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COUNTY POWERS IN ASSISTED HOUSING PROGRAMS: THE CONSTITUTIONAL LIMITS IN NEW YORK

*John P. Deller**

I. Introduction

For some seventy years, and through at least as many programs, governments at the federal, state or local level have contributed to the cost of housing the poor in New York State. Programs have developed slowly, and often with much controversy, from the first modest steps that tried to encourage private investment in low cost housing to current rent subsidy programs and homeownership initiatives.

The housing assistance provided by these programs is distinct from other kinds of public assistance not only because of the large capital investments that are required, but also because the personal relationships associated with one's home — relationships with landlords, neighbors and other members of the community — are not changed easily. Selecting sites for low-income housing will have a profound effect upon the people who will live there as well as upon the neighborhood,¹ and it is therefore of the utmost importance that those making site decisions be in the best position to do so.

The selection of sites that will serve the interests of the poor and of the neighborhoods they will live in demands attention to a multitude of factors, including education, recreation, health services, transportation, shopping and police protection, as well as to financing and budgetary concerns. Successful developments will reflect the extent to which planning decisions are made by those who are knowledgeable about such factors and who are in a position to assure their delivery. Failed ventures are more likely to be the product of decisionmakers who are either uninvolved in the community or disengaged from its political and legal process.

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1. For a description of the first halting efforts of middle-income homeowners and low-income tenants of Yonkers, N.Y. to live with each other after new public housing units opened under court order, see Melinda Henneberger, *A Yonkers Street: Whites, Blacks and Silence*, N.Y. TIMES, Oct. 15, 1992, at A1.

This article will show that with the exception of facilities set aside for people who cannot live independently, the law has historically given counties in New York State little or no role in addressing housing issues, with decisions being left to private enterprise, municipalities and public corporations. However, pressures persist to find new ways to finance assisted housing and to overcome local opposition to unpopular projects. Proposals are thus regularly advanced to grant powers to county governments to initiate their own housing programs. In 1992, the Attorney General of New York State issued an opinion that departs from previous opinions of his office and invites greater county involvement in low-cost housing.² The opinion reportedly inspired a proposal from Westchester County to build 5,000 units of "affordable housing" that would not be subject to local opposition.³

The exclusion of counties from low-income housing programs is a controversial matter. It is said that county involvement would allow for regional solutions to regional problems and would be more effective in dealing with racial and economic segregation.⁴ Others say that county powers could undermine municipal home rule and lead to the construction of housing where local opposition makes development difficult or where it impairs the delivery of support services.⁵ Support for these points can be found in racial segregation cases like *Yonkers*⁶ and *Gautreaux*,⁷ which show that members of representative bodies often exercise a veto power over proposed sites for low-income housing and are therefore able to exclude low-income projects from their districts.⁸ Where opposition to a project is based upon economic or

2. 1992 Op. Att'y Gen. I 92-4 (1992) [hereinafter Op. Att'y Gen. 92-4]. For an extended discussion of this opinion, see *infra* Part IV.

3. Lisa W. Foderaro, *O'Rourke Proposes Low-Income Housing*, N.Y. TIMES, Feb. 25, 1992, at B5; Lynda Richardson, *County Executive Details Affordable-Housing Plan*, N.Y. TIMES, Mar. 14, 1992, at 30 ("The program . . . appears crafted to head off the resistance commonly seen among neighborhood groups over proposals for low-income housing and transitional housing for homeless people.").

4. See TEMPORARY STATE COMMISSION ON THE CONSTITUTIONAL CONVENTION, REPORT NO. 9, HOUSING, LABOR & NATURAL RESOURCES, at 28-29 (1967) [hereinafter TEMPORARY STATE COMMISSION] ("[T]he exclusion of counties . . . complicates relocation problems and permits the continuation of economic and racially segregated communities in many parts of the state.").

5. *Id.*

6. *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 801 F.2d 593 (2d Cir. 1986).

7. *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969).

8. In *Yonkers*, the court found that "the operation of the City's ward system provided strong incentive for individual councilmen to defer to the views of their constituents on subsidized housing, and for the Council as a whole to defer to the views of the ward councilman." 624 F. Supp. at 1369. In *Gautreaux*, the court found that the Chicago Housing Authority followed a practice of "informally clearing each [proposed hous-

racial factors, the exercise of such veto power may contribute to unlawful segregation by increasing the concentration of assisted housing in low-income areas that present no such opposition.⁹

It is not clear, however, that regionalizing site selection would ameliorate the situation, and it might actually make it worse. Communities are now required to consider regional housing conditions in making zoning decisions,¹⁰ and they must also affirmatively further fair housing if they participate in federal programs that provide grants for economic development, such as the Community Development Block Grant Program.¹¹ Such requirements encourage low-income housing development within municipal boundaries and are intended, as the Court of Appeals has observed, "to avoid the parochialism of elected local officials in communities which excluded minorities and socioeconomic groups from undeveloped areas of their municipalities to cater to a favored constituency."¹² If county governments obtain the power to build such housing, it is reasonable to expect that more sites will be chosen in areas of the county having the greatest need and where land is cheapest, which is to say, in areas with the highest percentage of residents who are poor. Since these areas often have the

ing project] site with the Alderman in whose Ward the site is located and eliminating each site opposed by an Alderman." 296 F. Supp. at 913. See also ELIZABETH WOOD, NATIONAL CTR. FOR HOUS. MANAGEMENT, *THE BEAUTIFUL BEGINNINGS, THE FAILURE TO LEARN: FIFTY YEARS OF PUBLIC HOUSING IN AMERICA* 12-13 (1982) [hereinafter WOOD] (stating that one reason Congress provided for local housing authorities in the U.S. Housing Act of 1937 was "to avoid the possibility that parochial or dishonest local politicians would interfere with [the public housing program]").

9. In *Yonkers*, the court stated, "the segregative effect of the actions challenged by plaintiffs has been remarkably consistent and extreme. It is, to say the least, highly unlikely that a pattern of subsidized housing which so perfectly preserved the overwhelmingly white character of East and Northwest Yonkers came about for reasons unrelated to race." 624 F. Supp. at 1369.

10. See *Berenson v. Town of New Castle*, 341 N.E.2d 236, 242 (N.Y. 1975) ("There must be a balancing of the local desire to maintain the *status quo* within the community and the greater public interest that regional needs be met. 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."). Where a county planning board is in existence, municipalities must obtain the board's comments on certain zoning decisions before they are implemented, but final authority rests with the municipality. See N.Y. GEN. MUN. LAW § 239-m (McKinney 1986).

11. 42 U.S.C. § 5309 (1988). The community development block grant program was authorized by Title I of the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974) (codified at 42 U.S.C. §§ 5301-5320 (1988 & Supp. II 1990)). Under the program, the Federal Government provides grants to eligible communities for economic renewal and increased economic opportunities for low- and moderate-income persons. For a fuller discussion of the Community Development Block Grant Program, see *infra* notes 293-307 and accompanying text.

12. *Asian Ams. for Equality v. Koch*, 527 N.E.2d 265, 272 (N.Y. 1988).

largest minority population, the exercise of housing powers at the county level could increase the degree of racial as well as economic segregation in the county simply because county officials, taking the path of least resistance, may avoid selecting sites in communities that oppose low-income housing and may instead locate projects where popular support exists.

In addition to these political factors, New York's zoning law might increase the degree of housing segregation if county officials stepped in to meet housing needs neglected by municipalities. In the absence of exclusionary practices that violate the civil rights laws,¹³ the obligation of municipalities under zoning laws to provide for low-income housing within their own borders could be satisfied by county programs, since "a town need not permit a [zoning] use solely for the sake of the people of the region if regional needs are presently provided for in an adequate manner."¹⁴ The net effect of granting counties the power to initiate housing projects may therefore reduce or even extinguish a municipality's obligation to zone for low-rent housing where county projects in other communities meet regional housing needs. As a result, the concentration of assisted housing in those other communities would increase.

Regional solutions to common problems or cooperative efforts among local governments are advocated by planners because they are sometimes the most efficient ways to provide public services. Constructing housing is, however, peculiarly local in nature: site selection involves zoning and land use laws that are generally administered locally; construction requires compliance with local building codes; oc-

13. See *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988). The Court of Appeals found that a zoning ordinance restricting the development of low-income housing to a largely minority urban renewal area had a discriminatory effect and that a *prima facie* case of discrimination in violation of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1988), was thereby established. The Supreme Court did not reach the question of whether disparate impact is the proper test under Title VIII because the parties did not contest the issue. 488 U.S. at 18.

14. *Berenson v. Town of New Castle*, 341 N.E.2d 236, 242 (N.Y. 1975). New York does not subscribe to the "*Mount Laurel*" approach, see *Suffolk Hous. Serv. v. Town of Brookhaven*, 491 N.Y.S.2d 396, 402 (App. Div. 1985), *aff'd*, 511 N.E.2d 67 (N.Y. 1987); *Asian Ams. for Equality v. Koch*, 514 N.Y.S.2d 939, 950 (App. Div. 1987), *aff'd*, 527 N.E.2d 265 (N.Y. 1988), which assigns to municipalities responsibility to meet their "fair share" of regional housing needs. See *South Burlington County NAACP v. Mt. Laurel Twp.*, 336 A.2d 713 (N.J. 1975); *South Burlington County NAACP v. Mt. Laurel Twp.*, 456 A.2d 390 (N.J. 1983).

In *Koch*, the Court of Appeals did not reject the *Mt. Laurel* approach, as the Appellate Division had done. Instead, the Court distinguished the case at bar — which involved densely-developed New York City — from *Mt. Laurel*, which concerned largely undeveloped suburbs. 527 N.E.2d at 272-73. In a proper case, the door remains open for a *Mt. Laurel* claim in New York.

cupancy must conform with local occupancy standards; and a successful project requires support of local utilities and municipal services ranging from sanitation to police protection.¹⁵ These functions are usually administered locally and must be coordinated with project development if projects are to be successful. Making the decision to build a project in a jurisdiction that opposes it may therefore create more problems than it solves.

The resistance of Yonkers to the construction of court-ordered public housing shows how a housing development may be adversely affected when the municipal government opposes the project.¹⁶ The construction of 200 public housing units was ordered by a federal court in 1986 and later enforced through the threat of escalating fines that would have exceeded \$1 billion within a month.¹⁷ The district court's remedial order contained considerable detail about housing sites, development methods and financial inducements, among other things,¹⁸ but this "Housing Remedy Order" was only the beginning of six years of delay and continued opposition to construction that was mounted by City officials. The court was subsequently called upon to resolve detailed matters including zoning and title conveyance,¹⁹ provision of surveys, soil borings, and technical studies of housing sites;²⁰

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

16. Non-governmental opposition in the local community can delay projects and increase construction costs, but if the opposition lacks merit, if funds are available, and if the local government supports the project, it will in all likelihood be built. Litigation involving a 50-unit project in Huntington, N.Y., which has been in the planning stage since 1984, illustrates the point. See *Strathmore Hills Civic Ass'n v. Town of Huntington*, 537 N.Y.S.2d 264 (App. Div.), *appeal denied*, 547 N.E.2d 103 (N.Y. 1989) (challenge to public housing site based upon zoning and environmental issues); *Grayson v. Town of Huntington*, 545 N.Y.S.2d 633 (Sup. Ct. 1989), *aff'd*, 554 N.Y.S.2d 269 (App. Div.), *appeal denied*, 565 N.E.2d 1269 (N.Y. 1990) (challenge based upon parkland issue). Legislation further restricting the alienation of parkland for public housing purposes was enacted after the second lawsuit was resolved in favor of the project, Act of Aug. 22, 1990, ch. 929, § 2, 1990 N.Y. Laws 2012, thereby precipitating a third lawsuit, *Grayson v. Town of Huntington*, No. 9782/91 (N.Y. Sup. Ct., Suffolk Co.). This case was dismissed in 1992 on the grounds that the 1990 legislation was inapplicable. *Id.*, slip op. at 3. A fourth lawsuit, *Litwin v. Town of Huntington*, No. 29380/91 (N.Y. Sup. Ct., Suffolk Co.), claimed title to the public housing site by adverse possession. This case, too, was dismissed in 1992. *Id.*, slip op. at 2.

17. *United States v. City of Yonkers*, 856 F.2d 444, 459 (2d Cir. 1988), *rev'd on other grounds sub. nom.*, *Spallone v. United States*, 493 U.S. 265 (1990). The Court of Appeals limited the fine to \$1 million per day.

18. *United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

19. *United States v. Yonkers Bd. of Educ.*, No. 80 Civ. 6761 (S.D.N.Y. Mar. 20, 1987).

20. *Yonkers*, No. 80 Civ. 6761 (S.D.N.Y. July 1, 1987).

site selection, site density, eminent domain proceedings, tax abatements and bonuses to developers;²¹ and changes in property tax records, demapping of public streets, and various other title questions.²²

It is clear that the lack of support from local government can frustrate housing development in many ways. The orders entered in *Yonkers* involved only some of the complicated steps requiring the cooperation of local governments, and the extraordinary resistance of Yonkers²³ was overcome only because of the extraordinary powers exercised by the federal courts.²⁴ It is obvious that county governments, unaided by a federal judge acting to remedy civil rights violations, would not fare as well against municipal opposition. The success of low-income housing developments will thus depend upon affirmative support for projects by the municipalities in which they are located.

This article argues that under New York law, the role of municipalities is central in housing development and that county governments have few powers to initiate low-income housing programs. These roles are firmly grounded in a desire to limit public debt and to assure that subsidized housing is provided by municipal governments since they are in the best position to assess local housing needs and to provide such housing with the public services that it needs. Part II briefly describes the growth of federal and state housing programs. Part III discusses the constitutional and statutory limits on county housing powers in New York State. Part IV considers whether county police powers authorize assisted housing programs. Finally, Part V discusses the extent to which counties can participate in federal housing programs.

II. Development of Housing Assistance Programs

Government housing programs were created in the United States during the early part of this century. Prior to that time, assistance was offered through "settlement houses" built by wealthy individuals who would "settle" themselves in poor neighborhoods to assist the poor, often providing supportive services, such as child care, summer

21. First Remedial Consent Decree in Equity, *Yonkers*, No. 80 Civ. 6761 (S.D.N.Y. Jan. 28, 1988).

22. *Yonkers*, No. 80 Civ. 6761 (S.D.N.Y. Aug. 2, 1990).

23. For a description of the City's efforts to overturn the remedy order, see *Spallone v. United States*, 493 U.S. 265, 267-75 (1990).

24. For a discussion of limitations on the district court's powers, see Candace Saari Kovacic-Fleischer, *The Remedial Problems of Spallone v. U.S. and Jenkins v. Missouri*, 24 URB. LAW. 621 (1992).

camp, organized sports, job training and family counseling.²⁵ Government involvement was limited to enforcing health and safety codes enacted after the Civil War for the purpose of improving conditions in over-crowded tenements.²⁶

In an effort to increase the supply of low cost housing, early state laws tried to encourage greater private investment in low-income housing projects. In New York, for example, tax exemptions were offered to private "housing companies" that agreed to build housing for low-income persons,²⁷ and programs were devised to increase mortgage lending.²⁸ These early programs had little impact, however, with only ten projects being constructed between 1926 and 1938.²⁹

The federal government started providing assistance during the 1930s, building the first public housing projects under an emergency measure intended to create construction jobs and to clear slums.³⁰ The Reconstruction Finance Corporation was the first federal agency authorized to fund low-rent housing,³¹ but most early construction was financed by the Housing Division of the Public Works Administration established in 1933.³² These early projects were usually constructed without the participation of local governments,³³ a situation which soon changed.³⁴ After persistent efforts on the part of Senator Robert Wagner of New York and limited support from the Roosevelt

25. See Howard Husock, *Bringing Back the Settlement House*, THE PUBLIC INTEREST, Fall 1992, at 53.

26. See REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, vol. II, at 1563 (1938) [hereinafter REVISED RECORD] (remarks of Gov. Smith during debate of the 1938 State Constitution).

27. State Housing Law, ch. 823, 1926 N.Y. Laws 1507.

28. See Urban Redevelopment Corporations Law, ch. 892, 1941 N.Y. Laws 2039 (replaced by N.Y. PRIV. HOUS. FIN. LAW, Art. 13, § 605 (McKinney 1991)); Redevelopment Companies Law, ch. 845, 1942 N.Y. Laws 1855 (replaced by N.Y. PRIV. HOUS. FIN. LAW, Art. 13, § 605 (McKinney 1991)).

29. TEMPORARY STATE COMMISSION, *supra* note 4, at 16 n.25; see also New York City Hous. Auth. v. Muller, 1 N.E.2d 153, 156 (N.Y. 1936) ("After ten years of experiment, [use of limited dividend corporations] for economic reasons, has proved inadequate as a solution.").

30. See IRVING WELFELD, WHERE WE LIVE 159 (1988) [hereinafter WELFELD].

31. Act of July 21, 1932, ch. 520, 47 Stat. 711 (1932) (repealed by Act of June 30, 1947, ch. 166, title II, §§ 206(a)-(e), 18 U.S.C. § 605 (1988)).

