounding conditions.[64]

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58. For definitions of spot and contract zoning, see *supra* note 25.

59. *See supra* note 8 and accompanying text.

60. R. ANDERSON, *supra* note 25, § 5.04; Rodgers v. Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951); Kravetz v. Plenge, 84 A.D.2d 422, 446 N.Y.S.2d 807 (4th Dep't 1982). *See generally* Note, *Zoning—The Non-Conforming Use and Spot Zoning*, 1 BUFFALO L. REV. 286 (1952).

61. *See* R. ANDERSON, *supra* note 25, § 5.04; Jackson & Perkins Co. v. Martin, 12 N.Y.2d 1082, 190 N.E.2d 422, 240 N.Y.S.2d 29 (1963).

62. *See* R. ANDERSON, *supra* note 25, § 5.04; *Jackson & Perkins Co.*, 12 N.Y.2d 1082, 190 N.E.2d 422, 240 N.Y.S.2d 29 (1963).

63. *See* R. ANDERSON, *supra* note 25, § 2.04 n.9 (citing Coley v. Cambell, 126 Misc. 869, 215 N.Y.S. 679 (1926), and Geisler v. Mitchell, 137 Misc. 462, 244 N.Y.S. 439 (Sup. Ct. 1930)).

64. *See, e.g.*, Collard v. Village of Flower Hill, 52 N.Y.2d 594, 600, 421 N.E.2d 818, 821, 439 N.Y.S.2d 326, 329 (1981) (applying a two-part test in determining that the village's zoning ordinance constituted an impermissible use of spot zoning: if the zoning change is part of a comprehensive plan calculated to serve the general welfare of the community, and if the zoning change is reasonable in relation to the neighborhood, then there is no impermissable use of spot zoning); *see also* Levine v. Oyster Bay, 26 A.D.2d 583, 272 N.Y.S.2d 171 (2d Dep't 1966) (where fourteen acres of land were rezoned from residential to industrial use and the evidence showed that this was the first industrial intrusion into the area and that the town's master plan contained no intention of moving

Zoning to create affordable housing may also be challenged as illegal contract zoning, by which a town agrees with a private landowner to rezone a parcel or area,[65] and in so doing, bargains away its zoning power.[66] Courts seldom invoke the general prohibition against contract zoning. They usually require proof of a binding agreement with a developer before they will invalidate the town's actions.[67]

Courts will uphold zoning ordinances which trade greater density on specific parcels in exchange for more affordable housing, provided those laws are designed to further the objectives of the comprehensive plan. The prohibitions against contract and spot zoning do not, of themselves, bar such initiatives.[68] Such ordinances will withstand court challenges based on these claims, if it is clear that the laws are in accordance with the comprehensive plan, that the conditions imposed are reasonable and that the zoning is responsive to proven housing needs.

## D. Preferences

In acting to induce the creation of affordable housing, localities sometimes adopt policies requiring such housing to be marketed, on a preferential basis, to groups such as senior citizens, young families, public sector employees, volunteer firemen, or private sector employees.[69] To be sustained as a valid exercise of the zoning authority,

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towards industrial growth, court concluded that the zoning change benefitted only the landowner and not the general public, and was thus illegal spot zoning). *See generally* R. ANDERSON, *supra* note 25, §§ 5.04-.09.

65. *See* A. RATHKOPF, *supra* note 32, §§ 1.04(2)(d), 27.05.

66. *See* R. ANDERSON, *supra* note 25, § 9.15.

67. *Id.*; *see, e.g.*, Century Circuit, Inc. v. Ott, 65 Misc. 2d 250, 253, 317 N.Y.S.2d 468, 471 (Sup. Ct. 1970), *aff'd*, 37 A.D.2d 1044, 327 N.Y.S.2d 829 (2d Dep't 1971). In *Century Circuit*, the town amended its ordinance to eliminate an off street parking requirement. The amendment was made pursuant to a request by an applicant who wanted to build a theater but could not obtain off street parking space. The applicant offered to widen the city street in lieu of meeting the parking requirement. This was determined not to be contract zoning because there was no contract. The court found that the town had exercised appropriate legislative discretion benefitting the whole community and not just one particular landowner. Thus, the court concluded that the ordinance was a valid exercise of the town's zoning authority. *See In Re* Rosedale Ave., 40 Misc. 2d 1076, 243 N.Y.S.2d 814 (Sup. Ct. 1963) (finding no contract, even though the town signed an agreement with the residents of a residential district prior to rezoning that even specified the amount of compensation to be paid to the landowner after the rezoning).

68. Collard v. Village of Flower Hill, 52 N.Y.2d 594, 601, 421 N.E.2d 818, 821-22, 439 N.Y.S.2d 326, 330 (1981) ("a rule which would have the effect of forbidding a municipality from . . . imposing protective conditions . . . would not be in the best interests of the public.").

69. *See* A. RATHKOPF, *supra* note 32, § 17.06(b) n.17; Maldini v. Ambro, 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385, *cert. denied, appeal dismissed*, 423 U.S. 993 (1975).

these official preference schemes must operate within certain legal limitations and must follow certain guidelines.[70]

The long standing principle that zoning can regulate the use, but not the ownership or users of the land, challenges the legality of preferences.[71] Arguably, zoning incentives that use occupancy preferences to influence who may rent or buy affordable housing constitute unauthorized limitations on potential users of property. An equally formidable obstacle to the use of such preference schemes is the allegation that they are unconstitutionally discriminatory. Initial attempts to prohibit certain persons from owning land were struck down as unconstitutional because of their discriminatory nature.[72] Such ordinances, because of their exclusionary effect, were found to have no reasonable relationship to the purpose of zoning.[73]

When a court is faced with a zoning ordinance alleged to violate the Civil Rights Act of 1866,[74] or the Equal Protection Clause of the four-

70. *See infra* notes 78-86 and accompanying text.

71. Weinrib v. Weisler, 33 A.D.2d 923, 307 N.Y.S.2d 603 (2d Dep't), *aff'd*, 27 N.Y.2d 592, 261 N.E.2d 406, 313 N.Y.S.2d 407 (1970); A. RATHKOPF, *supra* note 32, § 1.04.

72. *See* Buchanan v. Warley, 245 U.S. 60 (1917) (declaring zoning ordinance unconstitutional because it restricted the use of land based on race); *see also* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) (attempt to exclude a philanthropic home from a residential neighborhood held unconstitutional).

73. *Id.*

74. 42 U.S.C. § 1982 (1982) (Civil Rights Act of 1866). This Act gives all citizens equal rights to purchase property. Denying that right by restricting the availability of housing to a limited group or groups could violate this law. The Civil Rights Act includes a specific body of law that regulates the occupancy of housing called the Federal Fair Housing Law. 42 U.S.C. § 3604(c) (1982). This provision forbids occupancy standards based on race, color, religion, sex or national origin, and, by recent amendment, handicap. Fair Housing Amendments Act of 1988, H.R. RES. 1158, 100th Cong., 2d Sess., 134 CONG. REC. 10,562 (1988). *See also* N.Y. EXEC. LAW § 296(5) (McKinney 1989); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir.), *aff'd*, 109 S. Ct. 276 (1988), *reh'g denied*, 109 S. Ct. 824 (1989) (challenging town's refusal to rezone an R-40 zoning district in order to enable plaintiffs to build a federally financed, integrated, low-income multifamily housing project). The Town of Huntington, invoking an unusual procedural device, *denied* the rezoning because the project was outside a designated urban renewal area. 844 F.2d at 928-33. The court held that the town's decision created a discriminatory effect within the town, since the minority population resided almost exclusively within the urban renewal area. *Id.* at 937-38. Furthermore, the court found that this effect was not balanced by legitimate and bona fide public concerns. *Id.* at 939-40. By limiting development of low income housing to the urban renewal area, the town continued the segregation of minority families. *Id.* at 939-41. The court directed the town to rezone the proposed site to allow low income housing to be constructed in a predominantly white, single family neighborhood. *Id.* at 942. The Supreme Court affirmed the Court of Appeals on narrow grounds, holding that the action of the town was repugnant to federal law, leaving open the standard that is to be used to determine what proof of disparate impact on minorities is needed in these federal cases. 109 S. Ct. 276 (1988).