32. Act of Mar. 23, 1933, ch. 5, 48 Stat. 20 (1933) (repealed by Act of June 30, 1947, ch. 166, title II, §§ 206(a)-(e), 18 U.S.C. § 605(b) (1988)). See WOOD, *supra* note 8, at 2-3 ("Prior to the enactment of the Housing Act of 1937, the PWA built 50 projects in 35 cities containing 21,000 units").

33. See *supra* note 32.

34. The first public housing project in New York State was dedicated by the New York City Housing Authority in 1935. See FIFTY-SIXTH ANNUAL REPORT, NEW YORK CITY HOUSING AUTHORITY 2 (1990).

Administration,³⁵ the United States Housing Act of 1937³⁶ (the "1937 Act") was enacted. The 1937 Act authorized federal loans and subsidies to local housing authorities for costs of construction and operation of low rent public housing.³⁷

The 1937 Act states a clear policy choice that housing should be built by local authorities and not the federal government. The Act provides, in pertinent part, "that there should be local determination of the need for low-income housing to meet needs not being adequately met by private enterprise" and that, accordingly, the government shall not finance public housing projects "unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the *local cooperation* required . . . pursuant to this Act."³⁸ "Local cooperation" includes exemption of projects and public housing authorities from state and local taxes in place of which authorities make "payments in lieu of taxes" to the municipality.³⁹ Local cooperation also includes an agreement by the "applicable local governing body" to provide residents of the housing authority's projects with the same public services and facilities "normally furnished to others in the community."⁴⁰ The effect of these provisions is to provide federal financing for public housing only where the local government agrees to support the project.

The federal public housing program was supplemented in 1939 by New York State legislation that gave the state and its cities, towns and villages authority to loan funds (which had been formed under legislation enacted five years earlier)⁴¹ to local housing authorities for public housing development,⁴² and to subsidize their operating expenses.⁴³ Acting under this authority, a number of state- and city-financed housing projects were developed throughout the state. In the 1950s, the State's Mitchell-Lama Law⁴⁴ authorized for the first time

35. WELFELD, *supra* note 30, at 158-61; WOOD, *supra* note 8, at 8-9.

36. Act of Sept. 1, 1937, ch. 896, 50 Stat. 888 (1937) (codified as amended at 42 U.S.C. §§ 1437-1437s (1988 & Supp. II 1990)).

37. 42 U.S.C. §§ 1437b, 1437d (1988).

38. *Id.* § 1437c(e)(2) (emphasis added).

39. *Id.* § 1437d(d); *see also* N.Y. PUB. HOUS. LAW § 52(3) (McKinney 1989) (exempting authorities and their federally-assisted projects from all local taxes).

40. 24 C.F.R. § 941.201(c) (1992). The "applicable local governing body" would be any local government, whether county or municipal, that has responsibility for furnishing public services to the community.

41. Municipal Housing Authorities Law, ch. 4, 1934 N.Y. Laws 13 (repealed by N.Y. PUB. HOUS. LAW § 227 (McKinney 1989)).

42. *See* N.Y. PUB. HOUS. LAW §§ 70, 93 (McKinney 1989).

43. N.Y. PUB. HOUS. LAW §§ 73, 94 (McKinney 1989).

44. Limited Profit Housing Companies Law, ch. 407, 1955 N.Y. Laws 1061 (codified at N.Y. PRIV. HOUS. FIN. LAW, Art. 2 (McKinney 1991)). This statute authorizes tax

the use of public funds for the construction of privately-owned projects for persons with income above public housing limits but below levels needed to purchase housing at market prices.

Unlike the State programs described above, the federal government originally limited low-income housing assistance to public housing.⁴⁵ However, in 1965, Congress created a program for leased housing assistance under which public housing agencies received federal funds to lease accommodations in privately-owned buildings for sublease to low-income families.⁴⁶ In 1974, this leasing program was replaced by direct subsidies authorized by Section 8 of the 1937 Act,⁴⁷ to be paid to owners of existing, newly constructed or rehabilitated housing (the "Section 8 Program"). Today, the Section 8 Program accounts for almost \$13 billion in annual outlays.⁴⁸

Programs emphasizing homeownership rather than rental housing appeared in 1985 under New York State legislation that sought to preserve neighborhoods threatened by blight and lack of private investment.⁴⁹ The legislation creates an "affordable housing corporation"⁵⁰ which is authorized to provide grants to eligible applicants for the cost of construction, rehabilitation, improvement or acquisition of

exemptions, N.Y. PRIV. HOUS. FIN. LAW § 33, and state and municipal loans for project development, *id.* §§ 22, 23, in return for which the project owner must agree to rent regulation, *id.* § 31, sale restrictions, *id.* § 36, and government supervision of the project, *id.* § 32.

45. The New York State programs cited *supra* notes 27-28 and accompanying text, were designed to facilitate the construction of private housing for low-income persons. Federal programs, on the other hand, assisted the poor through public housing and provided mortgage insurance to help develop rental housing for middle-income families. *See, e.g.*, Act of Aug. 2, 1954, ch. 649, § 123, 68 Stat. 599 (1954) (authorizing FHA mortgage insurance for projects with "moderate rental charges"). In 1961, mortgage insurance programs were amended to encourage construction of privately-owned housing for low-income persons. *See* Housing Act of 1961, Pub. L. No. 87-70, § 101(a), 75 Stat. 149 (1961) (codified as amended at 12 U.S.C. § 1715f (1988 & Supp. II 1990)).

46. Pub. L. No. 89-117, § 103, 79 Stat. 451, 455 (1965) (codified at 42 U.S.C. § 1422 (1988)). The House Report accompanying this legislation noted that existing federal and state programs "reach only a very small part of the total number of low- and moderate-income families." H.R. REP. NO. 365, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 2614, 2619.

47. 42 U.S.C. § 1437f. Under the Section 8 Program, the federal government funds "housing assistance payments" to landlords that equal the difference between rents that are comparable to those in the area of the project and the tenant's contribution, which is limited to a percentage of income.

48. *See* S. REP. NO. 356, 102d Cong., 2d Sess. 47 (1992).

49. Affordable Home Ownership Development Program, Act of Apr. 17, 1985, ch. 67, § 2, 1985 N.Y. Laws 333 (codified at N.Y. PRIV. HOUS. FIN. LAW, Art. 19 (McKinney 1991)).

50. The corporation is a subsidiary of the New York State Housing Finance Agency.

residences for persons who cannot afford market prices.⁵¹ An amendment enacted in 1988 makes it clear that eligible applicants include cities, towns and villages and that a county may act only as an administrator of a program undertaken by another applicant or in "any other capacity as permitted by law."⁵² Federal homeownership programs were authorized by the National Affordable Housing Act of 1990.⁵³ The statute creates three separate plans — known as HOPE I, II and III⁵⁴ — which use grants rather than loans to pay part of the cost of housing purchased by low-income homebuyers. The legislation also authorizes "HOME investment partnerships" with state and local agencies for the purpose of providing "affordable housing."⁵⁵ An earlier program encouraged homeownership by lower income families by offering mortgage interest subsidies to reduce the cost of housing,⁵⁶ but grants were not used until 1990. Some federal low-cost rental programs also fund construction with grants today instead of loans.⁵⁷

51. N.Y. PRIV. HOUS. FIN. LAW § 1112 (McKinney 1991). The question of who cannot afford market prices is discussed *infra* notes 251-54 and accompanying text.

52. Act of Dec. 9, 1988, ch. 714, 1988 N.Y. Laws 3387.

53. Pub. L. No. 101-625, 104 Stat. 4079 (1990).

54. HOPE I funds the purchase of existing public housing units by low-income persons coupled with the replacement of such units by either new or rehabilitated public housing, the issuance of Section 8 certificates or vouchers or the provision of comparable State or local assistance. 42 U.S.C. §§ 1437aaa-1437aaa-8 (Supp. II 1990).

HOPE II funds the purchase and resale to low-income persons of units in multifamily buildings that are either owned, held, or insured by HUD, or owned or held by the Agriculture Department, the Resolution Trust Corporation, or a state or local government. 42 U.S.C. § 12871-12880 (Supp. II 1990).

HOPE III funds the purchase by nonprofit organizations, cooperative associations and public agencies of single family properties owned or held by federal, state or local public entities for resale to first-time homebuyers. 42 U.S.C. §§ 12891-12898 (Supp. II 1990).

55. 42 U.S.C. §§ 12701-12839 (Supp. II 1990). "Affordable housing" means housing rented for the lesser of Section 8 "Fair Market Rents" or 30% of the adjusted income of a family with income equal to 65% of the area median income. It also includes housing for first-time homebuyers that does not cost more than 95% of the median area purchase price. *Id.* § 12746.

56. See, e.g., National Housing Act, Pub. L. No. 90-448, § 235, 82 Stat. 447 (1968) (codified as amended at 12 U.S.C. § 1715z (1988 & Supp. II 1990)). Section 5(h) of the 1937 Act, 42 U.S.C. § 1437c(h), authorized the sale of public housing units, but few sales have been made in accordance with that provision.

57. Development loans for the construction of public housing were forgiven by Pub. L. No. 99-272, § 3004, 100 Stat. 102 (1986) (codified at 42 U.S.C. § 1437b(c) (1988)). Supportive housing for persons with disabilities and elderly housing constructed under Section 202 of the Housing Act of 1959, 12 U.S.C. § 1701q (1988 & Supp. II 1990), may now be funded through capital grants rather than loans. Pub. L. No. 101-625, § 811, 104 Stat. 4324 (1990) (codified at 42 U.S.C. § 8013 (Supp. II 1990)); see also Pub. L. No. 101-625, § 801, 104 Stat. 4297 (codified at 12 U.S.C. § 1701q (Supp. II 1990)). The change in funding is more apparent than real, however, since development loans were repaid from federal subsidies to the PHA or the Section 8 landlord.

The National Affordable Housing Act also authorized housing programs for the "frail elderly," the homeless, and the disabled that offer "supportive services" suggestive of those provided by the settlement houses of the past. For example, supportive services for the elderly include "personal care, case management services, transportation, meal services, counseling, supervision, and other services essential for achieving and maintaining independent living."⁵⁸ Supportive services for the homeless include "health care, mental health services, substance and alcohol abuse services, child care services, case management services, counseling, supervision, education, job training, and other services essential for achieving and maintaining independent living."⁵⁹ Services for the disabled must address the individual needs of the residents,⁶⁰ and "the appropriate State or local agency" must certify that such services are "well designed to serve the special needs of persons with disabilities."⁶¹

The question of whether county governments in New York State have the power to participate in these low-income housing programs is complicated. As will be discussed below, the answer will depend on whether the program is designed for persons able to live independently or for those who require supportive services.⁶² The power of government to fund public housing construction or private projects in order to improve distressed areas may not exist for rent subsidy programs that allow beneficiaries to choose their own dwellings.⁶³ Programs benefiting low-income families raise different issues from those directed to moderate- and middle-income families,⁶⁴ and programs that allow for the sale of housing may be undertaken by counties in conjunction with activities that benefit the public, but not as separate programs.⁶⁵

III. State Constitutional Restrictions on County Housing Programs

The New York Constitution contains a number of provisions concerning the powers of counties to engage in low-income housing activities. Subpart A below discusses Article 18, which excludes counties from the units of state and local government that may undertake

58. 42 U.S.C. § 8012(g)(7) (Supp. II 1990).

59. *Id.* § 11398(11).

60. *Id.* § 8013(f)(3)(B).

61. 24 C.F.R. § 890.265(c)(19) (1992).

62. *See infra* notes 148-77 and accompanying text.

63. *See infra* notes 128-31 and accompanying text.

64. *See infra* notes 251-54 and accompanying text.

65. *See infra* notes 109-15, 118-27 and accompanying text.

housing assistance programs. It also describes the limitations imposed by Article 1 that restrict eminent domain to cases providing a public benefit and by Article 8 that prohibit public gifts for private purposes. Subpart B describes the limitations on public debt that are imposed by Articles 8 and 18 and shows that counties may not use their general debt authority for low-income housing programs. Finally, Subpart C discusses programs for low-income persons who cannot live independently and concludes that counties may participate in such programs under Article 17 of the Constitution.

A. Article 18 and Other Provisions Affecting Housing

The New York State legislation that provides for the use of public funds for low rent housing is expressly authorized by Article 18 of the State Constitution, which was adopted in 1938.⁶⁶ Article 18, § 1, provides:

Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing and nursing home accommodations for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto.

The Article authorizes the legislature to grant power to cities, towns and villages, but contains no explicit authority for counties. On the contrary, Article 18, § 2 expressly excludes counties from the definition of "public corporations" which may be provided with public funds to build or assist low-income housing.⁶⁷

66. Article 18 consists of ten sections, six of which are discussed in this article as follows: § 1, *see infra* notes 67-74 and accompanying text; § 2, *see infra* notes 67, 75-77 and accompanying text; § 3, *see infra* notes 142-47 and accompanying text; § 4, *see infra* notes 136-41 and accompanying text; § 8, *see infra* note 131 and accompanying text; § 10, *see infra* notes 214-227 and accompanying text.

67. N.Y. CONST., art. 18, § 2 (McKinney 1987) provides, in pertinent part:

For and in aid of such purposes, notwithstanding any provision in any other article of this constitution, but subject to the limitations contained in this article, the legislature may . . . authorize . . . capital or periodic subsidies by the state to any city, town, village, or public corporation . . . ; authorize any city, town or village . . . to make such subsidies to any public corporation . . . ; authorize . . . loans by the state to any city, town, village or public corporation . . . ; authorize any city, town or village . . . to make loans to any public corporation; authorize any city, town or village . . . to guarantee . . . indebtedness contracted by a public corporation; authorize . . . loans by the state and . . . any city, town or village to or in aid of corporations regulated by law as to rents, profits, dividends and disposition of their property . . . and engaged in providing housing

Although there are no reported court decisions determining the issue, the omission of counties from § 1 and their exclusion from § 2 has led the New York State Attorney General to conclude that Article 18 denies housing powers to county governments. The Attorney General has reached this conclusion in two opinions.⁶⁸ The first, issued in 1970,⁶⁹ concluded that a county government could not create a public housing agency to carry out the purposes of Article 18; and the second, issued in 1978,⁷⁰ concluded that counties could not assist in the development or operation of low-income housing by entering into rent subsidy contracts with the United States.⁷¹ Neither opinion offered any rationale beyond noting that counties are omitted from the entities that may be granted powers under Article 18 and that they are excluded from the definition of public corporations.

Further support for these conclusions may be found, however, in the venerable rule of construction that expressions of one thing exclude others.⁷² For example, in *Golden v. Koch*,⁷³ the New York Court of Appeals held that "where a statute describes the particular situations in which it is to apply, 'an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded.'"⁷⁴ Since Article 18 enumerates the units of local

facilities or nursing home accommodations; authorize any city, town or village to make loans to the owners of existing multiple dwellings for the rehabilitation and improvement thereof for occupancy by persons of low income . . . ; grant or authorize tax exemptions . . . ; authorize cooperation with and the acceptance of aid from the United States; grant the power of eminent domain to any city, town or village, to any public corporation and to any corporation regulated by law as to rents, profits, dividends and disposition of its property or franchises and engaged in providing housing facilities. As used in this article, the term "public corporation" shall mean any corporate governmental agency (except a county or municipal corporation) organized pursuant to law to accomplish any or all of the purposes specified in this article.

68. Opinions of the Attorney General are given consideration by the courts of New York State, but they are not binding and do not determine the law. See *American Tel. & Tel. Co. v. State Tax Comm'n*, 462 N.E.2d 1152, 1157 (N.Y. 1984); *City of New York v. State of New York*, 306 N.Y.S.2d 131, 147 (Ct. Cl. 1969).

69. 1970 Op. Att'y Gen. 153.

70. 1978 Op. Att'y Gen. 162.

71. See also 4 Op. N.Y. Comp. 339 (1948) (Art. 18 "specifically excludes counties from participati[on]" in housing).

72. See NEW YORK MCKINNEY'S STATUTES § 240 (1971).

73. 404 N.E.2d 1321 (N.Y. 1980).

74. *Id.* at 1323; see also *Application of Combs*, 254 N.Y.S.2d 143, 145 (Sup. Ct. 1964) ("a power not expressly conferred will not be implied unless essential to the fulfillment of the objectives of the statute.").

In *Golden*, the Court abandoned the rule of construction that had been used in *Matter of Kuhn v. Curran*, 61 N.E.2d 513 (N.Y. 1945). *Golden*, 404 N.E.2d 1321 (N.Y. 1980) (propositions put to popular vote must be construed in accordance with "the meaning which the words would convey to an intelligent, careful voter"). The Court applied tradi-

government that may be authorized to undertake housing activities, "an irrefutable inference" must be drawn that counties, omitted from such local governments, were intended to be excluded from the exercise of housing powers covered by Article 18.

Article 18, § 2 authorizes the Legislature to grant specified powers to the state and local government in aid of providing low rent housing. Such powers include (1) making capital or periodic subsidies to public corporations, (2) loaning funds to such corporations, (3) guaranteeing the indebtedness of public corporations, (4) loaning funds to limited dividend and limited profit corporations engaged in providing housing, (5) making rehabilitation loans to owners of multifamily low-income housing, (6) granting tax abatements for periods of up to 60 years, (7) authorizing cooperation with and acceptance of aid from the United States, and (8) granting powers of eminent domain in support of low-income housing.⁷⁵ The powers to provide tax exemptions and to cooperate with the United States are not expressly limited to any specific units of government, whereas the power of eminent domain may be granted only to cities, towns and villages, and the power to commit public funds may be granted only to the state, cities, towns and villages. These differences suggest that counties can be authorized by the legislature to engage in some activities, such as granting tax exemptions and entering into agreements with the federal government to provide low-income housing. The legislature has exempted assisted housing from county taxes,⁷⁶ but it has never empowered county governments to cooperate with the United States in the housing field.⁷⁷ As a result, it would appear that counties are denied all of the powers encompassed in Article 18, including the power to cooperate with and accept aid from the United States.

Repeated attempts have been made to amend Article 18 by adding counties to the list of local governments receiving powers thereunder, but no such proposals have passed successive legislative sessions as

tionally accepted standards used in the interpretation of statutes in construing provisions of the New York City Charter. It would seem that such standards should also be used in construing provisions of the New York Constitution. *See Schuyler v. South Mall Constructors*, 303 N.Y.S.2d 901 (App. Div. 1969) (statutory rules of construction are applicable to constitutional provisions).

75. For the full text of Article 18, § 2, see *supra* note 67.

76. N.Y. PUB. HOUS. LAW § 52(3) (McKinney 1989).

77. N.Y. GEN. MUN. LAW § 99-h (McKinney 1986) authorizes counties to cooperate with the United States in programs that are not inconsistent with any other law, but as shown *infra* notes 86-89 and accompanying text, county cooperation with the United States in low-income housing programs would be inconsistent with the Public Housing Law.

required by the state constitution.⁷⁸ A revised constitution submitted to the voters in 1967 would have empowered county governments to fund low-income housing, but the entire document was rejected by the voters.⁷⁹

Despite Article 18's apparent limitations on county powers, the State Comptroller concluded in a 1976 opinion⁸⁰ that county planning boards could contract with a public corporation to perform the administrative functions that public housing authorities perform in the Section 8 Program.⁸¹ After the Section 8 Program was established, municipalities were slow to respond to funding invitations published by the Department of Housing and Urban Development ("HUD"), raising the prospect that funds allocated to municipalities in New York State might go unused. To avoid this, the Urban Development Corporation ("UDC"), a public corporation organized under state law,⁸² proposed to apply to HUD for Section 8 funds and then to enter into contracts with county planning boards to perform administrative services. Such services would include advertising and outreach (which would be paid for by the UDC), maintaining waiting lists, processing applications for Section 8 certificates, inspecting units, approving leases and recertifying tenant income. The Comptroller's opinion concluded that such an arrangement would be lawful, relying upon Section 99-h of the General Municipal Law,⁸³ which enables

78. N.Y. CONST., art. 19, § 1 (1987). The most recent proposed amendments were passed by the Legislature in 1989 (S.2933A), but failed to pass in 1991. See N.Y. CONST., art. 18 (McKinney Supp. 1993). A number of previous proposals are listed in Op. Att'y Gen. 92-4, *supra* note 2, at 1014 n.1.

79. See *Final Report of the Health, Housing and Social Services Committee*, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, Vol. XI, Doc. No. 48, at 46-47 [hereinafter *Final Report*].

80. Op. N.Y. Comp. 76-1037 (1976) (unreported).

81. For a description of the Section 8 program, see *supra* notes 47-48 and accompanying text. Under HUD regulations in effect at the time, PHAs administering the Section 8 Program were responsible for publicizing the program, maintaining waiting lists, determining tenant income and contract rents, inspecting units and approving leases, among other things. 24 C.F.R. § 882.116 (1977).

82. N.Y. UNCONSOL. LAW §§ 6251-6286 (McKinney & Supp. 1979).

83. N.Y. GEN. MUN. LAW § 99-h (McKinney 1986) provides, in pertinent part:

1. As used in this section the term "municipal corporation" shall mean a county, city, town, village, school district, or board of cooperative educational services of this state. . . .

2. Any municipal corporation shall have power, either individually or jointly with one or more other municipal corporations, to apply for, accept and expend funds made available by the federal government either directly or through the state, pursuant to the provisions of any federal law, which is not inconsistent with the statutes or constitution of this state, in order to administer, conduct or participate with the federal government in programs relating to the general welfare of the inhabitants of such municipal corporation. Any such municipal cor-

municipal corporations (including counties) to apply for and expend federal funds made available under federal laws that are not inconsistent with state law.

However, the opinion did not consider whether the county activity would be inconsistent with any other laws.⁸⁴ As indicated above,⁸⁵ Article 18 does not preclude the legislature from authorizing counties to cooperate with and accept aid from the United States, and a county's participation in the Section 8 Program is thus not precluded by Article 18. It would appear, however, that in the absence of statutory authority, a county's administration of the Section 8 Program would be inconsistent with the Public Housing Law, and it is therefore not authorized by Section 99-h of the General Municipal Law.

Section 37(1)(i) of the Public Housing Law⁸⁶ authorizes public housing authorities to "act as agent for or enter into contracts and otherwise cooperate with the federal government in connection with . . . any federally-aided program to provide dwelling accommodations for persons of low income. . . ." The definition of public housing "authority," as that term is used in Section 37, expressly excludes counties.⁸⁷ This shows that counties are precluded from the activities specified in Section 37(1)(i), including acting as agent for or entering into contracts with the United States (such as contracts for annual contributions of Section 8 funds) or engaging in other activities to "otherwise cooperate with the United States" in connection with low-income housing programs.⁸⁸ Even though the UDC and not the county planning boards would enter into the annual contributions contracts with HUD, the county boards would "otherwise cooperate" with the federal government by performing all of the administrative

poration is authorized to appropriate and expend such sums as are required to administer, conduct or participate in any such programs and may perform any and all acts necessary to effectuate the purposes of any such programs. . . .

84. Cf. Op. N.Y. Comp. 79-388 (1979) (unreported) (concluding that county lacked the power to participate in hospital reimbursement program under exercise of home rule powers since, given scope of program and implications of county involvement, there was no assurance that county functions would be consistent with all general laws).

85. See *supra* notes 75-77 and accompanying text.

86. N.Y. PUB. HOUS. LAW § 37(1)(i) (McKinney 1989).

87. *Id.* § 3(2) ("The term 'authority' means a public corporation which is a corporate governmental agency (except a county or municipal corporation) organized pursuant to law to accomplish any or all of the purposes specified in article eighteen of the constitution. . . .")

88. Annual contributions contracts are authorized by 42 U.S.C. § 1437f(b). As discussed previously, accepted rules of statutory construction show that the exclusion of counties from the units of government enumerated in Article 18 of the New York Constitution was intended to preclude counties from undertaking housing activities that are specified therein. See *supra* notes 72-74 and accompanying text.

tasks required by the Section 8 Program.⁸⁹ Such activities are inconsistent with Section 37(1)(i) of the Public Housing Law because it excludes counties from engaging in them. Counties are not, therefore, authorized by Section 99-h of the General Municipal Law to administer the Section 8 Program under contract with the UDC.

In short, it would seem that in an effort to obtain federal funds, the Comptroller stretched the law more than a little and reached an unwarranted result.⁹⁰ The opinion presents no convincing argument for its conclusion and can be considered, at best, weak authority for county performance of administrative services in the Section 8 Program.

It has been suggested that Article 18 is not needed to authorize government support of low-income housing because adequate authority is granted elsewhere.⁹¹ While it may be true that other legal authority would support certain housing programs if Article 18 did not exist, the fact can hardly be ignored that Article 18 does exist and that it excludes counties from its powers. Under these circumstances, ignoring its limitations and its history takes a somewhat cynical view of self-government that would defy the will of the electorate as expressed in the repeated rejection of proposals to grant powers to counties.⁹²

In the absence of authority granted by Article 18, government disbursements for low-income housing raise a number of state constitutional issues. First, the condemnation of private property for housing development would raise an issue of whether the taking is for a public use within the meaning of Article 1 of the State Constitution.⁹³ Second, such disbursements could violate constitutional prohibitions on the gift or loan of public funds for private purposes.⁹⁴ The extent of

89. See *supra* notes 81-83 and *infra* notes 313-19 and accompanying text.

90. The opinion accepted the UDC's argument that the Section 8 Program is complicated enough "without further complicating it by requiring that [the] UDC contract with cities, towns and villages." Also, according to the opinion, if the UDC's proposal were rejected, New York State would lose 20% of the Section 8 funds allocated to the state. These are not, of course, legal arguments.

91. See TEMPORARY STATE COMMISSION, *supra* note 4, at 57 (arguing that there "have been sufficient court decisions regarding the public purpose, due process and the inherent police power of the state to provide adequate authority to engage in low-rent housing and renewal activities."); see also *infra* Part IV (discussing Op. Att'y Gen. 92-4, *supra* note 2).

92. See *supra* notes 78-79 and accompanying text.

93. "Private property shall not be taken for public use without just compensation." N.Y. CONST., art. 1, § 7.

94. N.Y. CONST., art. 8, § 1 provides:

No county, city, town, village or school district shall give or loan any money or property to or in aid of any . . . private undertaking . . . nor . . . give or loan its credit to or in aid of any . . . private undertaking.

these restrictions is discussed below.

1. *Public Use Limits Under Article I*

Federal government efforts to build public housing as a jobs-creation measure⁹⁵ were stymied in 1935 by the Sixth Circuit's ruling in *United States v. Certain Lands in Louisville*.⁹⁶ The court held that the federal government cannot exercise powers of eminent domain to clear lands for low-income housing because such housing is not a "public use" within the meaning of the Fifth Amendment.⁹⁷ The government chose not to appeal to the Supreme Court, apparently because it was decided that local governments should bear primary responsibility for undertaking housing projects with the federal government acting only as a financing agency.⁹⁸ However, while the decision may remain as an obstacle to federal government activity, its view of "public use" is not binding on the states.

Although the Fourteenth Amendment does not expressly restrict eminent domain, state housing laws similar to those passed in New York in the 1920's and 1930's⁹⁹ have been challenged under the public use requirement of the Fifth Amendment, as incorporated into the Due Process Clause of the Fourteenth Amendment.¹⁰⁰ In *Fallbrook Irrigation Dist. v. Bradley*,¹⁰¹ decided in 1896, the Supreme Court recognized such a "substantive due process" obstacle to a state's condemnation powers, holding that "the citizen is deprived of his property without due process of law if it be taken by or under state

It has been held that this provision relates only to state and local funds, not to federal assistance. *Kradjian v. City of Binghamton*, 482 N.Y.S.2d 89, 91 (App. Div. 1984).

95. See WELFELD, *supra* note 30, at 159.

96. 78 F.2d 684 (6th Cir. 1935).

97. See U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

In *United States v. Certain Lands in Louisville*, the court reasoned, "[t]he taking of one citizen's property for the purpose of improving it and selling or leasing it to another, or for the purpose of reducing unemployment, is not, in our opinion, within the scope of the powers of the federal government." 78 F.2d at 688; see also *infra* notes 107 and 112.

98. See R. Skilton, *Governmental Policies in Land & Housing*, 7 U. PITT. L. REV. 75, 91 n.77 (1941).

99. See *supra* notes 27-28 and accompanying text.

100. See, e.g., *Green v. Frazier*, 176 N.W. 11 (N.D.), *aff'd*, 253 U.S. 233 (1920); *Opinion of the Justices*, 48 So. 2d 757 (Ala. 1950); *Rowe v. Housing Auth. of Little Rock*, 249 S.W.2d 551 (Ark. 1952); *Zurn v. City of Chicago*, 59 N.E.2d 18 (Ill. 1945); *Spahn v. Stewart*, 103 S.W.2d 651 (Ky. 1937); *In re Slum Clearance, City of Detroit*, 50 N.W.2d 340 (Mich. 1951); *State v. Rich*, 110 N.E.2d 778 (Ohio 1953); *Belovsky v. Redevelopment Auth. of Phila.*, 54 A.2d 277 (Pa. 1947); *Opinion to the Governor*, 69 A.2d 531 (R.I. 1949); *Nashville Hous. Auth. v. City of Nashville*, 237 S.W.2d 946 (Tenn. 1951).

101. 164 U.S. 112 (1896).

authority for any other than a public use. . . ."¹⁰² However, in *Green v. Frazier*,¹⁰³ decided in 1920, the Court cleared this obstacle for housing programs, finding that states can constitutionally authorize the condemnation of land for sale to individuals where competent state authorities find that such use promotes the public welfare, and where their finding is not "clearly unfounded."¹⁰⁴ Subsequent cases show that the states have great latitude in this regard.¹⁰⁵

The laws of some states take a very broad view of public use, requiring only the slightest public benefit. For example, in New Jersey, the state legislature may authorize condemnation "when it is perceived that there is a degree of public benefit likely to spring out of the enterprise."¹⁰⁶ On the other hand, Oregon has required a direct benefit to the public before private land may be condemned,¹⁰⁷ stating a rationale similar to the one expressed in *United States v. Certain Lands in Louisville*.¹⁰⁸

Article 1 of the New York Constitution contains language, similar to that used in the Fifth Amendment, that permits the exercise of eminent domain powers for "public use."¹⁰⁹ In *New York City Housing Authority v. Muller*,¹¹⁰ the Court of Appeals took a narrow view of "public use" and limited condemnation in support of housing projects

102. *Id.* at 158.

103. 253 U.S. 233, 242 (1920).

104. The Court was forthright, if not informative, in its definition of substantive due process: "What is meant by due process of law this court has had frequent occasion to consider, and has always declined to give a precise meaning, preferring to leave its scope to judicial decisions when cases from time to time arise." 253 U.S. at 238. For criticisms of this concept of the Due Process Clause, see *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2883 (1992) (Scalia, J., dissenting in part); see generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977).

105. See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (legislation authorizing condemnation of land and resale to private parties in order to reduce concentration of land ownership in Hawaii was "rationally related to a conceivable public purpose" and, hence, constitutional); see also *Richardson v. City and County of Honolulu*, 759 F. Supp. 1477 (D. Haw. 1991) (legislation regulating condominium rents found to have a legitimate public purpose where local governing body found that Hawaii's ground leasehold system and high demand for housing had created a social emergency).

106. *Simon v. O'Toole*, 108 N.J.L. 32, 35, (Sup. Ct. 1931), *aff'd*, 108 N.J.L. 549 (N.J. 1932).

107. *Foellar v. Housing Auth. of Portland*, 256 P.2d 752 (Or. 1953) (public use of land taken in a redevelopment area "demands that the public's use and occupation of the property must be direct. . . . If the challenged statute contemplated that the Housing Authority should do no more than acquire, through the power of eminent domain, the property which comprises a project area, and then sell it to private parties who could do with it whatever they chose, the statute, obviously, would be invalid.").

108. 78 F.2d 684 (6th Cir. 1935). See also *supra* notes 95-98 and accompanying text.

109. Compare note 93 (public use provision of New York State Constitution) with note 97 (public use provision of Fifth Amendment to United States Constitution).

110. 1 N.E.2d 153 (N.Y. 1936).

to cases presenting a "substantial menace to the public health, safety or general welfare."¹¹¹ The court made it clear that an "incidental or colorable" public benefit is inadequate to justify the condemnation of private property.¹¹² More recently, in *Russin v. Town of Union of Broome County*,¹¹³ the Third Department invalidated the condemnation of land that was to be developed as low-income housing for sale to elderly individuals, because Article 18 authorized only low-rent housing. The court defined "public use" in a way that encompasses Article 18 objectives:

In the area of housing, a public use is generally found in and of itself if (1) the project will eliminate or prevent slums or blighted areas, even if the property is subsequently developed privately, or (2) the project will provide low-rent housing.¹¹⁴

The land that was to be condemned in *Russin* was not located in a blighted area. In addition, as noted, the proposed use was not low-rent housing, but the sale of units to occupants. The court thus found that condemnation was not authorized by Article 18, and concluded that there was no recognizable public use.¹¹⁵

In sum, New York has limited condemnation of private land to cases in which a clear public benefit is provided. While the federal Constitution would allow the States to take private property where the State's declaration of public use is not "clearly unfounded,"¹¹⁶ New York courts have limited condemnation for housing purposes to

111. *Id.* at 155. The court stated, "the essential purpose of the legislation [State Housing Law, *supra* note 27, and Municipal Housing Authorities Law, *supra* note 41] is not to benefit [low income persons] or any class; it is to protect and safeguard the entire public from the menace of the slums." *Id.* at 156. Delegates to the 1938 constitutional convention argued for adoption of Article 18 on the grounds that it would help clear slums and improve the public health. REVISED RECORD, *supra* note 26, vol. II, at 1532, 1563.

112. 1 N.E.2d at 156. "Nothing is better settled than that the property of one individual cannot, without his consent, be devoted to the private use of another, even where there is an incidental or colorable benefit to the public."