teenth amendment,[75] the question becomes whether the restrictions reasonably relate to the purpose of zoning—that is, whether they are calculated to achieve the objectives of the comprehensive plan.[76] If the ordinance specifically discriminates against a constitutionally protected class, the inquiry is whether the restriction is necessary to promote a compelling governmental interest.[77] Where a racial, religious, or ethnic minority is specifically excluded by a zoning preference scheme, the locality must advance a highly compelling justification.[78]

Under state law, the determinative question is whether the purpose of zoning includes providing housing in the community for various preference groups such as senior citizens, young people, volunteer firemen, and workers needed for available public and private sector jobs. The answer, of course, depends on what precisely the community seeks to accomplish through its particular housing preference scheme, and how closely related the scheme is to the purposes of the comprehensive plan.[79]

A New York court has provided relatively clear guidance to municipalities considering occupancy preferences for affordable housing. In *Maldini v. Ambro*,[80] residents brought suit claiming that the town ex-

75. U.S. CONST. amend. XIV, § 1. This amendment provides for equal protection of the law for all persons. In order to determine if a piece of legislation, such as an adopted housing preference scheme, discriminates against a class of persons, the courts must first categorize the class. If the classification is not "suspect"—classifications based on other than race, ethnicity, national origin, and gender—then the court will use the rational basis test to determine whether that classification is reasonably related to a legitimate governmental objective. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974). If, however, the classification is suspect, then the legislation must be necessary to promote a compelling governmental interest, or the law will be invalidated. This test is referred to as the strict scrutiny test. Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221, 236 (1987).

76. *See supra* notes 57-62; *see also infra* notes 78-84 and accompanying text.

77. *See supra* note 73; *see also infra* notes 78-84 and accompanying text.

78. *See supra* note 73 and accompanying text.

79. Allen v. Town of N. Hempstead, 103 A.D.2d 144, 478 N.Y.S.2d 919 (2d Dep't 1984) (classifying a local residency requirement for senior citizen housing as unconstitutionally exclusionary, and finding no compelling local government interest in restricting occupancy to local residents, in light of the severe *regional* shortage of housing for the elderly); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975) (holding that a municipality may not enact a zoning ordinance exclusively for the benefit of its residents while ignoring regional needs that were not met); *cf.* Campbell v. Berraud, 58 A.D.2d 570, 394 N.Y.S.2d 909 (2d Dep't 1977) (concluding that age was not a suspect class and that restricting occupancy to people over 55 was a rational means of achieving the legitimate government objective of providing affordable housing to the elderly).

80. 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385, *appeal dismissed*, 423 U.S. 993 (1975). The town of Huntington had created a Retirement Community District which allowed "multiple residences designed to provide living and dining accommodations, including social, health care, or other supportive services and facilities for aged

ceeded its authority in creating an age-oriented zoning district. In sustaining the highly specific preferential ordinance, the court wrote:

> [the fact that] the 'users' of the retirement community district have been considered in creating the zoning classification does not necessarily render the amendment suspect, nor does it clash with traditional 'use'—concepts of zoning. Including the needs of potential 'users' cannot be disassociated from sensible community planning based upon the 'use' to which property is to be put. The line between legitimate and illegitimate exercise of the zoning power cannot be drawn by resort to formula, but as in other areas of the law, will vary with surrounding circumstances and conditions. Therefore, it cannot be said that the board acted unreasonably in this case in making special provision for housing designed for the elderly, one of the major groupings within our population.[81]

In upholding the preference, the court stressed that the need for these restrictions was clear and had been carefully considered by the town, that the "class" of older people was a broad one, and that there was no evidence on the record that the town intended to segregate the community according to age or to discriminate against younger people.[82] The court held, furthermore, that " '[a]ge' considerations are appropriately made if rationally related to the achievement of a proper governmental objective. Here, as already indicated, 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."[83] This specific language explicitly states what the court implied throughout the decision: an ordinance is an appropriate exercise of the zoning authority if the facts show a "shortage of suitable housing," if the beneficiary group is a "segment of that population with special needs," if the classification is "rationally related to the achievement of a proper governmental objective," and if a "sensible community planning" base exists.[84]

The *Maldini* decision is a specific illustration of the general notion that a zoning preference will be found to be reasonable if it was enacted in conformance with the comprehensive plan. As discussed in Part I, comprehensive plans routinely address such legitimate zoning issues as achieving a demographic balance, preserving housing oppor-

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persons to be owned and operated by a non-profit corporation . . . ." *Id.* at 483-84, 330 N.E.2d at 405, 369 N.Y.S.2d at 388. This ordinance is highly specific: it regulates the type of housing, the occupant, and the builder and owner.

81. *Id.* at 487-88, 330 N.E.2d at 407-08, 369 N.Y.S.2d at 391-92.

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

83. *Id.* (emphasis added).

84. *Id.*

tunities for young and old residents of limited means, stabilizing and enhancing the tax base, and maintaining essential municipal and public services. A reasonable basis for the adoption of a housing preference plan can be found to exist where a community has identified a serious community need that can be solved through the provision of affordable housing, has pinpointed the needs of the particular groups suffering from that shortage, and has shown the relationship between housing that population and fulfilling the objectives of the comprehensive plan.

### E. Perpetuating Affordability

When local governments take formal action to ensure the creation of affordable housing, they expect that such housing will remain affordable over time, perhaps perpetually. This expectation, however, cannot be realized automatically.[85] Without appropriate controls, the purchaser of affordable housing could resell the unit at the market rate for a windfall profit or, in the case of an owner of a rental housing development, significantly increase the rents after the initial rental.[86] Whenever this happens, the public purpose in creating affordable housing is frustrated. Preventing these abuses may be called "perpetuating affordability."[87]

To perpetuate the affordability of rental housing, rents must be regulated and the sale of the building must be restricted so that if the building is sold, rent regulations will apply to the new owner. When affordable houses are sold to their occupants, the initial sales price and resale prices must be fixed by some method.[88] Zoning ordinances

85. In conversations a few years ago with the town manager of Lexington, Massachusetts and the Supervisor of the Town of Somers, New York, the author learned of failed attempts to create affordable housing. In Lexington, the town sold two excess schools to developers for affordable housing. In each case, the transfer of title was not conditioned on the perpetuation of affordability. In Somers, land was rezoned to a higher density to allow the developer to provide affordable housing, but no condition on the rezoning regarding future price increases was imposed. The result in both towns was the immediate resale of the affordable units at market prices, providing windfall profits to the first owners and removing the units from the inventory of affordable units in the community.

86. *See* Sweet & Hack, *Mitchell-Lama Buyouts: Policy Issues and Alternatives*, 17 FORDHAM URB. L.J. 117 (1989).

87. *See supra* notes 78-86 and accompanying text; *see also* A. RATHKOPF, *supra* note 32, § 17.06(3)(b) n.12.