113. 521 N.Y.S.2d 160 (App. Div. 1987).

114. *Id.* at 161 (citations omitted); see also *Murray v. LaGuardia*, 43 N.Y.S.2d 408 (Sup. Ct.), *aff'd*, 42 N.Y.S.2d 612 (App. Div.), *aff'd*, 52 N.E.2d 884 (N.Y.), *cert. denied* 321 U.S. 771 (1943) (the provision of low rent housing for persons of low income and the reconstruction of substandard areas both serve legitimate public purposes).

115. The Fourth Department has taken a broader view of "public use," holding that the term encompasses "any use which contributes to the health, safety, general welfare, convenience or prosperity of the community." *Byrne v. N.Y. State Office of Parks, Recreation & Historic Preservation*, 476 N.Y.S.2d 42, 42 (App. Div. 1984). The case, however, concerned a recreation facility that would be open to the general public. It is not at all clear that the courts would take a similar view of private housing accommodations that are not built in connection with the clearance of slums, to provide low-rent housing covered by Article 18, or as part of some other project that benefits the public.

116. See *supra* notes 103-05 and accompanying text.

programs authorized by Article 18 of the New York Constitution. Accordingly, the requisite "public use" will be found where condemnation is needed to clear slums and areas of blight or to assemble sites for the construction of low rent housing for low-income persons. On the other hand, condemnation may not be used to support homeownership programs, for example, in the absence of some direct benefit to the public.¹¹⁷

2. *Public Use Limits Under Article 8*

Article 8, § 1¹¹⁸ of the New York Constitution imposes restrictions upon making a gift or loan of public funds or property for a "private undertaking," which also raises questions of public use. The term "private undertaking" is given a very narrow definition, however, which is not easily reconciled with the definition of "public use" found in condemnation cases in the housing field.

In an opinion issued in 1987, the New York Attorney General concluded that a county could, consistent with Article 8, donate an unused county nursing home to a nonprofit corporation that would convert the project into rental units for the elderly with funds made available by the State.¹¹⁹ In 1988, the Attorney General concluded that a city could donate real property to a nonprofit corporation that would build "reasonably priced houses to be marketed to qualified first-time home buyers whose housing needs are not being met."¹²⁰ The opinion found that the program served a valid public purpose, "by retaining residents who contribute to the local economy and the local tax base [and by] creat[ing] jobs, thereby benefitting the local economy."

The 1987 opinion is consistent with *Russin*¹²¹ and *Muller*,¹²² both of which limited the definition of "public use" to projects serving the purposes of Article 18, because the nursing home would be used by the donee as low rent housing.¹²³ The gift was also consistent with Article 8 because the nursing home would be put to public use, not for a "private undertaking."¹²⁴ By contrast, the homeownership program

117. See *supra* notes 109-15 and accompanying text.

118. See *supra* note 94.

119. 1987 Op. Att'y Gen. 58, discussed *infra* notes 121-24 and accompanying text.

120. 1988 Op. Att'y Gen. I 88-75.

121. *Russin v. Town of Union of Broome Co.*, 521 N.Y.S.2d 160 (App. Div. 1987). See *supra* notes 113-15 and accompanying text.

122. *New York City Hous. Auth. v. Muller*, 1 N.E.2d 153 (N.Y. 1980). See *supra* notes 110-12 and accompanying text.

123. Article 18 declares that low-rent housing for low-income persons is a public use.

124. The 1987 opinion did not consider whether the county's participation in the project was inconsistent with Article 18 or with the Public Housing Law. The answer to this

described in the Attorney General's 1988 opinion seems indistinguishable from that which the *Russin* court declared not to be a public use. *Russin* invalidated condemnation orders on the basis of Article 1 because taking land for sale to homebuyers was not regarded as a legitimate public use. The Attorney General, however, concluded that the sale of land to first-time homebuyers served a valid public purpose and thus did not involve an unlawful gift.

There is no reason why government "takings" of private property must be judged using the same definition of public use as used for gifts of public property. Indeed, due process guarantees restrict condemnation proceedings,¹²⁵ but they have no application to gifts of public property. On the other hand, Article 8's prohibition against gifts for private undertakings should not be so narrowly defined as to sanction virtually any program the government supports. Such a view would render the prohibition largely superfluous in violation of accepted standards of construction.¹²⁶ If, as the Attorney General said, retaining residents in an area and providing employment opportunities is all that is required to establish a public use, it would be difficult to conceive of *any* otherwise lawful circumstances in which the government could not condemn land or give public property away. Homeownership programs should therefore be considered private undertakings for purposes of Article 8 unless direct benefits of some kind are obtainable by the public. Slum clearance would certainly qualify; a program focused on eliminating unemployment in distressed areas would probably qualify; and other objectives — such as combating drug abuse and crime or ending dependency on welfare — might qualify.¹²⁷

Questions similar to those raised by homeownership plans would also be presented by rent subsidy programs. It has been said that rent subsidy programs are not authorized by Article 18, because under Section 2 of the Article, assistance to owners of private projects is limited to loans and not subsidies.¹²⁸ The legality of using state or local funds for such programs may therefore be subject to challenge as

would presumably depend upon the extent to which the county participated in the development and execution of the proposal. *Cf. infra* notes 80-90, 313-16 and accompanying text (discussion of county's performance of Section 8 administrative services).

125. *See supra* notes 99-105 and accompanying text.

126. *NEW YORK MCKINNEY'S STATUTES* § 231 (1971); *see Rocovich v. Consolidated Edison Co.*, 583 N.E.2d 932, 935 (N.Y. 1991) ("It is an accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided").

127. *Cf. Daubner v. Harris*, 514 F. Supp. 856, 867 (S.D.N.Y. 1981) (maintaining status of New York City as a cultural center may justify subsidized housing for artists).

128. *See TEMPORARY STATE COMMISSION*, *supra* note 4, at 27 n.64; *but see infra* notes 260-65 and accompanying text. For the full text of Article 18, § 2, *see supra* note 67.

unlawful gifts.¹²⁹ Furthermore, any program that gives tenants the right to move and transfer their subsidies to a new dwelling¹³⁰ may be more difficult to justify than programs under which assistance is tied to a specific project, since the subsidies would be payable to any landlord who agreed to lease acceptable housing rather than being directed toward neighborhoods designated for improvement by public officials. Benefits of the program would then flow more to the individual tenant and less to identifiable neighborhoods where the assistance could be justified as meeting some public need.

In sum, it may be said that programs not authorized by Article 18 may lack the public benefits needed to avoid challenges under Article 8, although the definition of public use for this purpose is not as narrow as that found in condemnation cases. County powers to undertake housing programs would be limited by these rules whereas the powers of the state, municipal governments and public corporations would be enlarged to the extent provided in Article 18.¹³¹

B. Public Debt Limits

Article 8, § 4 of the New York Constitution imposes specific limitations on indebtedness incurred for general governmental purposes by counties and other units of local government.¹³² The limits are 10% of "average full valuation of taxable real estate" for Nassau County and New York City,¹³³ 9% for cities with populations of at least 125,000,¹³⁴ and 7% for all other counties, cities, towns and villages.¹³⁵ Debt for housing purposes is authorized by Article 18, § 4,¹³⁶ which

129. See 22 Op. N.Y. Comp. 489 (1966) (city cannot pay rent of displaced persons, as this would be a gift in violation of Art. 8). The use of federal funds is not subject to the gift and loan provisions of the New York Constitution. See *Kradjian v. City of Binghamton*, 482 N.Y.S.2d 89, 91 (App. Div. 1984). Participation in the Section 8 Program therefore raises no question that it may involve an unlawful private undertaking.

130. See 24 C.F.R. pt. 887, subpt. L (1992), which governs mobility and portability of housing vouchers. Congress extended portability rights to holders of Section 8 Existing Certificates in the Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 145, 101 Stat. 1852 (1987) (codified as amended at 42 U.S.C. § 1437f(r) (1988 & Supp. II 1990)).

131. For example, Article 18, § 8 authorizes "excess condemnation" in proceedings furthering the purposes of Article 18. This power would not be available in county programs because counties are excluded from Article 18.

132. N.Y. CONST., art. 18, § 4 provides that indebtedness is deemed to include "liability . . . on account of any contract for capital or periodic subsidies to be paid subsequent to the then current year." This would include annual contributions for amortization of development loans as well as those which fund operating subsidy contracts.

133. N.Y. CONST., art. 8, §§ 4(a), (c).

134. *Id.* § 4(d).

135. *Id.* §§ 4(b), (e), (f), (g).

136. N.Y. CONST., art. 18, § 4 provides, in pertinent part:

imposes special limitations on such debt. First, Article 18, § 4 authorizes cities, towns and villages to contract indebtedness to the extent of 2% of the "average assessed valuation" of real estate subject to taxation, rather than of *full* value, as with general purpose debt.¹³⁷ Second, the authority to incur debt for housing activities under Article 18 is in addition to general purpose debt that may be incurred by cities and larger villages, but it is included within the Article 8 debt limit for towns and small villages.¹³⁸ Thus, borrowing for housing purposes will not reduce the amount of debt that larger municipalities may incur for general purposes, but it will have that effect in towns and small villages.

The framers of Article 18 intended to withhold housing powers from county governments in order to avoid pyramiding county debt on that of cities, towns and villages carrying on the same activities. The comments of delegate F.C. Moore regarding what would become Article 18 are illustrative:

[S]hould all these subdivisions of government [any political subdivision, instrumentality or agency of the state, any county, city, town or village or instrumentality thereof] be permitted to go into the field of housing? We do not believe that the county should . . .¹³⁹ be permitted to do so.

In the City of New York your counties cannot, of course, incur any indebtedness. Our upstate county government is an overlying unit of government. It overlies the cities, the towns and villages contained in the county. In the City of New York under the proposal, you would have one municipal agency within the city exercising housing powers. Upstate, if counties were left in, we would

To effectuate any of the purposes of this article, the legislature may authorize any city, town or village to contract indebtedness to an amount which shall not exceed two per centum of the average assessed valuation of the real estate of such city, town or village subject to taxation. . . .

* * *

Indebtedness contracted pursuant to this article shall be excluded in ascertaining the power of a city or such village [with a population over 5,000] otherwise to create indebtedness under any other section of this constitution.

137. In 1965, the voters rejected an amendment to Article 18, § 4 that would have calculated housing debt on the basis of full value (the term used in Article 8) rather than assessed value. It has been suggested that this is evidence that the voters misunderstand housing issues, see TEMPORARY STATE COMMISSION, *supra* note 4, at 18, but it more likely reflects a hostility to higher taxes and subsidized housing. See *Final Report, supra* note 79, at 35 (noting voter rejection of proposals to increase housing debt limits).

138. The more restrictive rule for towns and small villages accommodated upstate opposition to higher debt because of housing activities. See REVISED RECORD, *supra* note 26, vol. II, at 1527.

139. A second "not" which appears in the record is omitted since it was apparently included in error.

have the cities, the towns and the villages in the county carrying on housing functions and on top of that we would pyramid the debt by having the county carrying on the same functions, too.¹⁴⁰

It would appear that while a concern with administrative confusion may have motivated some of the opposition to county powers, a concern with overall cost was foremost to most of the delegates.¹⁴¹ This concern is reflected by Article 18, § 3 which severely limits state debt in support of housing and requires that any increases be approved by the voters.¹⁴² Clearly, the framers were reluctant to incur public debt for assisted housing. In a period of fiscal austerity for virtually all levels of government, it is likely that their concerns are widely shared today and that attempts to amend Article 18 to include counties would be resisted purely on economic grounds.

To the extent counties incur debt for the "aid, care and support of the needy," they may use their general purpose debt limits.¹⁴³ However, while it appears from the discussion below that Article 17 of the New York Constitution authorizes the legislature to provide low-income housing for persons requiring special services,¹⁴⁴ it is not clear that counties have authority under existing legislation to incur indebtedness for any *housing* activities. First, the Local Finance Law¹⁴⁵ establishes procedures for incurring housing debt for Article 18 purposes that do not apply to counties. There is no clear statutory authority elsewhere that would permit counties to incur debt for housing purposes. Second, by requiring that housing debt of towns and small villages be counted against their general debt limits, the framers of Article 18 intended to restrict housing-related debt.¹⁴⁶ It would frustrate their statutory scheme if debt for housing purposes could be incurred to the limit of general debt authority.¹⁴⁷

140. REVISED RECORD, *supra* note 26, vol. II, at 1526.

141. For example, Governor Alfred E. Smith and Congressman Hamilton Fish, among others, warned that New York City real estate was overtaxed and that further taxes would be counterproductive. *Id.* at 1568, 1577.

142. The provision limits aggregate annual subsidies to \$34 million. N.Y. CONST., art 18, § 3.

143. N.Y. CONST., art. 8, § 1, ¶ 2.

144. *See infra* notes 161-65 and accompanying text.

145. Section 150.00 of the New York Local Finance Law provides that the 2% limit applies to activities effectuating the purposes of Article 18 that are undertaken by cities, towns and villages. N.Y. LOCAL FIN. LAW § 150.00 (McKinney 1968 & Supp. 1992); *see also id.* § 11.00(a)(41). It is not clear that county housing activities are authorized by any other provisions of the statute. *See infra* notes 201-03 and accompanying text.

146. *See supra* notes 137-38 and accompanying text.

147. *Cf. Diehl v. O'Dwyer*, 84 N.Y.S.2d 109, 113 (Sup. Ct. 1948). In *Diehl*, the court stated that it was for New York City to decide whether debt incurred for a "facilit[y] . . . incidental or appurtenant to a project," *see* N.Y. CONST., art. 18, § 1, could be financed

In sum, counties lack authority to incur indebtedness for assisted housing activities authorized by Article 18. They may use their general debt limits under Article 8 to fund programs for the aid, care and support of the needy, but the legislature has provided no clear debt authority for county housing programs.

C. Aid, Care and Support of the Needy

Article 17, § 1 of the New York Constitution requires that the state and its subdivisions provide assistance to the needy "in such manner and by such means, as the legislature may from time to time determine."¹⁴⁸ Counties are subdivisions of the state,¹⁴⁹ and may therefore be required to provide assistance under Article 17. It has been held that Article 17 creates an entitlement to public assistance for those defined as needy, although the legislature retains discretion to classify recipients of aid and to define the term "needy."¹⁵⁰ It has also been held that where access to aid programs is contingent upon subjective factors, applicants for assistance do not have a constitutional right to benefits, and the government is therefore not required to provide benefits to all who might be eligible.¹⁵¹

The Appellate Division suggested in *McCain v. Koch*,¹⁵² a suit brought on behalf of homeless persons to force New York City to improve conditions in its homeless shelters, that Article 17 requires the state and its subdivisions to provide emergency housing to eligible families. The Court of Appeals, however, declined to reach that question on appeal because the issues in the case were resolved on other grounds.¹⁵³ The state of the law thus remains uncertain. In *McCain*,

within its general debt limit or within the 2% housing debt limit. The court would therefore allow projects authorized by Article 18 to be funded under general purpose debt limits.

148. N.Y. CONST., art. 17, § 1 provides: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."

149. Subdivisions of the State include all political jurisdictions within the state, including counties, municipalities and any number of public districts. See 1 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 1.38 (3rd ed. 1987). Under the New York Constitution, the legislature may provide for the creation of local governments, including counties. N.Y. CONST., art. 9, § 2(a).

150. See *Tucker v. Toia*, 371 N.E.2d 449, 452 (N.Y. 1977).

151. See *Morillo v. City of New York*, 582 N.Y.S.2d 387, 391 (App. Div. 1992) (squatters in city-owned housing have no right to housing under a city program that places homeless persons in *in rem* properties because of the broad discretion the City retained in selecting program beneficiaries).

152. 484 N.Y.S.2d 985 (Sup. Ct. 1984), *modified*, 502 N.Y.S.2d 720 (App. Div. 1986), *rev'd on other grounds*, 511 N.E.2d 62 (N.Y. 1987).

153. *McCain*, 511 N.E.2d at 65 n.4.

homeless persons with children contended, among other things, that the state and its subdivisions were obligated to provide them with adequate emergency shelter under the mandate of Article 17.¹⁵⁴ The trial court recognized no such mandate, but found that once the government undertakes to provide shelter, it must meet reasonable minimum standards as determined by the court.¹⁵⁵ The Appellate Division reversed,¹⁵⁶ suggesting that Article 17 obligates government to provide emergency shelter, but holding that the adequacy of such shelter is a matter committed to legislative discretion.¹⁵⁷ The court of Appeals reversed, holding that the courts have power to impose habitability standards for shelter made available by the government. The court expressly declined, however, to decide whether the government has a constitutional obligation to furnish shelter to those in need.¹⁵⁸

The conclusion that the state and its subdivisions are obligated to house persons who are "needy" could be based upon specific enactments by the legislature, but it is difficult to see how Article 17 itself creates such an obligation. If it did, virtually all low-income housing programs would become entitlements, governments would be required to finance prohibitive costs through current revenue since borrowing would still be limited by Article 8,¹⁵⁹ and Article 18 would become largely superfluous. Such results argue strongly against the conclusion that Article 17 alone creates an obligation to provide housing for persons in need. Rather, Article 17 should be interpreted as authority for the legislature to enact general laws under which the state and local governments (including counties) may be required to provide public assistance to the needy. This could include housing programs that are consistent with Article 18 if the legislature so determines or it may be limited to cash payments.¹⁶⁰

Legislation enacted pursuant to Article 17 provides authority for county housing programs that may be distinguished from low-rent

154. See *supra* note 148.

155. 484 N.Y.S.2d at 987.