88. One often employed deed restriction requires the owner of an affordable unit to offer it for sale to a non-profit agency representing the municipality at an indexed price. The price may be calculated by inflating the price paid by the owner by using a factor such as the Consumer Price Index. The non-profit agency may then assign its right to the next person on the municipality's waiting list, who is then enabled to buy it at the indexed price. *See, e.g.*, Moderately Priced Housing Program of Montgomery County, Maryland, MONTGOMERY COUNTY, MD., CODE ch. 25A (1988).

or actions which create affordable housing routinely require developers, as a condition of the rezoning and a precondition to the issuance of a certificate of occupancy, to file deed restrictions regarding rents or sale prices.[89]

The need to restrict the price or value of real estate confronts common law and statutory principles that protect the alienation of property from unreasonable restrictions. The question, therefore, is under what circumstances are municipal restrictions on the price of housing legal.

### *1. Legal Restrictions on the Alienation of Property*

There are two basic common law rules which restrict the free alienation of property—the rule against perpetuities,[90] and the general rule against unreasonable restraints on the alienation of property.[91]

These rules, in large part modified by statute, serve several useful purposes: (1) they ensure the productive use and development of property; (2) they facilitate the exchange of property; (3) they free property from unknown or embarrassing impediments to alienability; and (4) they limit the power of an owner to create uncertain future estates.[92]

The New York Court of Appeals, in *Metropolitan Transportation Authority v. Bruken Realty Corp. (MTA)*,[93] has recently reviewed these rules with respect to the right of first refusal,[94] which is often

89. *See* Code of the Town of Bedford § 125-56.

90. The rule against perpetuities states that no interest in property is valid unless it will vest within the lifetime of an individual or within 21 years after that individual's death. New York has incorporated this rule into the N.Y. EST. POWERS & TRUST LAW § 9-1.1(b) (McKinney 1967 & Supp. 1990). In simple terms, this rule requires that interests created in real estate come into effect within reasonable and measurable periods. The assignable right of first refusal, discussed *supra* in note 79, creates a future interest in real property which may endure beyond the permitted period.

91. At common law, a conveyance was held invalid if it imposed unreasonable restraints on the future alienation, that is, on the sale or disposition, of real property. This rule forbade owners from imposing certain conditions on conveyances which would prevent the purchaser from freely disposing of the property. *See, e.g.*, Schnebly, *Restraints Upon the Alienation of Legal Interests* (pts. I-III), 44 YALE L.J. 961, 1186, 1380 (1935).

92. *See* J. CRIBBET, PRINCIPLES OF LAW OF PROPERTY (2d ed. 1975); R. POWELL, POWELL ON REAL PROPERTY (1968).

93. 67 N.Y.2d 156, 492 N.E.2d 379, 501 N.Y.S.2d 306 (1986) [hereinafter *MTA*]. The MTA owned the property, and air rights were conveyed to a second party. An option agreement allowed the second party to purchase the land if the MTA determined that the property was no longer needed for transportation purposes. This right was limited to 99 years, and was to be exercised within 90 days of the MTA's decision to sell. The purchase price was established as the fair market value at the time the right to purchase was exercised. For an example of how the right of first refusal is used in the context of zoning for affordable housing, see *infra* note 75.

94. The right of first refusal gives the property holder the first right to purchase the

employed in land transactions involving public or quasi-public agencies.[95] The court held that the rule against perpetuities does not automatically apply to rights of first refusal in this context.[96] In so holding, the court reasoned that a right of first refusal imposes only a minor impediment to the transfer of property, and promotes the use and development of the property without forcing an owner to sell. The court stated that the violation of the rule against perpetuities is "properly offset by [the] utility [of the right of first refusal] in modern legal transactions and that usefulness justifies excepting [it] from the operation of the rule."[97]

In order to ensure free alienbility, however, the court analyzed the validity of the right of first refusal by applying the common law rule prohibiting unreasonable restraints of alienability.[98] The reasonableness of such a restraint rests on its duration, price, and purpose.[99] Applying this test of reasonableness, the *MTA* court found the purpose, the duration and the price reasonable.[100]

Although the court in *MTA* limited its holding to preemptive rights in commercial and governmental transactions,[101] the New York Appellate Division, First Department has applied the principle to a right

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property if the owner decides to sell. The *MTA* court distinguished between an option right and a right of first refusal:

> An option grants to the holder the power to compel the owner of property to sell it whether the owner is willing to part with ownership or not. A preemptive right, or right of first refusal, does not give its holder the power to compel an unwilling owner to sell; it merely requires the owner, when and if he decides to sell, to offer the property first to the party holding the preemptive right so that he may meet a third-party offer or buy the property at some other price set by a previously stipulated method. Once the owner decides to sell the property, the holder of the preemptive right may choose to buy it or not, but the choice exists only after he receives an offer from the owner. If the holder decides not to buy, then the owner may sell to anyone.

*Id.* at 163, 492 N.E.2d at 382, 501 N.Y.S.2d at 309 (citations omitted).

95. *MTA*, 67 N.Y.2d 156, 492 N.E.2d 379, 501 N.Y.S.2d 306.

96. *Id.* at 163, 492 N.E.2d at 382, 501 N.Y.S.2d at 309.

97. *Id.* at 164, 492 N.E.2d at 383, 501 N.Y.S.2d at 310. In arriving at this conclusion, the court looked at early cases that held similarly. A Pennsylvania case upheld an option to purchase imposed by a municipality. The court held that the option was in the public interest and that the government was not subject to the Rule Against Perpetuities. *Id.* at 165, 492 N.E.2d at 384, 501 N.Y.S.2d at 311 (citing Southeastern Pa. Transp. Auth. v. Philadelphia Transp. Co., 426 Pa. 377, 233 A.2d 15 (1967)).

98. *Id.* at 166, 492 N.E.2d at 384, 501 N.Y.S.2d at 311.

99. *Id.* at 167, 492 N.E.2d at 385, 501 N.Y.S.2d at 312. What is reasonable? In *MTA*, the duration was deemed reasonable because it was measured by the time given to exercise the right to purchase after receipt of notice of the decision to sell. *Id.* The price was fair because it was set at market value, and the purpose was beneficial because it provided unity of ownership of the ground lots and the air rights. *Id.*

100. *Id.*

101. *Id.* at 166, 492 N.E.2d at 384, 501 N.Y.S.2d at 311.

of first refusal in the context of a private condominium association. In *Anderson v. 50 E. 72nd St. Condominium,*[102] the court excepted condominium preemptive rights from the rule against perpetuities because the enforcement of these rights did not violate the underlying purpose of the rule.[103] The court reasoned that the management of a condominium has a valid interest in protecting the ownership of the common areas and the underlying fee.[104]

If reasonably drawn, rights of first refusal and other techniques that municipalities use to maintain affordable housing will pass the *MTA* test.[105] The purpose of maintaining affordable housing is reasonable and clearly in the public's interest: "meeting the community shortage of suitable housing accommodations for its population, including an important segment of that population with special needs," is a valid exercise of municipal zoning authority.[106] Such an objective can be realized, however, only if affordable housing, once created, remains affordable.[107]

The reasonableness of the duration of a right of first refusal is a question of fact.[108] Once the owner notifies the option holder of his intent to sell, the option holder must exercise his option within a reasonable time. The findings of the courts in *MTA* and *Anderson* provide guidance in determining what is reasonable. Those courts held that option periods of ninety days and of thirty days, respectively, were acceptable.[109] Somewhat longer intervals might pass muster if clearly reasonable to accomplish a legitimate objective.

The reasonableness of the exercise price is also a question of fact.