156. The court's decision was based on *Bernstein v. Toia*, 373 N.E.2d 238 (N.Y. 1977), which held that Article 17 does not mandate that public assistance must be granted on an individual basis in every instance or that the state "must always meet in full measure all the legitimate needs of each recipient." *Id.* at 244.

157. 502 N.Y.S.2d at 728, 731.

158. 511 N.E.2d at 65 n.4.

159. See *supra* notes 132-38 and accompanying text.

160. The legislative history of Article 17 that is quoted in *Tucker v. Toia*, 371 N.E.2d 449 (N.Y. 1977), refers to the state's obligation to provide "relief of the needy" and states that the legislature may "continue the system of relief now in operation, . . . preserve the present plan of reimbursement to the localities" or devise "new ways of dealing with the problem." *Id.* at 452.

housing of the kind authorized by Article 18. Such legislation has thus far drawn a clear distinction between Article 18 programs and special needs programs authorized by Article 17 that are supervised by the Department of Social Services. For example, under Section 193 of the Social Services Law,¹⁶¹ county welfare districts may establish and operate "public homes" or "adult care facilities," which are defined as residences for low-income persons who cannot live independently.¹⁶² Statutes implementing Article 18,¹⁶³ by contrast, create programs for all low-income persons. In addition, statutory definitions of "residence for adults"¹⁶⁴ and "adult home,"¹⁶⁵ which refer to county facilities authorized by Article 17, expressly exclude housing projects assisted under the Private Housing Finance Law or the Public Housing Law unless such projects operate "distinct programs . . . which provide supervision and/or personal care" approved by the Department of Social Services.

The Legislature has thus limited Article 17 to programs for persons who cannot live independently and has used its authority under Article 18 to provide low-rent housing for the general population of low-income persons. Even though counties cannot undertake Article 18 programs, it would seem that the legislature can give them full authority to participate in programs authorized by Article 17.

The growth of federal special needs programs in recent years has created increased opportunities for county activity in Article 17-type housing programs. For example, the federal program of "supportive housing for the disabled," which was established by the National Affordable Housing Act of 1990,¹⁶⁶ funds housing that could fall within the scope of Article 17 since the program benefits individuals who cannot live independently and requires that state social service agencies approve the supportive services. Participation in recent programs for the frail elderly and the homeless might also be authorized by

161. N.Y. SOC. SERV. LAW § 193 (McKinney 1983).

162. *Id.* §§ 2(21), 193 (McKinney 1983); 10 Op. N.Y. Comp. 55 (1954). Section 193 authorizes county welfare districts to establish a "public home," defined as an "adult care facility." An "adult care facility" is "a family type home for adults, a shelter for adults, a residence for adults or an adult home, which provides temporary or long-term residential care and services to adults who, though not requiring continual medical or nursing care . . . are by reason of physical or other limitations associated with age, physical or mental disabilities or other factors, unable or substantially unable to live independently." N.Y. SOC. SERV. LAW § 2(21) (McKinney 1983).

163. N.Y. PUB. HOUS. LAW (McKinney 1989); N.Y. PRIV. HOUS. FIN. LAW (McKinney 1991).

164. N.Y. SOC. SERV. LAW § 2(24) (McKinney 1983).

165. *Id.* § 2(25).

166. Pub. L. No. 101-625, § 811, 104 Stat. 4324 (1990) (codified at 42 U.S.C. § 8013 (Supp. II 1990)).

legislation enacted pursuant to Article 17.¹⁶⁷ Under Section 131-v of the Social Services Law,¹⁶⁸ county social services officials are authorized to contract with private organizations to provide temporary emergency shelter for the homeless to the extent this is consistent with federal law.¹⁶⁹

County participation in federal programs is subject to federal program requirements that in some cases — such as supportive housing for persons with disabilities — limit funding to private, nonprofit organizations.¹⁷⁰ State enabling legislation could, however, authorize county governments to assist such programs with their own funds. In addition, HUD is authorized by the Stewart B. McKinney Homeless Assistance Act¹⁷¹ to make grants to units of general local government (including counties) to meet the emergency, transitional and permanent housing needs of the homeless and to help the poor avoid becoming homeless. Federal programs in which counties may be eligible participants, either directly or in cooperation with the state or other units of local government, include the Emergency Shelter Grants Program,¹⁷² Transitional Housing,¹⁷³ Permanent Housing for Handicapped Homeless Persons,¹⁷⁴ and Supplemental Assistance for Facilities to Assist the Homeless.¹⁷⁵ To the extent facilities funded under such programs meet the definition of “public home” under Section 193 of the Social Services Law¹⁷⁶ or are provided under contracts entered into pursuant to Section 131-v of the Social Services Law,¹⁷⁷

167. See *supra* notes 58-61 and accompanying text.

168. N.Y. SOC. SERV. LAW § 131-v (McKinney Supp. 1992).

169. See *infra* notes 170-77 and accompanying text.

170. 42 U.S.C. § 8013(b) (Supp. II 1990).

171. Pub. L. No. 101-625, § 821(a), 104 Stat. 4334 (1990) (codified at 42 U.S.C. § 11363 (Supp. II 1990)).

172. 24 C.F.R. pt. 576 (1992). Program funds may be used to rehabilitate or convert buildings for use as emergency shelters for the homeless. 24 C.F.R. § 576.21.

173. 24 C.F.R. pt. 577 (1992). Program funds may be used to construct, acquire or rehabilitate structures to be used as transitional housing for disabled homeless people or homeless families with children. The purpose of the housing is to facilitate the relocation of the residents to independent living accommodations within 24 months. 24 C.F.R. § 577.100.

174. 24 C.F.R. pt. 578 (1992). States may apply under this program for funds to construct, acquire or rehabilitate group homes for handicapped homeless persons in need of supportive services. 24 C.F.R. § 578.5.

175. 24 C.F.R. pt. 579 (1992). Funds are provided for facilities and services (including temporary housing) that help move the homeless population to permanent housing where they can live independently. 24 C.F.R. § 579.215(b)(2)(i).

176. See *supra* note 162.

177. N.Y. SOC. SERV. LAW § 131-v (McKinney Supp. 1992). See *supra* notes 168-69 and accompanying text.

they could be provided by county welfare districts in accordance with their Article 17 powers.

In sum, counties have authority to provide various kinds of housing assistance to the needy under statutes implementing Article 17 of the New York Constitution. These statutes, however, limit assistance to persons who are unable to live independently and who require supportive services provided by county social services agencies.

IV. County Police Powers in Assisted Housing Programs

Courts have long recognized that powers of government to protect the health, safety and welfare of the public support the construction of low-income housing in conjunction with the eradication of slums. For example, in *New York City Housing Authority v. Muller*,¹⁷⁸ the New York Court of Appeals found that condemnation in support of public housing projects constructed before Article 18 was adopted was justified as an effort to "cure or check" slum conditions.¹⁷⁹ In *Murray v. LaGuardia*,¹⁸⁰ construction of the privately owned Stuyvesant Town project in New York City was found to be authorized by municipal powers to beautify and reconstruct the City that are "akin to the police power."¹⁸¹

The adoption of Article 18 accomplished two main objectives: first, it removed any doubt about the public purpose of low-income housing activities that were authorized by Article 18;¹⁸² and second, it codified the extent and nature of government's power to provide low-income housing.¹⁸³ Article 18's codification of housing powers is substantially the same as the recognized definition of police powers in the housing field.¹⁸⁴ Viewed this way, it may be argued that Article 18

178. 1 N.E.2d 153 (N.Y. 1936).

179. *Id.* at 155 ("The Session Laws for nearly seventy years past are sprinkled with acts applying the taxing power and the police power in attempts to cure or check [the menace of the slums]"). The court upheld a statute giving cities the power of eminent domain to assist in eradicating slums, calling this "the last of the trinity of sovereign powers." *Id.* at 154.

180. 43 N.Y.S.2d 408 (Sup. Ct.), *aff'd*, 42 N.Y.S.2d 612 (App. Div.), *aff'd*, 52 N.E.2d 884 (N.Y. 1943), *cert. denied*, 321 U.S. 771 (1944).

181. 43 N.Y.S.2d at 411.

182. *See Op. Att'y Gen.* 92-4, *supra* note 2, at 1014.

183. *See REVISED RECORD, supra* note 26, vol. II, at 1528-29 (remarks of delegate F.C. Moore at the 1938 Constitutional Convention) ("We believe that in placing in the Constitution housing powers for the agencies and subdivisions of the State government, we are . . . invading a new field. We feel, however desirable it may be to go into that uncharted territory, we should take along with us as our compass the lesson learned from our fiscal experience of the past, and that such restrictions should be incorporated in the proposal as our experience has determined wise.")

184. *See* 7A EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 24.563 (3rd ed.

limits housing police powers to the units of government and activities contained therein, and that since counties are excluded from those activities, they are, in effect, denied police powers in the housing field. This view was taken by a number of housing officials who testified in favor of a revised constitution proposed in 1967 that would have expanded the scope of Article 18.¹⁸⁵

A. The Attorney General's View of County Police Powers

The New York State Attorney General has taken a markedly different view. In an opinion issued in 1992, the Attorney General responded to a request from three New York counties that he state "whether and the extent to which a county may develop affordable housing."¹⁸⁶ The request was supported by arguments from private lawyers and legal academics that Article 17 provides authority for county participation in affordable housing programs.¹⁸⁷ The Attorney General did not address those arguments on the merits, however, because he concluded that adequate authority for county housing programs existed in Article 9.¹⁸⁸

The 1992 opinion traces the history of Article 18, finding that

[t]he unambiguous intent of the framers . . . was to grant to the Legislature a limited power to enable certain specified political subdivisions to engage in the clearance of slums and creation and maintenance of public housing. The exclusion of counties from this group of subdivisions was deliberate.¹⁸⁹

The Article was needed, the Attorney General said, to declare that affordable housing is a valid public purpose and to give the legislature authority to provide for affordable housing programs.¹⁹⁰ Power to conduct such activity did not otherwise exist for most local governments, he continued, because with the exception of cities, local governments had no significant home rule powers when Article 18 was adopted.¹⁹¹

The Attorney General concluded that Article 18 should be seen as

1989) ("Slum clearance, the elimination of unsafe and dilapidated tenements, rehabilitation of blighted areas, housing projects for persons of low income, low-rent housing districts and the like are within the general police power to provide for the public health, safety and welfare.").

185. See *infra* notes 266-69 and accompanying text.

186. See Op. Att'y Gen. 92-4, *supra* note 2, at 1010.

187. *Id.* at 1011.

188. *Id.*

189. *Id.* at 1013.

190. *Id.* at 1014.

191. *Id.*

a grant of powers to the particular units of government included therein, not as a limitation on housing powers granted elsewhere.¹⁹² This conclusion is based upon Article 18, § 10, which is construed as a preservation of housing powers existing under other provisions of law.¹⁹³ The authority for counties to engage in low-income housing was then found in home rule powers that were given to counties and municipalities under Article 9 of the Constitution as amended in 1963.¹⁹⁴

The rest of the opinion discusses the extent of Article 9 police powers, noting that they must not be inconsistent with the general laws of the State or exercised in a field that the State has preempted.¹⁹⁵ The Attorney General does not discuss either limitation in detail and says only that programs undertaken under Article 9 must be "separate and distinct from the specific scheme for provision of low-income housing" that is created by Article 18.¹⁹⁶ A list of "affordable housing activities" is offered as examples of what counties may do,¹⁹⁷ but the opinion does not define "affordable housing" or otherwise identify the kinds of programs in which such activities may be pursued.

Finally, the Attorney General opined that, notwithstanding the 2% limit on housing debt that applies to cities, towns and villages under

192. *Id.* at 1015.

193. N.Y. CONST., art. 18, § 10 provides:

The legislature is empowered to make all laws which it shall deem necessary and proper for carrying into execution the foregoing powers. This article shall be construed as extending powers which otherwise might be limited by other articles of this constitution and shall not be construed as imposing additional limitations; but nothing in this article contained shall be deemed to authorize or empower the state, or any city, town, village or public corporation, to engage in any private business or enterprise other than the building and operation of low rent dwelling houses for persons of low income as defined by law, or the loaning of money to owners of existing multiple dwellings as herein provided.

194. See Op. Att'y Gen. 92-4, *supra* note 2, at 1015. N.Y. CONST., art. 9, § 2(c)(ii)(10) empowers local governments to enact legislation relating to "[t]he government, protection, order, conduct, safety, health and well-being of persons or property therein."

195. Op. Att'y Gen. 92-4, *supra* note 2, at 1015 n.1.

196. *Id.* at 1017.

197. *Id.* at 1016-17. The list includes:

county provision or acquisition of necessary land; the siting of affordable housing by county government in appropriate locations within the county; county construction of affordable housing; cooperation by the county with other municipalities in the joint provision of affordable housing utilizing the constitutional and statutory grant of authority for municipal cooperation; the appropriation of county funds for these purposes; and the financing of the costs of the affordable housing program consistent with general constitutional debt limitations.

Id. (citations and footnotes omitted).

legislation implementing Article 18,¹⁹⁸ counties may fund affordable housing to the full extent of their general debt limits.¹⁹⁹ This is consistent with Article 18, he says, because it “prevent[s] the spiraling of debt,” as the framers intended.²⁰⁰

Legislation governing the issuance of public debt prohibits counties and other municipal jurisdictions from issuing bonds for a period longer than the specified “period of probable usefulness” (“PPG”) of the asset to be funded.²⁰¹ The statute specifies PPGs for housing projects that are constructed in accordance with the Private Housing Finance Law and the Public Housing Law, both of which implement Article 18.²⁰² The Attorney General acknowledged that the Public Housing Law excludes counties from housing activities, but concluded that other subdivisions of the Local Finance Law “may provide” PPGs for county housing programs.²⁰³ No such provisions are identified, however, and none appear from an examination of the statute.

In sum, the Attorney General found that counties had the power to undertake low-income housing activities under their general police powers and that they could fund such activities by incurring indebtedness to the extent of their general debt limits. The only limitation he recognized was that county powers may not involve the “specific scheme” of Article 18, which he did not attempt to define. Legislation that governs the issuance of public debt for housing purposes appears to be inapplicable to counties, and the Attorney General failed to show that there is a statutory basis allowing counties to incur such debt. This opinion represents a sharp departure from prior opinions of the Attorney General and the State Comptroller,²⁰⁴ and while its description of the history of Article 18 is unassailable, its application of that history and its analysis of the statutory scheme are subject to several criticisms, as the following discussion shows.

198. N.Y. LOCAL FIN. LAW § 150.00 (McKinney 1968 & Supp. 1992); *see supra* notes 132-38 and accompanying text.

199. Op. Att’y Gen. 92-4, *supra* note 2, at 1018.

200. *Id.*

201. N.Y. LOCAL FIN. LAW § 11.00 (McKinney 1968 & Supp. 1992).

202. *Id.* § 11.00(a)(41). N.Y. PRIV. HOUS. FIN. LAW § 2(20) (McKinney 1991) and N.Y. PUB. HOUS. LAW § 3(13) (McKinney 1989) define projects undertaken thereunder as those which “effectuate the purposes of article eighteen.”

203. Op. Att’y Gen. 92-4, *supra* note 2, at 1018.

204. *See supra* notes 68-71 and accompanying text; *see also supra* notes 80-90 and accompanying text (discussing Op. N.Y. Comp. 76-1037 (1976) (unreported)).

1. *The Attorney General's Opinion is Inconsistent With Rules of Statutory Construction*

In the first place, the argument that Article 18 does not prohibit counties from undertaking housing programs is, as discussed above,²⁰⁵ inconsistent with "traditionally accepted standards of statutory construction."²⁰⁶ These standards dictate that the exclusion of counties from Article 18 should be interpreted as a prohibition against county participation. The Attorney General's view that the 1963 revisions to Article 9 which granted police powers to counties, towns and villages superceded the exclusion of county powers in Article 18 contravenes the rule disfavoring the implied repeal of statutes.²⁰⁷ The view would also render the inclusion of *cities* in Article 18 superfluous since cities already had full home rule powers when Article 18 was adopted in 1938.²⁰⁸ If police powers had been sufficient to undertake housing programs, there would have been little point to granting housing powers to cities in Article 18.²⁰⁹ If, in fact, police powers conferred authority to undertake low-income housing projects, most of Article 18 would have become extraneous upon the adoption of the 1963 revisions to Article 9. The Attorney General's view that Article 9 empowers counties to participate in low-income housing programs therefore contravenes the rule that statutory interpretations should be avoided if they would render portions of the statute meaningless.²¹⁰ The Attorney General did not discuss any of these principles of statutory construction.