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102. 119 A.D.2d 73, 505 N.Y.S.2d 101 (1st Dep't 1986). In *Anderson*, the condominium by-laws contained a right of first refusal exercisable by the board of managers and applicable to all the unit owners. The board reserved the right to purchase the unit, or produce a purchaser, at the same price and on the same terms as offered by a proposed purchaser found by the condominium owner. This right was to be exercised within thirty days after notification by the seller that he had found a buyer.

103. *Id.* at 79, 505 N.Y.S.2d at 105.

104. *Id.* at 79, 505 N.Y.S.2d at 104.

105. *See supra* notes 88-104 and accompanying text.

106. Maldini v. Ambro, 36 N.Y.2d 481, 487, 330 N.E.2d 403, 407, 369 N.Y.S.2d 385, 391, *appeal dismissed*, 423 U.S. 993 (1975).

107. *See* Campbell v. Berraud, 58 A.D.2d 570, 572, 394 N.Y.S.2d 909, 912 (2d Dep't 1977), where the Second Department stated that it was illogical to encourage the construction of elderly housing and then prohibit its exclusive use by those it was created to serve.

108. Metropolitan Transp. Auth. (*MTA*) v. Bruken Realty Corp., 67 N.Y.2d 156, 162, 492 N.E.2d 379, 381, 501 N.Y.S.2d 306 (1986); Anderson v. 50 E. 72nd St. Condominium, 119 A.D.2d 73, 79, 505 N.Y.S.2d 101, 104 (1st Dep't 1986). *See supra* notes 78-84 and accompanying text.

109. *MTA*, 67 N.Y.2d at 168, 501 N.Y.S.2d at 312, 492 N.E.2d at 385; *Anderson*, 119 A.D.2d at 79, 505 N.Y.S.2d at 104.

In *MTA* and *Anderson* the value of the property subject to the restraint was established by determining its market value, a reasonable index in that context, where the underlying transaction is governed only by market forces from beginning to end. The initial price of municipally-aided affordable housing, however, is often substantially below market value. Is it realistic to fix the market price as the index of reasonableness, when the price at which the owner purchased the property was artificially lowered by municipal regulation in order to meet a demonstrated need for subsidized housing? The reasonableness of price restrictions should be evaluated by comparing the sales price, not to market value, but to the initial affordable price. Municipal restrictions that allow an owner of affordable housing to recoup the original purchase price plus reasonable appreciation serve the public interest while treating both buyers and sellers of affordable housing fairly. Such a standard would pass the *MTA* and *Anderson* tests. Moreover, such price restrictions are essential to the public purpose of creating and perpetuating vitally needed affordable housing.

Municipalities can use their zoning powers to influence the development of privately held property so as to create affordable housing. The principles of land use and property law compel this conclusion. By carefully documenting the public need for affordable housing as furthering the objectives of the comprehensive plan, and by ensuring that such housing is marketed and remarketed to those in need, municipalities can avoid potential claims of illegality. Where there is a clear need for affordable housing and the public interest is directly served by its development, the courts will find that a reasonably conceived and executed regulatory program does not violate the judicially created rules against spot and contract zoning or the rules against restraints on the alienation of real property.

## III. Municipal Power to Directly Reduce the Cost of Housing

Zoning is not the only weapon in the local arsenal which can be directed against housing costs. Local governments have the authority, other than through their land use powers, to reduce housing costs or to produce housing themselves. They can use direct methods of lowering housing costs such as donating publicly owned land to a developer conditioned on its use for affordable housing,[110] abating real

110. The public land dedication technique is a particularly effective method of creating affordable housing. If land is sold by local government to any of the quasi-public corporations discussed below, it may be used by them to develop projects within which most or all of the units can be affordable. The sine qua non of density bonus zoning is that it must provide a powerful financial incentive to the private market. This is why the majority of

property taxes, issuing bonds to provide low-cost mortgages, paying the costs of community buildings in senior citizen projects, and paying the costs of off-site improvements.[111]

New York State empowers municipalities to use these devices under the Private Housing Finance Law[112] and the Public Housing Law.[113] These statutes create and regulate quasi-public corporations whose function is to establish affordable housing. In recent years this authority has not been used aggressively because federal funding for housing production[114] (the main impetus for using these statutory powers) has been severely curtailed. As a result, a misperception has grown that these historical authorities have little relevance to the contemporary challenges of affordable housing. Recent evidence suggests, however, that this statutory authority is as relevant today as it was during the height of federal housing assistance.[115]

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the units in a density bonus development are sold at market rates and only a percentage of them are affordable to moderate or middle income households. When the public sector owns the land, the need to include a majority of market-rate units in the development is absent because there is no need to coax land with other valuable uses from private hands.

111. In New York State there is a long tradition of such assistance being given to affordable housing projects by municipal governments. This tradition grew out of initiatives such as public housing, urban renewal, and federally-assisted housing programs, where localities used extensive statutory authority to further lower the costs of low-income housing projects that were heavily subsidized under federal spending programs. To protect the public interest, the state legislature limited municipal authority of this type to projects sponsored by state-chartered development corporations. Such corporations can be created and operated directly by private developers, by not-for-profit sponsors, or by the municipalities themselves. *See supra* notes 87-110, *infra* notes 112-23 and accompanying text.

112. N.Y. PRIV. HOUS. FIN. LAW §§ 1-806 (McKinney 1976). The Private Housing Finance Law confers authority on local governments to work with and to assist private and not-for-profit development entities organized under that law. *Id.*; *see also infra* notes 131-53 and accompanying text.

113. N.Y. PUB. HOUS. LAW §§ 1-228 (McKinney 1989). Generally, the Public Housing Law describes the powers that local governments have to assist their local municipal housing authorities (MHA), which are created by and operate under the Public Housing Law. *Id.; see also infra* notes 116-30 and accompanying text.

114. In the past decade, the federal government has largely withdrawn its support from these classic urban programs. The urban renewal program was replaced in 1974 by the Community Development Block Grant Program. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1976). Funding for low and moderate income housing construction programs has been curtailed and many of the programs themselves discontinued. *See* Nolon, *Reexamining Federal Housing Programs in a Time of Fiscal Austerity: The Trend Toward Block Grants and Housing Allowances*, 14 URB. LAW. 249 (1982).

115. For example, in Orangetown, New York, the town rezoned a parcel of town-owned land to a higher density, sold it to a corporation organized under the Private Housing Finance Law, and has agreed to provide financial assistance to the project after that corporation develops the property and transfers title to the local housing authority, created under the Public Housing Law. In Bedford, New York, the developer of a prop-

This Part examines, first, the authority that localities have to assist their local Municipal Housing Authority (MHA) in developing and operating public housing projects under the Public Housing Law; it then analyzes local authority to assist privately initiated developments under the Private Housing Finance Law.

## A. The Public Housing Law

The New York Public Housing Law was the first statute of its kind in the nation. Passed originally in 1926 as the State Housing Law,[116] it was amended and recodified in 1939 as the Public Housing Law.[117] The statute addressed the question of whether the expenditure of municipal funds for the provision of lower income housing was a public purpose to which tax dollars could be dedicated.[118]

The answer, an emphatic yes, was first voiced in the Public Housing Law which provided for the construction and operation of low rent public housing by MHAs.[119] The statute authorized MHAs to issue bonds to provide low cost financing, to condemn land and lower its cost, and to abate local property taxes to reduce the operating cost of such housing.[120] In all cases, the local public housing authority

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erty rezoned for affordable housing has transferred ownership of a portion of the parcel to a Private Housing Finance Law regulated company, which is eligible for tax-exempt financing provided by the New York State Housing Finance Agency. Finally, in Harrison, New York, the town is moving toward the transfer of two parcels of town-owned land, at a below-market price, to a corporation to be organized under art. XI of the Private Housing Finance Law, using authority contained in that statute.