205. See *supra* notes 72-74 and accompanying text.

206. See *Golden v. Koch*, 404 N.E.2d 1321, 1323 (N.Y. 1980).

207. See NEW YORK MCKINNEY'S STATUTES § 396 (1971).

208. N.Y. CONST., art. 9, in effect on January 1, 1939 provided, in pertinent part:

§ 4. . . . The Legislature shall, by general laws, confer upon the boards of supervisors, or other governing elective bodies, of the several counties of the state such further powers of local legislation and administration as the legislature may, from time to time, deem expedient. . . .

* * *

§ 12. . . . Every city shall also have the power to adopt and amend local laws not inconsistent with this constitution and laws of the state . . . in respect to the following subjects: . . . the government and regulation of the conduct of its inhabitants and the protection of their property, safety and health.

209. One reason for including cities in Article 18 would be to increase their borrowing capacity for housing programs. See N.Y. CONST., art. 18, § 4. This would not explain the inclusion of cities in Article 18, § 2, however.

210. NEW YORK MCKINNEY'S STATUTES § 231 (1971); see *Rocovich v. Consolidated Edison Co.*, 583 N.E.2d 932, 935 (N.Y. 1991) ("It is an accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided").

2. *The Attorney General's Opinion is Inconsistent With Debt Limitations*

If the Attorney General's view of Article 18 were correct, the constitutional scheme of debt limitations imposed upon local governments would be irrational. As discussed above,²¹¹ debt limits for general governmental purposes range from 7-10% of the full value of real estate within the taxing jurisdiction, but debt for Article 18 housing purposes is limited to 2% of assessed value. This 2% may be incurred in addition to the general limits of cities and large villages, but it counts against the general debt limits of towns and small villages.²¹²

By finding general police powers adequate to undertake low-income housing activities, the Attorney General reaches the anomalous result that since counties are not granted powers under Article 18 to incur housing debt, they are not subject to the limitations Article 18 imposes on such debt. Counties could then use their full general debt limits for housing activities (7-10% of full property value), while cities, towns and villages would be limited to 2% of assessed value.²¹³ In other words, the only unit of local government that was not granted powers by Article 18 would end up having greater spending powers than the others.

3. *The Attorney General's Opinion is Inconsistent With Article 18 § 10*

As discussed above,²¹⁴ the Attorney General regarded Article 18, § 10²¹⁵ as preserving county powers that are granted elsewhere in the Constitution and as requiring that Article 18 not be construed as imposing "additional limitations" on county powers. The pertinent language provides:

[t]his article shall be construed as extending powers which might otherwise be limited by other articles of this constitution and shall not be construed as imposing additional limitations. . . .

The Attorney General's view is an artful construction of a section others have called "probably unnecessary,"²¹⁶ but it fails the test of logic and is contrary to the view of the framers.

211. See *supra* notes 132-38 and accompanying text.

212. See *supra* notes 137-38 and 146-47 and accompanying text.

213. See Op. Att'y Gen. 92-4, *supra* note 2, at 1018.

214. See *supra* notes 192-94 and accompanying text.

215. For the full text of Article 18, § 10, see *supra* note 193.

216. See TEMPORARY STATE COMMISSION, *supra* note 4, at 45 ("It is argued that the entire section is probably unnecessary, as it merely reaffirms the authority in Section 1.")

First, as the Attorney General observes, counties did not acquire home rule powers until Article 9 was amended in 1963.²¹⁷ The intent of § 10 was therefore unrelated to county police powers since none existed in 1938 when § 10 was adopted. Furthermore, the logical extension of the Attorney General's argument is that since counties have police powers under Article 9 which authorize housing programs, and since Article 18 may not be construed as limiting those powers, the exclusion of counties from Article 18 means nothing.²¹⁸ This argument is refuted by the standards of statutory construction discussed above.²¹⁹ It also contradicts the Attorney General's own theory that counties are excluded from the "specific scheme" of Article 18.²²⁰ If Article 18 imposes no "additional limitations" on county housing powers, then counties should not be excluded from *any* of the activities authorized by Article 18.

Second, the Attorney General's construction of § 10 ignores the second half of the provision, which reads as follows:

but nothing in this article contained shall be deemed to authorize or empower the state, or any city, town, village or public corporation, to engage in any private business or enterprise other than the building and operation of low rent dwelling houses. . . .²²¹

The quoted language expressly limits participation in private enterprise by the state and units of local government that may be granted housing powers under Article 18. It thus prohibits them from engaging in business activity under Article 18 other than the construction and operation of housing.²²² It would frustrate this statutory scheme if counties, having been granted no powers under Article 18, were

Section 1 is the declaration of Article 18's purposes. *See supra* notes 66-67 and accompanying text.

217. Op. Att'y Gen. 92-4, *supra* note 2, at 1015.

218. The Attorney General argues that denying counties the 2% housing debt authority that is contained in Article 18 prevents the "spiraling of debt." *See supra* note 200 and accompanying text. This assumes, of course, that counties would have been treated like cities and large villages whose 2% may *exceed* their general debt limit. If, however, counties had been treated in Article 18 like towns or small villages, denying them the 2% housing debt would have had no effect upon aggregate debt because the 2% would count against the general debt limit. *See supra* notes 137-38 and 146-47 and accompanying text.

219. *See supra* notes 72-74, 205-10 and accompanying text.

220. *See supra* notes 195-97 and accompanying text.

221. The Attorney General's opinion substitutes a period for the semi-colon used in the second sentence of § 10 and fails to indicate that the remaining language, which is quoted in the text, has been omitted. Op. Att'y Gen. 92-4, *supra* note 2, at 1015.

222. The exclusion of government from such other activities follows from the traditional standards of statutory construction discussed *supra* at notes 72-74 and accompanying text.

given powers to engage in private enterprise that are denied all other units of government. In addition, when § 10 is read with Article 18, § 1,²²³ it appears that the reference in § 10 to “additional limitations” should be construed only as preserving the powers of local governments under § 1 to provide parks and other facilities that are located next to low-income housing projects. The framers of Article 18 intended to assure that publicly-funded recreational facilities provided in connection with housing projects would be open to the public. Without § 10, it was thought that Article 18 could be interpreted as authorizing public funding of *private* parks and recreational facilities because Article 18, § 1 authorizes the legislature to provide for facilities “incidental or appurtenant” to housing projects that would not be open to the general public. To avoid this interpretation, the framers inserted the language quoted above that the Attorney General overlooked, thus making clear that construction and operation of low-rent *housing* is the only private business activity in which the government may engage.²²⁴ The provision that Article 18 creates no “additional limitations” on government powers makes it clear that local governments retain their traditional powers to provide *public* parks and facilities appurtenant to housing projects.²²⁵

In sum, § 10, as interpreted by the Attorney General, makes the exclusion of counties from Article 18 virtually meaningless and distorts the statutory scheme of the New York State Constitution insofar as it limits government participation in private business activity. On

223. See *supra* note 66-67 and accompanying text.

224. See TEMPORARY STATE COMMISSION, *supra* note 4, at 44-45 (the second part of § 10 quoted in the text “simply defines the intent [of Art. 18] a little more at length.”).

225. See REVISED RECORD, *supra* note 26, vol. III, at 1714 (remarks of delegate O’Shea):

The purpose of this amendment [adding the second part of § 10 that is quoted in the text] is to make sure that the intention as expressed by Mr. Baldwin when we were considering Section 1 of the bill [later adopted as Art. 18, § 1] shall prevail. Section 1 of the bill gives permission for the public corporation or for the city or state to provide for recreational and community facilities incidental or appurtenant to the improvement. And this amendment is designed to make sure that under that authorization in Section 1, the public corporation or the State or the city shall not have power to engage in any private enterprise or business other than the building of houses or the loaning of money. . . .

It is not intended by this amendment . . . to prevent the municipality or the State from providing parks or playgrounds or facilities that would be considered public and not private.

See also TEMPORARY STATE COMMISSION, *supra* note 4, at 44, expressing the following view of the portion of § 10 quoted by the Attorney General: “In this form its intent and effect were to insure, as far as possible, the liberal construction of the previous provisions of Article 18.” It obviously did not occur to the Commission that the section could be interpreted as the Attorney General proposes.

the other hand, § 10 can be given a construction that is consistent with the statutory scheme and with the intention of the framers. Accordingly, the requirement that Article 18 shall be construed as “extending powers which otherwise might be limited” should be seen as overriding limitations on housing activity imposed by the gift and loan clause²²⁶ or the public use requirement.²²⁷ The provision that Article 18 shall not be seen as “imposing additional limitations” should be seen only as a preservation of municipal powers to provide public parks and other facilities in connection with housing projects.

4. *The Attorney General's Opinion is Inconsistent With Other Provisions of Law*

The most serious deficiency in the opinion is, however, its failure to explain the relationship between Articles 9 and 18 and the statutory scheme of laws enacted under both constitutional provisions. Under Article 9, § 2(c)(ii)(10), local governments, including counties, are granted authority to adopt local laws “not inconsistent with the provisions of this constitution or any general law” relating to “[t]he government, protection, order, conduct, safety, health and well-being of persons or property therein.”²²⁸ Home rule legislation and laws authorizing cooperation with the United States contain similar general welfare language as well as similar requirements that laws not be inconsistent with constitutional or statutory provisions.²²⁹ The principle expressed in these provisions is that police powers exist only if they are “not inconsistent” with other provisions of law, but that where inconsistencies exist, such other provisions will control.²³⁰ It

226. N.Y. CONST., art. 8, § 1. See *supra* note 94.

227. N.Y. CONST., art. 1, § 7. See *supra* note 93.

228. N.Y. CONST., art. 9, § 2(c)(ii)(10).

229. See N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a) (McKinney 1969) (empowering counties to enact local laws in specific areas “not inconsistent with the provisions of the constitution or . . . any general law”); N.Y. GEN. MUN. LAW § 99-h(3) (McKinney 1986) (authorizing local government cooperation with the United States in programs relating to the general welfare which are undertaken pursuant to federal law “not inconsistent with the statutes or constitution of this state”).

230. See *Town of Clifton Park v. C.P. Enterprises*, 356 N.Y.S.2d 122, 124 (App. Div. 1974) (prohibition against “inconsistent” laws “is a check against local laws which would contradict or would be incompatible or inharmonious with the general laws of the State”); see also *People v. Cook*, 312 N.E.2d 452, 457 (N.Y. 1974) (New York City law requiring retailers to charge a higher price for cigarettes having a high tar and nicotine content was not inconsistent with state laws where the state had taken no position with respect to price regulation); cf. *Village of Nyack v. Daytop Village*, 583 N.E.2d 928, 931 (N.Y. 1991) (state regulation of site selection for substance abuse treatment facilities not inconsistent with local zoning laws because “[s]tate and local regulation of the placement of substance abuse facilities will not by their very nature produce conflict and inconsistency”).

therefore appears that counties have no police powers under Article 9 where they have been denied housing powers under Article 18 or under the general laws of the state. The Attorney General hinted at this conclusion by finding that police powers are adequate to support only those activities that are "separate and distinct" from the "specific scheme for provision of low-income housing" under Article 18.²³¹

Rather than define what he meant by the "specific scheme," the Attorney General identified a number of "affordable housing" activities that counties could undertake under their police powers.²³² These include: provision or acquisition of land;²³³ selection of sites for affordable housing "in appropriate locations within the county;" construction of affordable housing; cooperation with other units of local government in housing programs; appropriation of county funds for these purposes; and financing of program costs within general debt limits. There is little question that counties could exercise powers like these in programs authorized by legislation enacted under Article 17.²³⁴ Legislation could also conceivably authorize counties to exercise such powers in housing programs that are "separate and distinct" from the purposes of Article 18.²³⁵ However, because counties are excluded from Article 18,²³⁶ there is no question that they cannot exercise powers to effectuate the purposes of Article 18.

An understanding of what counties can do in the housing field therefore requires that one define the scope of Article 18. As shown in Subpart B below, Article 18 has been broadly defined to authorize virtually all low rent housing programs for persons of lower income. There are some exceptions, such as homeownership programs and rehabilitation of single family homes,²³⁷ and housing authorized by Article 17,²³⁸ but most housing commonly known as low-income housing is authorized by Article 18. Participation by counties in such

231. Op. Att'y Gen. 92-4, *supra* note 2, at 1017.

232. See *supra* note 197. The opinion does not define the terms "affordable" or "low-income" and uses them interchangeably.

233. The opinion assumes that the county's powers of eminent domain may be used to assemble sites for low-income housing. Op. Att'y Gen. 92-4, *supra* note 2, at 1016. For the reasons explained *supra* notes 75-76 and accompanying text, it would appear that they may not.

234. See *supra* notes 161-77 and accompanying text.

235. See *supra* notes 196-97 and accompanying text.

236. See *supra* notes 66-77 and accompanying text.

237. See *infra* notes 255-59 and 269-70 and accompanying text.

238. For a discussion of Article 17 housing, see *supra* notes 148-77 and accompanying text. Article 18, § 1 expressly authorizes "nursing home accommodations," which might otherwise be considered housing for persons who are unable to live independently, which is authorized by Article 17. Existing legislation does not grant authority to counties in this area, however, and provides for the development of nursing homes with assistance

low-income housing programs would be inconsistent with Article 18, and it is therefore not authorized by county police powers.²³⁹

B. The "Specific Scheme" of Article 18

The purposes of Article 18 are to authorize low rent housing and nursing home accommodations for persons of low income, to eliminate slums, and to provide recreational and other facilities in connection with the foregoing.²⁴⁰ The framers thought of Article 18 as a "health measure" rather than a welfare program,²⁴¹ although clearance of slums and blight is not a prerequisite to building low rent housing.²⁴² Any programs that provide low rent housing for low-income persons are therefore within the statutory scheme of Article 18.

The legislature has provided for extensive low-rent housing activities in laws enacted pursuant to Article 18. For example, under the Public Housing Law, public housing "authorities" — which expressly excludes counties²⁴³ — have the following powers: identifying areas of substandard housing;²⁴⁴ condemning land;²⁴⁵ clearing such areas;²⁴⁶ constructing low-income housing projects;²⁴⁷ contracting with the federal government "in connection with any federally-aided program to provide" low-income housing;²⁴⁸ and leasing and subleasing dwellings to low-income persons.²⁴⁹ These powers are substantially the same as the "affordable housing activities" that the Attorney General said counties could undertake;²⁵⁰ but since authority to engage in

provided by the State Housing Finance Agency. See N.Y. PRIV. HOUS. FIN. LAW § 41(6) (McKinney 1991).

239. See *supra* notes 229-31 and accompanying text.

240. See N.Y. CONST., art. 18, § 1.

241. REVISED RECORD, *supra* note 26, vol. II, at 1532.

242. See *Murray v. LaGuardia*, 43 N.Y.S.2d 408, 410 (Sup. Ct. 1943) ("The object and purpose of [Article 18] was not limited to low rent housing for persons of low income but also in the disjunctive for reconstruction and rehabilitation of substandard areas."); see also N.Y. PRIV. HOUS. FIN. LAW (McKinney 1991). Under the Private Housing Finance Law, low-income housing projects constructed under this statute may involve slum clearance, *id.* § 2(20), or they may be limited to the provision of low rent housing, *id.* § 12(4). The purpose of projects assisted under the New York Public Housing Law may be for slum clearance "or providing homes for persons of low income." N.Y. PUB. HOUS. LAW § 3(13) (McKinney 1989).

243. See N.Y. PUB. HOUS. LAW § 3(2) (McKinney 1989).

244. *Id.* § 37(1)(b).

245. *Id.* § 37(1)(m).

246. *Id.* § 37(1)(g).

247. *Id.* § 37(1)(e).

248. N.Y. PUB. HOUS. LAW § 37(1)(i) (McKinney 1989).

249. *Id.* §§ 37(1)(k), (m).

250. Op. Att'y Gen. 92-4, *supra* note 2, at 1016-17; see *supra* notes 197, 232-34 and accompanying text.

them is given to housing authorities and since counties are excluded from the definition of authorities, county participation would be inconsistent with the Public Housing Law.

Courts have given a broad scope to Article 18. Accordingly, it has been taken as authority not only for housing commonly known as public housing, but also for programs such as the Mitchell-Lama Law which benefit lower income persons who cannot afford market prices.²⁵¹ Beneficiaries of such "lower income" programs are defined as:

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.²⁵²

This definition raises more questions than it answers and creates considerable uncertainty as to the limits of Article 18. "Low income groups" could arguably include anyone with an income below the median, and costs in excess of amounts one can afford could arguably be determined under mortgage banking standards, but fixing an objective price at which "private enterprise" is willing to build housing is probably impossible. Since most developers will not build *any* residential projects without government inducements (such as tax credits, deductions, abatements, zoning variances or the like), unaided "private enterprise" would probably not build much housing. The statute must therefore refer to businesses that require inducements to build low-income housing that exceed those available to residential housing projects generally. Any such analysis would require many subjective judgments and could not be performed with precision.