116. New York State Housing Law, 1926 N.Y. Laws 823 (in N.Y. UNCONSOL. LAW §§ 2251-2343 (McKinney 1936)). This original law preceded the first federal law on the subject by more than a decade. *See* United States Housing Act of 1937, 2 U.S.C. §§ 1401-30 (1976). The federal statute made available direct subsidies to local governmental bodies to enable them to develop, own and manage housing for low-income households and to encourage the replacement of slums with newly constructed housing.

117. N.Y. PUB. HOUS. LAW §§ 1-228 (McKinney 1939).

118. Article VIII, § 1, of the New York State Constitution, § 1, states that no municipality "shall give or loan any money or property to or in the aid of any individual, or private corporation or association, or private undertaking . . . ." First proposed by the Constitutional Commission of 1872 and adopted by the people in 1874, this constitutional provision is the principal obstacle that must be overcome if localities are to provide financial assistance to affordable housing projects, which are clearly "private undertakings" in the aid of individuals, unless otherwise authorized by the constitution and statute.

In 1938, article XVIII was added to the state constitution making it clear that the state legislature could delegate to local governments the authority to assist a variety of quasi-public corporations in reducing the cost of housing in several specific ways.

119. *See* N.Y. PUB. HOUS. LAW §§ 30-57, 400-566 (McKinney 1989). This law was enacted pursuant to the constitutional authority contained in art. XVIII. *See supra* note 89. Under this law, the MHAs are created by state charter at local request and become local institutions with their board members selected by locally elected leaders. N.Y. PUB. HOUS. LAW §§ 30-57, 400-566 (McKinney 1989).

120. N.Y. PUB. HOUS. LAW §§ 30-57 (McKinney 1989).

owns and operates projects created in this way.[121]

Local housing authorities in New York State have used the financing arrangements of the federal public housing subsidy programs to guarantee the repayment of the principal and interest on the bonds issued to finance the construction of their projects and to subsidize the projects' operating costs.[122] In this way, truly affordable public housing for the poor was made possible. Although local MHAs have rarely issued bonds unsupported by the federal subsidies, they can use their substantial authority under both state and municipal law to assist them in creating financially feasible projects for people of lower income.[123] This power, especially important given the current reduction of federal assistance for lower income housing projects, encompasses a variety of specific cost cutting techniques available to local MHAs and their host communities.[124]

Once public housing is constructed, the issue of who may occupy these projects remains.[125] A person or family having income insufficient to "cause private enterprise" to build housing qualifies as "low income" for the purpose of the public housing law.[126] Under this standard, a wide range of occupants are eligible for public housing. The MHA can select from among them those with sufficient resources to pay the costs of the project, thus enabling it to construct and operate housing without large federal subsidies.

Even without federal subsidies, however, localities can make public housing projects affordable to those of very low income by using their broad powers to assist them financially. These formidable powers include the following: an MHA can issue tax exempt bonds to finance

121. *See id.* § 37.

122. United States Housing Act of 1937, 42 U.S.C. §§ 1401-30 (1976).

123. *See supra* notes 119-21 and accompanying text.

124. *Id.*

125. *See* N.Y. PUB. HOUS. LAW § 3 (McKinney 1939). The definition of who may be housed in MHA financed housing projects is very broad. "The terms 'persons of low income' and 'families of low income' mean persons or families who are in the low income groups and who cannot afford to pay enough to cause private enterprise in their municipality to build a sufficient supply of adequate, safe and sanitary dwellings." *Id.*

126. Some greater specificity was attempted by the Court of Appeals in Chelcy v. Buffalo Mun. Hous. Auth., 24 Misc. 2d 598, 605, 206 N.Y.S.2d 158, 166 (Erie County 1960) (quoting N.Y. CONST. art. XVIII, § 3). In *Chelcy*, the court defined "low income" as meaning income below the usual rate or amount of wages. The court noted, however, that where there is a reasonable difference regarding what constitutes "low income" at a given time and place, the court should not take away the right of an MHA to determine what that income should be. This confirms prior judicial commentary on the subject. In Borek v. Golder, 190 Misc. 366, 74 N.Y.S.2d 675 (Oneida County 1947), the court held that these general definitions of persons and families of low income, with their application left to local housing authorities, were adequate and constitutional.

the construction of a low-rent project;[127] a municipality can make land available to an MHA, either by selling publicly owned land, or by condemning privately owned land;[128] a municipality can provide infrastructure to support the project;[129] and the local government can subsidize the costs of operating the project.[130]

A municipality's legislative power to effect the creation of affordable housing does not end, however, with the Public Housing Law. Another body of law, the Private Housing Finance Law, if properly understood and used, can be an effective weapon in a municipality's affordable housing arsenal.

## B. The Private Housing Finance Law

In enacting the Mitchell-Lama Program in 1955,[131] the New York legislature noted that

> [i]t is hereby declared that there exists in municipalities in this

127. Section 41 of the Public Housing Law gives to local housing authorities the power to issue bonds. That power is not made dependent on the existence of federal assistance or on the availability of other forms of governmental finance. The bonds of a local housing authority, backed only by the net revenues of a low-rent housing project, are not marketable by themselves. To make them so, it is necessary to enhance their credit rating. One method of accomplishing this is to have the municipality guarantee the MHA bonds. N.Y. PUB. HOUS. LAW § 41 (McKinney 1989). This authority is granted to municipalities under New York's Public Housing Law § 95, which states that "a municipality is authorized to guarantee . . . the principal of and interest on . . . indebtedness contracted by an authority operating within the territorial limits of such municipality . . . ." *Id.* § 95. The state comptroller has ruled that this section also authorizes a local government to pledge future tax revenues for the payment of the debt service of the MHA bonds. 82 Op. State Compt. 202, 256 (1982).

128. N.Y. PUB. HOUS. LAW § 120 (McKinney 1989).

129. Under § 99 of the Public Housing Law, municipalities are authorized to provide and pay for parks, roads, sidewalks, sewerage or other facilities adjacent to or in connection with a project of an MHA. *Id.* § 99.

130. Under § 94 of the Public Housing Law, a municipality may make, or contract to make, operating subsidies to an MHA. *Id.* § 94. Similarly, it may annually appropriate to an MHA the amount required by it for its administrative expenses.

131. The Mitchell-Lama Program, the forerunner of the Private Housing Finance Law, can trace its roots back to 1926, when the legislature first adopted the Limited Dividend Housing Companies Law. *See* N.Y. PRIV. HOUS. FIN. LAW §§ 70-97 (McKinney 1976 & Supp. 1990). This statute offered to private development corporations tax concessions and the use of the government's power to condemn land in exchange for rent and profit limitations in the operations of assisted projects. The legislation was aimed squarely at the construction of middle-income housing, developed by private enterprise, but assisted by government action. Apparently, the state legislature in 1926 thought that acting to solve critical middle-income housing problems was within the general police power authority then in existence.

In the late 1930s and early 1940s, the issue of government-assisted middle-income housing was again at the forefront of legislative discussion. The result was a modest effort tied to early urban renewal initiatives. After the New York Constitutional Convention adopted art. 18 in 1938, the legislature adopted the Urban Redevelopment Corpora-

> state a seriously inadequate supply of [housing] . . . for families and persons of low income . . . necessitating speedy relief which cannot readily be provided by the ordinary unaided operation of private enterprise and requiring that provision be made by which private free enterprise may be encouraged to invest in companies regulated by law . . . and engaged in providing such housing . . . for families or persons of low income; . . . that the provision of such [housing] . . . by such companies . . . are public uses and purposes for which public money may be loaned and private property may be acquired by and for such companies and tax exemptions granted . . . .[132]

In 1961, Mitchell-Lama and its progeny—i.e., statutes that encourage private enterprise to develop housing for moderate and middle income persons—were codified into the Private Housing Finance Law (PHFL).[133] The Mitchell-Lama law became Article II of the PHFL;[134] the statute creating the state Housing Finance Agency be-

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tions Law in 1941 and the Redevelopment Companies Law in 1942. N.Y. PRIV. HOUS. LAW §§ 200-221, 100-126 (McKinney 1976).

These limited initiatives failed to compensate for the dearth of housing production in that era, and for the dramatic post-war increase in housing demand. A booming population of households existed whose incomes were barely high enough to make them ineligible for federally assisted low-income housing programs, and yet insufficient to cause the private market to provide housing for them. *See generally* Note, *Homeownership for the Poor: The Rockefeller Program*, 54 CORNELL L. REV. 811, 849 (1969).

In response, the legislature enacted the Limited Profit Housing Companies Law in 1955, popularly known as the Mitchell-Lama Program. N.Y. PRIV. HOUS. FIN. LAW §§ 10-37 (McKinney 1976). This statute permitted the government to provide low interest, long term mortgages to private developers who agreed to limit rents and profits. The law authorized localities and the state government to make 90%, 50-year loans to Limited Profit Companies incorporated under the Mitchell-Lama law. Such loans were funded by bonds issued by the state or local governments and sold to the public. *See generally* Sweet & Hack. *Mitchell-Lama Buyouts: Policy Issues and Alternatives*, 17 FORDHAM URB. L.J. 117 (1989).

In 1960, the legislature created the New York State Housing Finance Agency (HFA) to provide direct mortgage financing to Limited Profit Companies. N.Y. PRIV. HOUS. FIN. LAW §§ 40-62 (McKinney 1976). The HFA enabled the state to circumvent the state constitution's requirement that all long-term government borrowing be approved in a state-wide referendum. As a separate agency, the HFA could borrow without referendum, and its bonds were made marketable by the pledge of the state's "moral obligation" to pay if the HFA defaulted.

132. N.Y. PRIV. HOUS. FIN. LAW § 11 (McKinney 1976).

133. *Id.* §§ 1-805.

134. The Limited-Profit Housing Companies Law was passed in 1955 for the purpose of providing safe and sanitary dwellings for persons of low income. *Id.* § 11. The Legislature amended this law in 1968 declaring that the "improvement of the physical environment and revitalization of the quality of urban life in [urban] municipalities would be promoted by cooperative action by tenants who are persons or families of low income to acquire ownership of their dwellings and to operated them on a nonprofit basis." *Id.* § 11-a(2-a). To realize this purpose, the legislature made available to low income cooperative tenants long-term financing on a favorable basis and tax exemption. *Id.*

The Limited-Profit Housing Companies Law provides for the creation of Limited-

came Article III; the Limited Dividend Housing Companies Law[135] became Article IV; the Redevelopment Companies Law[136] became Article V; and Article VI included the Urban Redevelopment Corporations Law. Article IX authorized local governments to acquire property for housing companies by gift, purchase, condemnation, or otherwise. Finally, Article X allowed localities to sell publicly owned land to housing companies without public bidding, "upon such terms and conditions as may be agreed upon by such . . . municipality and such housing company."[137]

Starting in the 1960s, the state legislature creatively supplemented the PHFL. In 1966, the state began to assist non-profit developers in a variety of ways.[138] This trend continued into the 1980s when the legislature wrote the latest chapter in state-aided housing, adding Articles XVIII and XIX to the PHFL.[139] These statutes created, respectively, the Low Income Housing Trust Fund Program,[140] operated by

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Profit Housing Companies organized under the New York Not-For-Profit Corporation Law. *Id.* § 13. The Board of Directors of the Mutual Company is elected by the tenants entitled to occupancy in the project. *Id.* § 13(7) (McKinney Supp. 1988). Tenants entitled to occupancy shall be persons or families of low income—those whose probable aggregate annual income at the time of admission and during the period of occupancy does not exceed seven times the rental of the dwelling, including the value or cost of heat, light, water, and cooking fuel. *Id.* § 31.

The resale price of shares in a mutual company is outlined in § 31:1(a). Basically, the resale price is equal to the price paid by the selling tenant plus the cost of any capital improvements plus a portion of the actual aggregate amortization paid on all existing and prior mortgages plus reasonable administrative costs. This sales price is subject to the approval of New York's commissioner of housing.

135. The Limited Dividend Housing Companies Law was passed in 1949 to encourage the investment of the savings of the people in low rent housing accommodations. *Id.* § 70.

136. The Redevelopment Companies Law was passed in 1961 for the clearance, replanning, reconstruction, rehabilitation, and modernization of substandard and insanitary areas and the provision of adequate, safe, sanitary, and properly planned housing accommodations. *Id.* § 101. The provisions for creating a redevelopment company are located in § 103.

137. N.Y. PRIV. HOUS. FIN. LAW § 552 (McKinney 1976).

138. Article XI, the Housing Development Fund Company Law, was added to the PHFL in 1966 in response to the emergence of community-based, nonprofit corporations in that era. *Id.* §§ 573-582. Such corporations are eligible for certain state "seed-fund" grants and loans, and are allowed 100% tax abatement for their projects, as compared to Mitchell-Lama companies, which must pay at least 10% of rent in property taxes. *Id.* § 575 (McKinney Supp. 1990). Operating grants for certain community-based nonprofits were authorized under art. XVI, the Neighborhood Preservation Companies Act, adopted in 1977, and under art. XVII, the Housing and Community Preservation in Rural Areas Act, adopted in 1980. *Id.* § 1001-10 (McKinney Supp. 1989).

139. *Id.* §§ 1100-03, 1110-13.

140. The Low Income Housing Trust Fund Program defined "low-income" persons to be benefitted as those having incomes which do not exceed 80% of the applicable median income. *Id.* § 1002(6).

a separate corporation administered by the State Division of Housing and Community Renewal,[141] and the Affordable Home Ownership Development Program,[142] operated by a separate corporation administered by the State Housing Finance Agency.[143] These programs make available substantial grant funds to Article XI Housing Development Fund Companies, to other qualifying nonprofit corporations, and to local governments for the purpose of rehabilitating and constructing housing for low and moderate income persons and households.[144] This expansive and diverse set of statutes broadly authorize local governments to assist the housing projects of companies created or financed under the PHFL.

A variety of provisions of the PHFL enable local governments to make housing projects advanced by the Limited Profit Housing Companies (Article II companies) and Housing Development Fund Companies (Article XI companies) more affordable.[145] Within certain limits,[146] these authorities parallel the powers given to local governments to assist projects developed by Municipal Housing Agencies.[147] These powers are far reaching. They permit municipalities to act directly to create affordable housing. They include abating local taxes,[148] mortgage financing,[149] acquisition and disposition of prop-

141. *See Id.* § 1101.

142. The Affordable Home Ownership Program continues the PHFL tradition of defining occupant eligibility in reference to the ability of households to procure housing in the private market. *Id.* § 1110.

143. *Id.* § 1112.

144. *Id.* § 1112(1).

145. *See infra* notes 146-53 and accompanying text.

146. *See infra* notes 148-53 and accompanying text.

147. *See supra* notes 119-30.