The scope of Article 18 (and, hence, the limits of Article 9)²⁵³ therefore depends upon how the vague definition of low income per-

251. *Minkin v. New York City*, 198 N.Y.S.2d 744, 749 (Sup. Ct.), *appeal dismissed*, 202 N.Y.S.2d 992 (App. Div. 1960) (Condemnation held consistent with Article 18 where action was taken in support of Mitchell-Lama project: "[It] makes no difference whether the income of those sought to be aided is in the lowest income group or above that group, so long as the income is not sufficient to produce that rental which will attract private industry to build housing"); *Chelcy v. Buffalo Mun. Hous. Auth.*, 206 N.Y.S.2d 158, 168 (Sup. Ct. 1960) (Conversion of low rent public housing project to Mitchell-Lama cooperative for families of "middle income" was not unconstitutional "as long as the income [of tenants] is not sufficient to produce the rental which attracts private industry to build housing.").

252. N.Y. PUB. HOUS. LAW § 3(18) (McKinney 1989); N.Y. PRIV. HOUS. FIN. LAW § 12(10) (McKinney 1991). The New York definition of "persons of low income" was originally used in the U.S. Housing Act of 1937, but federal law has used percentages of area income since 1974. See 42 U.S.C. § 1437a(b)(2).

253. See *supra* notes 228-39 and accompanying text.

sons will be applied to the facts in particular cases. The more broadly Article 18 is defined, the less likely it is that county housing programs will be constitutional. Under the circumstances, it may not be possible to say with any assurance whether a particular "affordable" housing program is outside the scope of Article 18 and within the scope of county police powers. Counties that establish their own programs in the belief that the activity is authorized by Article 9 police powers may therefore place themselves as well as their bond counsel²⁵⁴ in an untenable position if the law subsequently defines "low-income housing" for Article 18 purposes in a way that covers the county's program. Such a definition would limit the county's police powers, thereby invalidating the perceived legal basis for the program. The scope of Article 18 is also unclear with respect to other housing activities, such as homeownership plans and rent subsidy programs. County activities in these areas could therefore be challenged as unconstitutional where it may be said that the activity has been reserved to other units of government by Article 18.

1. Homeownership Programs

One of the strongest cases to be made for the proposition that counties are authorized to undertake housing programs is in the area of homeownership programs.²⁵⁵ As the court decided in *Russin v. Town of Union of Broome County*,²⁵⁶ a plan for the sale of housing to low-income individuals is not authorized by Article 18 because the constitution authorizes only low-rent housing. Counties are thus not excluded from developing low-income homeownership programs by Article 18, and they may be authorized to engage in such activities by Article 9 police powers. However, police powers, powers of eminent domain and the power to make gifts or loans of public funds are limited in varying degrees to programs that have a valid public use.²⁵⁷ It is questionable whether homeownership programs would fall within such powers unless the program also provides some significant benefit to the public.²⁵⁸

254. If the county issues bonds to fund housing programs, lawyers considering the bond issue's legal requirements could find it difficult to say that the bonds were validly issued if it is unclear whether the housing was authorized by county powers.

255. For a description of such programs, see *supra* notes 49-56 and accompanying text.

256. 521 N.Y.S.2d 160 (App. Div. 1987). See *supra* notes 113-15 and accompanying text.

257. See *supra* notes 95-131 and accompanying text; see also 6A EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 24.05 (3d ed. 1988) (stating that the exercise of police powers is proper only where the general welfare is served rather than purely private interests).

258. See *supra* notes 126-27 and accompanying text.

Programs that may be supported by county police powers include homesteading plans like the Federal Nehemiah Program,²⁵⁹ which could help redevelop blighted areas by constructing or renovating homes for low- to middle-income homebuyers. Neighborhood redevelopment would be a valid public purpose justifying the exercise of police powers, and counties would not be excluded from the activity because the sale of housing is clearly not authorized by Article 18, and the exercise of police powers would therefore not be inconsistent with Article 18.

2. Rent Subsidy Programs

While it has been said that Article 18 does not authorize rent subsidy programs because Article 18, § 2²⁶⁰ authorizes only loans and not subsidies to owners of private projects,²⁶¹ § 2 does allow cities, towns and villages to pay periodic subsidies to public corporations.²⁶² Article 18 thus arguably authorizes an arrangement, like the Section 8 Program,²⁶³ under which housing authorities receive subsidy payments from the state or cities, towns or villages and then pay rent subsidies to private landlords. Since Article 18 does not authorize counties to fund public corporations, their participation in such a program would be inconsistent with Article 18 and therefore would be excluded from county police powers.

The Federal Section 8 Program is authorized by Article 18, § 2, under which the Legislature may empower counties to cooperate with the United States. Such cooperation in low-rent housing programs is restricted by the Public Housing Law, however, to public housing "authorities."²⁶⁴ County participation in the Section 8 Program would thus be inconsistent with the Public Housing Law and would

259. "Nehemiah Housing Opportunity Grants," named for the Biblical prophet who rebuilt Jerusalem, see H.R. REP. NO. 122, 100th Cong., 1st Sess. 95 (1987), reprinted in 1987 U.S.C.C.A.N. 3317, 3411, were authorized by Title VI of the Housing and Community Development Act of 1987, Pub. L. No. 100-242, 101 Stat. 1951 (1988) (codified as amended at 12 U.S.C. § 1715l (1988 & Supp. II 1990)). The legislation was designed to encourage homeownership by lower income families, to rebuild depressed urban areas, and to increase employment opportunities in low-income areas by providing loans to middle-income families for the purchase of one- to four-family dwellings in distressed areas.

260. For the full text of Article 18, § 2, see *supra* note 67.

261. See TEMPORARY STATE COMMISSION, *supra* note 4, at 27 n.64.

262. N.Y. CONST., art. 18, § 2 provides that the Legislature may "authorize any city, town or village . . . to make [periodic] subsidies to any public corporation." *But see* 22 Op. N.Y. Comp. 489 (1966) (city cannot pay rent of displaced persons, as this would be a gift in violation of Article 8).

263. See *supra* notes 47-48 and accompanying text.

264. See *supra* notes 86-89 and accompanying text.

therefore be excluded from Article 9 police powers.²⁶⁵

3. Other Housing Programs

It was argued during the debate on the proposed 1967 constitution that counties could not provide senior citizen housing²⁶⁶ because Article 18 authorized such programs and excluded counties. This is unquestionably true in the case of programs for low-income persons, but it is conceivable that counties could undertake assisted rental programs for higher income senior citizens under their police powers. Such programs would be excluded from the scope of Article 18 if they do not benefit "lower income" persons²⁶⁷ and could therefore be authorized by county police powers if they provide a public benefit.²⁶⁸ The point was also made in the 1967 debate that New York City could not provide mortgage interest subsidies or rehabilitation loans to the owners of one- and two-family homes because such activities are not authorized by Article 18.²⁶⁹ Even though Article 18 does not authorize these activities, it does not follow that police powers necessarily would. Since police powers may not be exercised in a manner that is inconsistent with the constitution or general laws, they do not authorize activities that Article 18 prohibits, either expressly or by implication. By providing authority for rehabilitation loans for multiple dwellings, Article 18 impliedly prohibits such loans for other kinds of dwellings.²⁷⁰ Thus, even though single family rehabilitation loan programs would be outside the scope of Article 18, they would not be authorized by county police powers since authority to conduct such programs was denied by Article 18.

In summary, county police powers do not authorize activity that is "inconsistent" with Article 18 or the general laws of New York,

265. *Id.* See also *supra* notes 228-39 and accompanying text.

266. See *Final Report, supra* note 79, at 34 (statement of then Nassau County Executive [now U.S. District Judge] Eugene Nickerson).

267. See *supra* notes 251-54 and accompanying text.

268. See *supra* notes 95-131 and accompanying text; but see N.Y. GEN. MUN. LAW § 290 (McKinney 1986) (county property may not be used for elderly housing). County property may be sold to nonprofit organizations for use as elderly housing, however. See *supra* notes 119-20 and accompanying text.

269. Jason R. Nathan, New York City's Housing and Development Administrator, said that mortgage interest subsidy programs and measures to rehabilitate single family homes were hampered because of the restricted scope of Article 18. *Final Report, supra* note 79 at 34. Article 18, § 2 authorizes legislation giving cities, towns and villages the power "to make loans to the owners of existing *multiple dwellings* for the rehabilitation and improvement thereof for occupancy by persons of low income." N.Y. CONST., art. 18, § 2 (emphasis added).

270. See *Golden v. Koch*, 404 N.E.2d 1321 (N.Y. 1980), discussed *supra* note 73 and accompanying text.

meaning that which would be "incompatible or inharmonious" with such laws.²⁷¹ Counties therefore lack the power to provide low rent housing for low-income persons, either as public housing²⁷² or as private subsidized housing constructed with public funds.²⁷³ For the same reason, counties may not undertake programs for the rehabilitation of single family dwellings because that would be incompatible with Article 18's exclusion of such activity.²⁷⁴ It would appear that counties are precluded from participating in federally-assisted rent subsidy programs because those programs are apparently authorized by the Public Housing Law,²⁷⁵ but it is less clear whether non-federally-assisted rent subsidy programs are within the scope of Article 18.

On the other hand, state legislation enacted pursuant to Article 17 could authorize counties to participate in programs for low-income persons who are unable to live independently.²⁷⁶ The state legislature could also enable counties, using their police powers, to engage in homeownership programs or affordable housing programs for higher income persons that provide a public benefit.²⁷⁷

V. County Participation In Federal Housing Programs

Most of the federally-assisted housing programs discussed in Part II²⁷⁸ are administered through public housing agencies that receive funds for development and operation of public housing or for payment to private landlords as rent subsidies. Other programs, including homeless programs²⁷⁹ and some homeownership plans,²⁸⁰ provide funds to states and units of local government. Subpart A below shows that counties in New York State lack authority to act as public housing agencies and therefore cannot participate in most federal housing programs. Subpart B concludes that larger counties that qualify as "urban counties" participate in housing programs through cooperation agreements with municipalities, even though counties lack the

271. See *Town of Clifton Park v. C.P. Enterprises*, 356 N.Y.S.2d 122, 124 (App. Div. 1974); see *supra* notes 228-30 and accompanying text.

272. See N.Y. CONST., art. 18, § 2 (excludes counties from making loans or paying subsidies to public corporations (public housing authorities) for the provision of low-rent housing); see also N.Y. PUB. HOUS. LAW § 37(1)(e) (McKinney 1989).

273. See N.Y. CONST., art. 18, § 2 (excludes counties from making loans to limited profit corporations for the provision of low-income housing).

274. N.Y. CONST., art. 18, § 2, quoted *supra* note 67.

275. N.Y. PUB. HOUS. LAW § 37(1)(i) (McKinney 1989).

276. See *supra* notes 161-69 and accompanying text.

277. See *supra* notes 255-59 and accompanying text.

278. See *supra* notes 36-40, 47-48 and accompanying text.

279. See *supra* notes 58-61, 171-75 and accompanying text.

280. See *supra* notes 54-55 and accompanying text.

power to participate in most low-income housing programs. Subpart C summarizes the discussion elsewhere in this article dealing with special needs programs and homeownership.

A. Counties Acting As Public Housing Agencies

Programs created by the U.S. Housing Act of 1937²⁸¹ authorize the Secretary of HUD to enter into contracts with public housing agencies either to fund public housing development costs and operating expenses²⁸² or to make rent subsidy payments to private landlords.²⁸³ The term "public housing agency" ("PHA") is defined as

any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) *which is authorized to engage in or assist in* the development or operation of lower-income housing.²⁸⁴

Whether a PHA is "authorized to engage in" or "assist" in the development or operation of low-income housing is determined under state law.

As seen in Part III, Article 18 of the New York Constitution precludes counties from making loans or subsidies for low-income housing,²⁸⁵ and the Public Housing Law excludes counties from cooperating with and accepting aid from the United States in low-income housing programs.²⁸⁶ County participation in either public housing programs or in privately-owned assisted housing would therefore be inconsistent with the general laws of the state and would thus fall outside the scope of county police powers.²⁸⁷ Given this state of the law, it would appear that counties are not authorized to engage in or assist in the development or operation of low-income housing, and they are therefore precluded from acting as PHAs.²⁸⁸

281. Act of Sept. 1, 1937, ch. 896, 50 Stat. 888 (1937)(codified as amended at 42 U.S.C. §§ 1437-1437s (1988 & Supp. II 1990)).

282. 42 U.S.C. §§ 1437b, 1437d.

283. *Id.* § 1437f.

284. *Id.* § 1437a(b)(6) (emphasis added). New York law uses the term public housing "authority" to identify public corporations that are organized to provide public housing. N.Y. PUB. HOUS. LAW § 3(2) (McKinney 1989).

285. *See supra* notes 66-79 and accompanying text.

286. *See supra* notes 86-89 and accompanying text.

287. *See supra* notes 228-39 and accompanying text.

288. Subpart B draws a distinction in the Block Grant Program between "undertaking" assisted housing activities and "assisting" other governments in their own activities under home rule legislation. *See infra* notes 308-27 and accompanying text. No such distinction is appropriate in determining whether counties may act as PHAs, however, because the term "assist" as used in the 1937 Act refers to privately-owned housing that PHAs support through the payment of rent subsidies. As stated in the text, counties are precluded from acting in this area by the Public Housing Law.

Even though the legislature could enable county governments to act as PHAs or to otherwise participate in federal assisted housing programs, such an extension of powers would likely have only limited effect. First, legislation alone cannot grant powers of eminent domain to counties for the purpose of providing low-rent housing, because counties are excluded from such powers by Article 18, § 2 of the New York Constitution.²⁸⁹ Thus, even with enabling legislation providing authority to participate in federal housing programs, counties would be limited to purchasing land for low-income housing projects unless municipal governments or public corporations were willing to exercise their own powers of eminent domain.²⁹⁰ Second, many of the objectives to be attained by extending powers to counties, such as increasing efficiency in the provision of public services and providing regional solutions to regional problems,²⁹¹ can be attained through the exercise of powers of townships in New York State. Under existing law, townships have full authority to organize public housing authorities that may operate within villages wishing to avoid the expense of creating their own authorities.²⁹²

B. Actions Under Cooperation Agreements

In 1974, Congress enacted Title I of the Housing and Community Development Act of 1974 (the "1974 Act"),²⁹³ under which HUD provides "community development block grants" to states and local governments for economic development activities. The primary objective of the program is "development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income."²⁹⁴ Grants paid to cities with at least 50,000 people and to "urban counties" are entitlements that are calculated by a statutory formula,²⁹⁵ while other communities must compete for dis-

289. See *supra* notes 75-76 and accompanying text.

290. Public housing authorities organized under New York law have powers of eminent domain, N.Y. PUB. HOUS. LAW § 120 (McKinney 1989), that would not be available to counties without an amendment to Article 18.

291. See *supra* notes 4-15 and accompanying text.

292. N.Y. PUB. HOUS. LAW § 30 (McKinney 1989). Township authorities may operate within villages if the town and village governing bodies consent. *Id.* § 31.

293. Pub. L. No. 93-383, 88 Stat. 633 (1974) (codified at 42 U.S.C. §§ 5301-5320 (1988 & Supp. II 1990)). The purpose of the 1974 Act is described *supra* note 11.

294. 42 U.S.C. § 5301(c) (1988).

295. *Id.* § 5306(b). The purpose of providing entitlement grants to "urban counties" is to encourage "urban-suburban cooperation on housing and renewal." See S. REP. NO. 693, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.A.N. 4273, 4320.

cretionary grants.²⁹⁶ A county's status as an "urban county" thus assures that it will receive community development block grants each year the program is funded. Block grants fund a substantial part of a county's economic development efforts, with Westchester County, for example, receiving approximately \$60 million since the program's inception.²⁹⁷

The Block Grant Program funds a wide range of community development activities other than housing.²⁹⁸ Block grant funds may not generally be used to construct housing, but they can support housing development by assembling and clearing sites, providing site improvements and paying for certain planning and financing costs.²⁹⁹ The following discussion concludes that while counties in New York have only limited powers to undertake or assist in undertaking low-income housing activities, they have nevertheless qualified as "urban counties" and are thus able to use federal funds for limited housing purposes.

1. *Qualification as Urban County*

A county may qualify as an "urban county" if it has a population of at least 200,000 persons with at least 100,000 residing in unincorporated areas³⁰⁰ or in cities, towns and villages that enter into cooperation agreements with the county.³⁰¹ The parties to such agreements

296. See 42 U.S.C. § 5306(d).

297. See Statement in Support of Act No. 124-1992 of the Westchester Co. Board of Legislators Submitted by the Committee on Community Affairs and Housing (Sept. 24, 1992).

298. For example, eligible activities include: provision of homeless shelters, convalescent homes, halfway houses and group homes for the mentally retarded, 24 C.F.R. § 570.201(c) (1992); provision of employment services, fair housing counseling, welfare services or recreation, *id.* § 570.201(e); repair of streets and public buildings in distressed areas, *id.* § 570.201(f); payment of relocation assistance to persons and businesses who are displaced by federally-assisted activities, *id.* § 570.201(i); removal of architectural barriers to public and private buildings, *id.* § 570.201(k); provision of distribution lines and facilities of privately owned utilities. *Id.* § 570.201(l).