148. Sections 33 and 577 of the PHFL authorize local governments to abate real property taxes, including those of the school district and county, for qualified projects of art. II and art. XI companies. N.Y. PRIV. HOUS. FIN. LAW §§ 33, 577 (McKinney 1976 & Supp. 1990). In the case of an art. II company under § 33, the abatement is partial. Such projects must pay at least "[10%] of the annual shelter rent or carrying charges." In calculating "shelter rent," payments for utilities are excluded. Section 577 authorizes local governments to abate 100% of the property taxes for a qualified project of an art. XI Housing Development Fund company for a period of up to 40 years. Under this statute, mortgages of Housing Development Fund companies are exempt from mortgage recording taxes imposed by art. 11 of the Tax Law. *Id.* § 577. The state comptroller has ruled that § 577 does not exempt Housing development fund companies from administrative fees charged by local governments in the course of regulating the development and operation of housing projects. 34 Op. State Compt. 102 (1978).

149. The Private Housing Finance Law authorizes cities, towns and villages to issue bonds to provide mortgage financing directly to a project of an art. II, limited profit housing company. N.Y. PRIV. HOUS. FIN. LAW §§ 23, 23-a (McKinney 1976 & Supp. 1990). This authority extends to projects of nonprofit organizations created under art. II for the purpose of housing for aged or handicapped persons of low income or other persons of low income. *See id.* §§ 23 (1), 12, 14. The funding for such mortgages is obtained

erty,[150] direct municipal subsidies, and provision of infrastructure.[151] In addition to these general powers, "special" powers address specific

by the issuance of full faith and credit bonds by the locality. *Id.* § 23. In the case of an art. II company organized by a private developer, the § 23 mortgage can equal 95% of the project's cost. In the case of a not-for-profit corporation organized under art. II, the mortgage can equal 100% of such costs.

Section 23 allows municipalities to support eligible projects in two critical ways. First, it makes financing available for such projects that may not otherwise exist in the private market. Second, the cost of such a mortgage can be considerably less than that of private mortgages. *Id.* Since the bonds are favorably rated, full faith and credit municipal bonds, they will carry an interest rate that is substantially less than prevailing rates for long-term housing mortgages. Section 23 authorizes such mortgages to "contain such terms and conditions . . . as the local legislative body may deem necessary or desirable to secure repayment of its loan, the interest thereon and other charges in connection therewith." *Id.* § 23(1).

150. Article IX of the Private Housing Finance Law states that "real property may be acquired by a housing company, a limited-profit housing company or by a municipality for a housing company or a limited-profit housing company, by gift, grant, devise, purchase, condemnation or otherwise." *Id.* § 500. This provision contains no authority to reduce the cost of property conveyed to an eligible company, but it does provide critical authority to secure property directly on behalf of such companies. *Id.* A special procedure for municipal condemnation, on request of such a company, is contained in art. IX. Section 501 of the Private Housing Finance Law contains the following authority: A housing company may petition a municipality to institute condemnation proceedings to acquire property for the development of low income housing. The housing company shall pay the municipality an amount designated by the municipality, or the sum expended by the municipality in the acquisition of the property. The amount, time and manner of payment shall be set forth in a resolution passed by the local legislative body. Once the resolution is passed, the municipality may proceed in accordance with the procedures of eminent domain. When the title to the property vests in the municipality, title shall be conveyed to the housing company, enabling the housing company to enter the property and proceed with its development.

Section 503 of art. IX authorizes local governments to sell or lease excess publicly-held property to qualified housing companies, including art. II companies. *Id.* § 503. Such a conveyance can be made without appraisal, public notice or bidding "for such price or rental and upon such terms . . . as may be agreed upon between the municipality and the housing company." *Id.* § 503(2). A public hearing is required prior to such a conveyance. *Id.* § 503(3).

Section 576-a of art. XI makes it clear that this authority to acquire land and to sell excess lands also extends to art. XI housing development fund companies. *Id.* § 576-a. This section allows local governments to convey publicly-held real property to an art. XI company without public auction, upon public notice and hearing. *Id.*

151. In the area of providing direct subsidies and infrastructure, however, municipal authority to assist PHFL projects is significantly less than it is in the public housing arena. The projects of MHAs, as discussed above, may be assisted with the provision of infrastructure and the payment of direct operating subsidies. No such blanket authority is found in regard to PHFL projects.

Under the ordinary operations of its capital budget program, a local government can install qualified public infrastructure supporting an affordable housing project. Local government may do this to support any development, if it follows proper statutory procedures. There is no legal impediment to providing off-site public infrastructure to support and encourage the development of affordable housing; a locality, however, may provide

concerns such as the construction of housing for the elderly[152] and emergency shelters.[153]

Municipalities in New York have considerable authority to reduce the cost of housing projects to accommodate those who cannot afford private market housing.[154] Enterprising local officials may combine these cost reduction techniques with the zoning powers discussed in Part II. When these powers are combined creatively, it is easy to dispel the myth of municipal impotence in the housing field. The difficulty, however, of mastering this amalgam of statutory authorities and the cases and legal principles that shape them may prevent localities from using the authority they already have. Consequently, until

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on-site infrastructure, which is normally paid for by the private developer, only to a public housing project.

Municipalities possess the authority to act more potently in assisting senior citizen housing, whether or not the projects are sponsored by a municipal housing authority. Section 290 of the General Municipal Law authorizes a city, town or village "to establish, construct, equip, maintain and operate for such city, town or village, a facility for housing . . . the elderly citizens of the community . . . ." N.Y. GEN. MUN. LAW § 290 (McKinney 1986).

152. Section 291 further authorizes the use of "real property owned by the county, town, city or village" for such senior citizen projects, as long as the property is not needed for other public use. *Id.* § 291. In addition, § 291 authorizes the appropriation of public funds to acquire real property for such projects by negotiation or condemnation. Section 291 also permits this authority to be used for land banking of real property for future projects. *Id.* Land banking is the acquisition by a municipality of undeveloped land, the holding of that land, and the later disposition of it at a below market price to a public, not-for-profit, or private developer for the development of affordable housing. *See* H. FLECHNER, LAND BANKING IN THE CONTROL OF URBAN DEVELOPMENT 3-9 (1973).

Although §§ 290 and 291 do not say so explicitly, local governments may authorize non-profit and other regulated companies to carry out such functions as they are authorized to do directly. *See* 58 Op. N.Y. Compt. 861 (1958) (county governments may contract to have governmental services performed as the county could have directly performed itself). It would seem possible, then, for a local government to work with and through an art. II or art. XI company to develop a housing facility for "elderly citizens of the community" under these provisions. This would allow the locality to pay any costs of establishing, constructing, equipping, maintaining, or operating such a project that are not covered by the rents or payments of the occupants. When working to assist the development of senior housing, the locality should proceed directly under § 290, particularly in light of the comptroller's opinion stating that a town does not have the power to donate funds to a private organization that intends to build a senior citizens' housing project. 78 Op. N.Y. Compt. 338 (1978).

153. Section 576-c of the PHFL authorizes cities, towns and villages to make loans to an art. XI company in order to acquire, rehabilitate or construct housing exclusively for persons and families of low income who reside in or need emergency shelter as defined by the municipality. N.Y. PRIV. HOUS. LAW § 576-c (Supp. 1990). These loans may be converted to grants if the property is owned and operated for such purposes over a 15 year period. *Id.* This provision was added to the PHFL in 1987 in response to the public emergency created by the dramatic increase in homelessness throughout the state.

154. *See supra* notes 110-53 and accompanying text.

the state acts to make the law of affordable housing less cumbersome, and to provide municipalities with more guidance, its use will be limited to those communities graced with resourceful officials and advisers.[155]

## IV. Conclusion

In assessing the virtues of local authority as a guard against the evils of despotism in America, Alexis de Tocqueville wrote:

> . . . a democracy without provincial institutions has no security against these evils. How can a populace, unaccustomed to freedom in small concerns, learn to use it temperately in great affairs? . . . . Those who . . . fear absolute power, ought . . . to desire the gradual development of provincial liberties.[156]

Today, localities sit in close proximity, not in relative isolation as they did in de Tocqueville's time.[157] Land use experts, therefore, question local governments' effectiveness in regulating development in contemporary metropolitan areas. A commentator on municipal law has noted that recent cases "exemplify a growing consensus among the courts of this [s]tate to broadly construe the 'statewide concern' doctrine . . . in order to severely curtail municipal home rule authority."[158]

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155. For an example of such resourcefulness, see *supra* at page 383 for the author's dedication of this Article to the pioneering work of a handful of communities in the state.

156. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 46 (Washington Square Press ed. 1964) (1835-40). In addition, de Tocqueville wrote:

> [i]n the American townships, power has been disseminated with admirable skill, for the purpose of interesting the greatest possible number of persons in the common weal . . . . The American system, which divides the local authority among so many citizens, does not scruple to multiply the functions of the town officers . . . . In this manner, the activity of the township is continually perceptible; it is daily manifested in the fulfillment of a duty, or the exercise of a right; and a constant though gentle motion is thus kept up in society, which animates without disturbing it.

*Id.* at 40.

157. *See supra* note 12, citing recent New York Court of Appeals decisions which call for "sound regional planning" and "[s]tate-wide or regional control of planning" to insure that "interests broader than that of the municipality underlie various land use policies."

158. Sweeney, *Courts Strike Down Impact Fee Laws*, 3 MUN. LAW. 1, 4 (1988) (joint publication of the Municipal Law Section of the New York State Bar Association and the Edwin G. Michaelian Municipal Law Resource Center of Pace University). "It is apparent to this author that our [c]ourts are viewing the municipalities as little more than agencies of state government. Due to the ever shrinking geo-political world of the state . . . almost everything is a matter of statewide concern precluding its control by the municipalities." *Id.*; *see also* Cole, *Constitutional Home Rule in New York; The Ghost of Home Rule*, 59 ST. JOHN'S L. REV. 713 (1984-85).

If solving the "crisis"[159] in affordable housing is a matter of statewide concern, the public should expect much more clarity from state officials in articulating solutions. Sixty years of law-making has resulted in a complex accretion of statutes and judicial decisions. Some courts appear to have misunderstood the extent of local authority,[160] and some have called for the state legislature to provide direct guidance to local government.[161] The legislature has thoroughly ignored those pleas. As the housing crisis steadily worsens, it is time for the legislature to reconsider its housing policies and for the courts to reexamine what authority is within the grasp of local officials. Although local governments have the power to create affordable housing, the state could provide valuable assistance to help them implement their broad powers.

The options available to the state in assisting or directing local governments to solve the housing crisis include: (1) endorsing de Tocqueville's view and supporting local government by providing unambiguous authority and competent technical assistance and other resources;[162] (2) defining regional housing needs and directing localities to meet a stated percentage of those needs, under penalty of court ordered rezoning, as New Jersey has done;[163] and (3) articulating a

159. *See supra* note 2 and accompanying text.

160. *See supra* note 15 and accompanying text.

161. *See supra* note 12.

162. If it is to follow this path, the state should examine its housing statutes, which do not constitute a well organized body of municipal authority to act to create, or assist in the creation of, affordable housing. Instead of providing a clear and easily applied blueprint to localities, they are organized by category of housing developer, by income of occupant, by geographical area, or by type of assistance. At a minimum, an article enumerating municipal powers could be added to the Private Housing Finance Law or the General Municipal Law so that local officials and their attorneys could rely on a codification of modern authority to act to solve this critical, state-wide problem.

163. The Supreme Court of New Jersey provided this direction: a developing municipality "must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing" for low- and moderate-income households. The municipality must, therefore, "afford such persons the opportunity to acquire such housing at least to the extent of the municipality's fair share of the present and prospective regional need therefor." Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 188, 336 A.2d 713, 731-32 (1975). The New Jersey court's opinion in the later *Mount Laurel II* decision, *supra* notes 10, 18-19, represents a knowledgeable tour-de-force of housing programming. The court commented that higher density zoning, without conditions, seldom produces affordable lower income housing, 92 N.J. 158, 261, 456 A.2d 390, 443 (1983); it sanctioned rent and resale controls to keep housing affordable, *id.* at 269, 456 A.2d at 447; it mandated that zoning ordinances be amended to remove cost generating restrictions and to include density bonuses or allow mobile home construction, *id.* at 267-77, 456 A.2d at 446-51; and it cast the net broadly stating "where appropriate, municipalities should provide a realistic opportunity for housing through other municipal action inextricably related to land regulations," *id.* at 264, 456 A.2d at 444 (referring presumably to awarding tax abatement, donating publicly

state developmental policy, as Oregon has done, defining the extent of local responsibility to implement that policy, and directing state agencies to act so that housing is produced in the quantities and locations necessary to accomplish the objectives of that policy.[164]

Unlike Oregon and New Jersey, neither the New York State legislature nor any state agency has articulated a statewide housing policy, defined regional housing needs, or allocated responsibility to individual municipalities. The state has failed to explain to localities the effective use of existing authority, failed to modernize and codify that authority so it is understandable, and failed to provide effective technical assistance to local governments. The courts have determined that they "will assess the reasonableness of what the locality has done"[165] in light of present and foreseeable local and regional housing needs, to be proved anew in each case brought to bar.[166]

Apparently, the policy of the State of New York is to leave the problem of housing the poor in the hands of relatively untutored local officials who lack the advantages of clearly defined responsibilities, meaningful guidance and competent technical assistance. The courts and these officials must come to understand, as apparently they do not,[167] that local governments possess the authority to facilitate the creation of housing affordable to a broad spectrum of the state's population. In addition, the courts must begin to focus on localities' re-

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owned land, and using other authorities, such as those possessed by New York municipalities under the Public Housing Law and Private Housing Finance Law detailed *supra* at (Part III)).

164. In Oregon, the state legislature provided a structure for statewide land use planning that includes housing as one of 14 statewide goals that must be accommodated in local planning and zoning decisions. A state agency was created to function as the overseer of the comprehensive planning process at the local level and to assure that local plans are in compliance with statewide goals. That agency adopted a statewide housing goal in 1975 which states that:

> [b]uildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.

OR. ADMIN. R. ch. 660, § 15-000(10) (1985). The legislative response to the housing cost problems in Oregon includes legislation to require state agencies to use an expedited permit procedure for processing housing applications, OR. REV. STAT. §§ 447.800-.865 (1977 Rep. Pt.), and a requirement that the cost of all state and local regulatory legislation should be measured against the benefits to the occupants, *see* 1977 OR. LAWS, RESOLUTIONS, HJR8, at 1094-95.

165. Berenson v. Town of New Castle, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 243, 378 N.Y.S.2d 672, 682 (1975); *see also supra* note 10.

166. On the difficulties involved with such proof in the absence of some articulated methodology or policy at the state level, see *generally* Raymond, Berenson: *An Obligation Undefined is An Obligation Unfulfilled*, 4 PACE ENVTL. L. REV. 131 (1986).

167. *See supra* note 15 and accompanying text.

sponsibilities to correct existing exclusionary zoning policies. Equally important, state officials must integrate and communicate the authority contained in the Public Housing Law and the Private Housing Finance Law, if they expect local officials to solve the housing crisis proclaimed by the Governor's Task Force.