299. 24 C.F.R. § 570.207(b)(3) (1992). Housing development grants provided under § 17 of the 1937 Act, 42 U.S.C. § 1437o(d), were terminated as of October 1, 1989. Pub. L. No. 100-242, § 152, 101 Stat. 1855 (1988).

300. The term "unincorporated areas," as used in the 1974 Act, means areas "which are not units of general local government." 42 U.S.C. § 5302(a)(6)(A). In New York, general local governments include cities, towns and villages, which have powers to govern their local affairs under N.Y. MUN. HOME RULE LAW § 10 (McKinney 1969 & Supp. 1992). In the area of publicly-assisted housing, "municipalities," which includes cities, towns and villages, N.Y. PUB. HOUS. LAW § 3(5), have the power to organize public housing authorities, *id.* § 30(1), and to construct projects themselves. *Id.* § 55. The term "unincorporated areas" therefore means any part of a county which is not within the jurisdiction of a city, township or village.

301. 42 U.S.C. § 5302(a)(6)(A)(ii)(I).

are known as an "urban county consortium." The county must also have authority under state law to undertake or assist in undertaking low-income housing activities such as the acquisition or rehabilitation of property for occupancy by low- and moderate-income households, conversion of non-residential structures for lower income housing use, and construction of new housing to be occupied primarily by low- and moderate-income households.³⁰² The requirement that counties have the power to undertake such activities is an important part of the 1974 Act's statutory scheme. The Senate would have provided entitlement grants to all counties with populations in excess of 50,000, but the House required that "urban counties" have the power to undertake or assist in undertaking "essential community development and housing assistance activities." The legislation adopted the House definition.³⁰³

The form of urban county cooperation agreement required by HUD must meet the following standards in order to be acceptable:³⁰⁴ (1) the parties must agree to cooperate in undertaking or assisting the others in undertaking urban renewal and assisted housing activities; (2) no party may reserve a right of veto over activities that are needed to meet housing needs the urban county consortium has identified; (3) the county must reserve the final responsibility for selecting activities; (4) the county must have *full authority* to undertake or assist in undertaking community development and assisted housing programs; and (5) the consortium members must assure their compliance with Federal Civil Rights Laws.³⁰⁵ For the reasons discussed in the following subsections, it would appear that counties lack the power to undertake or assist in undertaking most low-income housing activities and that they may not, therefore, satisfy the requirement that they

302. 42 U.S.C. § 5301(c); 24 C.F.R. § 570.208(a)(3) (1992). These activities, which are among the "national objectives" of the community development block grant program, should satisfy the statutory definition of "essential community development and housing assistance activities." 42 U.S.C. § 5302(a)(6)(A)(ii)(I). HUD's regulations define "essential activities" as "community renewal and lower income housing activities, specifically urban renewal and publicly assisted housing." 24 C.F.R. § 570.307(c) (1992). Lower income households are those with incomes not exceeding 80% of area median income as determined by HUD. 42 U.S.C. § 1437a(b)(2); 24 C.F.R. § 570.3 (1992).

303. See H.R. CONF. REP. NO. 1279, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.A.N. 4449, 4451.

304. HUD Notice CPD 92-16, at 9-12 (May 28, 1992) (emphasis added) [hereinafter HUD Notice].

305. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7 (1988); Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1988 & Supp. II 1990); Section 109 of the 1974 Act, 42 U.S.C. § 5309 (1988 & Supp. II 1990); Americans With Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. II 1990). The county is required, among other things, to affirmatively further fair housing within its jurisdiction.

have "full authority" to engage in assisted housing activities. Nevertheless, nine counties in New York State have qualified as "urban counties."³⁰⁶ The qualification of such counties reflects their powers to engage in the limited housing activity described below as well as in a wide range of community development activities.³⁰⁷

2. *County Powers to Undertake Housing Activities*

It is shown above that counties in New York State can provide housing for persons with special needs,³⁰⁸ and that they may be able to participate in homeownership programs benefitting lower income persons.³⁰⁹ Counties are, however, precluded from most other low-income housing programs. They cannot act as public housing authorities or otherwise receive aid and cooperate with the federal government in low-income housing programs because the Public Housing Law excludes counties from such activities.³¹⁰ They lack the power to fund the development or operation of assisted housing with non-federal funds because Article 18 of the New York Constitution excludes counties from exercising such powers.³¹¹ Counties also lack the power of eminent domain in furtherance of assisted housing programs.³¹² Counties therefore lack the power to "undertake" most assisted housing activities — meaning, to initiate housing programs of their own.

3. *County Powers to Assist Other Units of Government*

Counties are authorized by Article 9, § 1(c) of the New York Constitution

to provide cooperatively, jointly or by contract any facility, service, activity or undertaking *which each participating local government has the power to provide separately.*³¹³

The General Municipal Law similarly provides that counties may enter into cooperation agreements with other units of local government "for the performance of their respective functions, powers or duties."³¹⁴ This authority is not intended to augment the powers of

306. See HUD Notice, *supra* note 304, Attachment A. The nine counties are: Dutchess, Erie, Monroe, Nassau, Onondaga, Orange, Rockland, Suffolk and Westchester.

307. See *supra* note 298.

308. See *supra* notes 148-69 and accompanying text.

309. See *supra* notes 255-59 and accompanying text.

310. See *supra* notes 86-89, 285-88 and accompanying text.

311. See *supra* notes 66-79 and accompanying text.

312. See *supra* notes 75-76 and accompanying text.

313. N.Y. CONST., art 9, § 1(c) (emphasis added).

314. N.Y. GEN. MUN. LAW, § 119-o(1) (McKinney 1986).

local governments, but rather to encourage intergovernmental cooperation in the exercise of pre-existing functions.³¹⁵ Each contracting party must therefore have authority to perform separately the functions that are to be performed cooperatively. Hence, since counties lack the power to undertake most low-income housing activities, they also lack the power to engage in such activities under cooperation agreements with municipalities.³¹⁶ This conclusion finds further support in Section 99 of the Public Housing Law,³¹⁷ which authorizes "municipalities" to render services to public housing authorities and "to cooperate in the planning, undertaking, construction or operation of [public housing] projects." Since the term "municipality" excludes counties,³¹⁸ traditional standards of statutory construction indicate that counties are precluded from providing such services.³¹⁹

Counties may, however, assist municipalities and public housing authorities in a number of ways that would provide support for low-income housing activities. For example, they may use block grant funds to provide site improvements for assisted housing projects under their general police powers or bear a portion of planning costs where that is not precluded by the powers granted to public housing authorities by the Public Housing Law.³²⁰ In addition, counties can apparently make their property available to nonprofit organizations for conversion to rental housing for the elderly.³²¹ Moreover, counties may, under Article 17, participate independently in a number of

315. See 1974 Op. Att'y Gen. 232 (County sheriff could not police town's roads under an agreement with the town because "no county has the authority through the sheriff to operate a police department.").

316. See *supra* notes 80-90 and accompanying text, where it is argued that the New York Comptroller erred in concluding that county planning boards could perform Section 8 administrative services under a contract with a public corporation, because counties would then "otherwise cooperate" with the United States in the Section 8 Program in violation of Section 37 of the Public Housing Law. Op. N.Y. Comp. 76-1037 (1976) (unreported). The administrative functions of a PHA in the Section 8 Program are described *supra* note 81. A county performing such functions would be required to enforce federal program requirements as well as to cooperate with HUD in its monitoring of the PHA pursuant to 24 C.F.R. § 882.217 (1992). Such cooperation would seem to be precisely the kind of activity contemplated by N.Y. PUB. HOUS. LAW § 37(1)(i), which precludes counties from acting.

317. N.Y. PUB. HOUS. LAW § 99 (McKinney 1989).

318. *Id.* § 3(5).

319. See *supra* notes 72-77 and accompanying text.

320. See *supra* notes 243-49 and accompanying text.

321. See 1987 Op. Att'y Gen. 58, discussed *supra* notes 121-24 and accompanying text. The use of county property "for residential use other than housing, or for non-residential use of the elderly citizens of the county" is authorized by N.Y. GEN. MUN. LAW § 290 (McKinney 1986). By contrast, § 290 allows cities, towns and villages to use their property as *housing* for the elderly.

housing programs for persons with special needs³²² and could therefore assist other units of government in their own activities. The foregoing powers, taken together with the power of counties to participate in community development programs, may be cited as justification for urban county qualification. However, such qualification may be subject to question to the extent county activities fail to address the needs of low- and moderate-income persons as required by the 1974 Act.

The inability of counties to undertake most low-income housing activities could prevent the urban county from meeting the housing needs identified by the urban county consortium. Failure to make satisfactory progress towards meeting those needs could result in suspension or termination of the consortium's block grant assistance.³²³ For example, such needs may require that a member of the consortium take land through eminent domain in order to construct low-income housing. Counties could not perform this function, since the power of eminent domain in support of low-income housing is given only to a "municipality" or an "authority,"³²⁴ both of which terms exclude counties.³²⁵ If, therefore, the city, town or village having jurisdiction over the intended site refuses to commence condemnation proceedings, the housing needs may not be met, and HUD could require that the offending city, town or village be excluded from the cooperation agreement.³²⁶ This could deprive the consortium of population needed to maintain its urban county status, in which case the county could not qualify as an urban county in the future.³²⁷

C. Special Needs Programs and Homeownership

The authority counties in New York State currently have to operate facilities for poor persons who are unable to live independently presents a number of opportunities for greater county participation in special needs areas.³²⁸ Federal programs for the "frail elderly," the disabled and the homeless³²⁹ may authorize grants to counties³³⁰ or, where nonprofit organizations are the only eligible recipients,³³¹ coun-

322. See *supra* notes 148-77 and accompanying text.

323. See 24 C.F.R. § 91.75(c) (1992).

324. N.Y. PUB. HOUS. LAW § 125 (McKinney 1989).

325. *Id.* §§ 3(2), (5).

326. 24 C.F.R. §§ 570.307(b)(2), 570.906 (1992).

327. See 24 C.F.R. § 570.307(b)(2) (1992).

328. See *supra* notes 161-69 and accompanying text.

329. See *supra* notes 58-61 and accompanying text.

330. See *supra* notes 170-77 and accompanying text.

331. See *supra* notes 169-70 and accompanying text.

ties may make county property available for use in the program.³³² In addition, counties may participate indirectly in federal programs by using their existing powers to provide site improvements or planning services³³³ that benefit housing projects.

Homeownership programs such as "HOPE"³³⁴ and state-federal partnership efforts like the "HOME" Program³³⁵ provide funding for units of local government that also create additional opportunities for county activity. However, county participation in these programs would require state enabling legislation to the extent the programs involve low-rent housing for lower income persons, since county activity would be inconsistent with the Public Housing Law and thus excluded from county police powers.³³⁶

"Affordable" housing programs for middle income families that are outside the scope of Article 18³³⁷ and homeownership programs that authorize the sale rather than the rental of housing³³⁸ would not be precluded by the restrictions on county powers imposed by Article 18. However, to the extent that state or local funds or property is used to subsidize the cost of housing, a valid public benefit would have to be provided in accordance with Article 8 of the New York Constitution.³³⁹

In summary, counties lack the power under current law to act as PHAs in federal housing programs because the New York Public Housing Law excludes them from the units of government that are authorized to cooperate with and accept aid from the United States.³⁴⁰ Counties may, however, be authorized by the legislature to participate in a number of special needs programs under Article 17 of the New York Constitution, such as programs for the homeless, the frail elderly and the disabled.³⁴¹ In addition, counties may assist other units of government in their own housing activities by expending community development block grants under cooperation agreements with municipalities.³⁴² Finally, counties may have sufficient powers to participate in federal programs that fund homeownership plans or "HOME" partnerships to provide affordable housing if they

332. See 1987 Op. Att'y Gen. 58, discussed *supra* note 119 and accompanying text.

333. See *supra* note 320 and accompanying text.

334. See *supra* notes 53-54 and accompanying text.

335. See *supra* note 55 and accompanying text.

336. See *supra* notes 86-89 and accompanying text.

337. See *supra* notes 251-54 and accompanying text.

338. See *supra* notes 255-59 and accompanying text.

339. See *supra* notes 118-31 and accompanying text.

340. See *supra* notes 285-88 and accompanying text.

341. See *supra* notes 148-77, 321-22 and accompanying text.

342. See *supra* notes 293-322 and accompanying text.

do not involve low-rent housing for lower income persons and provide a legitimate public benefit.³⁴³

VI. Conclusion

Article 18 has never been popular with low-income housing advocates. It was criticized by delegates to the 1938 Constitutional Convention as verbose and too complicated.³⁴⁴ The Temporary State Commission studying the 1967 revised constitution suggested it is superfluous.³⁴⁵ Most recently, the New York Attorney General counselled counties to rely upon general police powers to undertake low-income housing activities.³⁴⁶ For all these lumps, however, the voters of the state have rejected attempts to replace Article 18 or to increase its lending authority, and the legislature consistently rejects amendments designed to give housing powers to county governments.³⁴⁷ Constitutional limits on county powers therefore survive and must be observed carefully at the risk of compromising the legality and viability of housing programs.

With the exception of facilities for the aged and infirm,³⁴⁸ it has been understood until recently that counties had no power to build or to subsidize low-income housing and that municipal governments, either directly or through local housing authorities, are best situated to make policy decisions in the housing field. The availability of federal funds has inspired efforts to increase the role of county governments,³⁴⁹ but the efficacy of these efforts is open to question, and the restrictions placed on county activity limit whatever benefits may be obtained.³⁵⁰

The New York Attorney General's 1992 opinion on the subject³⁵¹ represents a sharp change from prior understanding of the law, both in his office and elsewhere,³⁵² but unless county activities go unchallenged, it is difficult to see how the opinion will lead to much low-income housing development. Its legal analysis of Article 18 is flawed, and the persuasiveness of the police power analysis loses much

343. See *supra* notes 334-39 and accompanying text.

344. See REVISED RECORD, *supra* note 26, vol. II, at 1503 (remarks of Robert Moses and Paul Windels).

345. See *supra* note 91 and accompanying text.

346. See *supra* notes 186-204 and accompanying text.

347. See *supra* notes 78-79 and accompanying text.

348. See *supra* notes 161-77 and accompanying text.

349. See *supra* notes 80-90 (discussing Comptroller's 1976 opinion) and 186-204 (discussing Attorney General's 1992 opinion) and accompanying text.

350. See *supra* notes 80-90 and 240-70 and accompanying text.

351. Discussed *supra* notes 186-204 and accompanying text.

352. See *supra* notes 68-71 and accompanying text.

of its force because of the Attorney General's failure to reconcile Article 18 with other provisions of the New York Constitution.³⁵³ It may be expected that bond counsel passing upon the legality of county bond issues would be reluctant to adopt the Attorney General's approach and that the ability of counties to finance housing under their police powers will therefore be severely limited.

Whether counties should have a greater role in low-income housing activities is another matter. Certainly, county involvement within small municipalities would be more efficient than establishing numerous small housing authorities. However, town governments could perform such functions instead of counties,³⁵⁴ and unless local governments support the activities counties undertake, the results may be costly, unproductive and even harmful to poor families who will have to live with the decisions that are made for them.

In the *Yonkers* case,³⁵⁵ the development of public housing was ordered in designated locations to remedy civil rights violations, but the families occupying those units still find themselves living in areas that may not serve their needs because of the effects of community opposition and the lack of municipal support for the projects. Public housing sites that are located long distances from social services, shopping, employment, religious organizations and the like may well cause occupants real hardship, which could be alleviated with municipal help or exacerbated by municipal opposition. The incidence of such hardship would probably increase if county governments had the power to override local opposition to housing projects and construct them where they serve county, rather than municipal, interests.

Recent state and federal housing programs that have expanded homeownership opportunities,³⁵⁶ and laws that authorize supportive services for those unable to live independently,³⁵⁷ probably offer the greatest opportunities for an increased county role. Homeownership programs may prove difficult to implement, however, to the extent they serve private interests with no clear public benefit being involved.³⁵⁸ Supportive services programs address only the special needs of a small percentage of those needing housing assistance and require the oversight of social services professionals.

In the field of low-rent housing for low-income families who can

353. See *supra* notes 205-39 and accompanying text.

354. See *supra* notes 291-92 and accompanying text.

355. See *supra* notes 6, 8, 16-24 and accompanying text.

356. See *supra* notes 49-57 and accompanying text.

357. See *supra* notes 58-61 and 148-77 and accompanying text.

358. See *supra* notes 109-17 and accompanying text.

live independently; an amendment to Article 18 of the New York Constitution would be required before county funds could be utilized; however, enabling legislation would be sufficient to authorize county participation in federal low-income housing programs.³⁵⁹ If such legislation were enacted, it should avoid unnecessary duplication of effort on the part of other units of local government and require assurances that county decisions reflect the lawful desires of local governing bodies.

359. Article 18, § 2 permits counties to cooperate with and accept aid from the United States government in Federal Housing programs. *See supra* notes 75-77 and accompanying text.