Fordham Law Review

Volume 6 | Issue 1 Article 1

1937

Legal Aspects of Low-Rent Housing in New York

E. H. Foley, Jr.

Legal Aspects of Low-Rent Housing in New York

Cover Page Footnote
Director, Legal Division, Federal Emergency Administration of Public Works

FORDHAM LAW REVIEW

VOLUME VI
1937

WOOLWORTH BUILDING
NEW YORK
1937

The Heffernan Press
Worcester, Mass., U. S. A.

TABLE OF LEADING ARTICLES—AUTHORS

TABLE OF LEADING ARTICLES—TITLES

TABLE OF BOOK REVIEWS—AUTHORS

INDEX—DIGEST

Page references in bold type are to Leading Articles; in plain type to Comments, Legislative Notes, Recent Decisions, Book Reviews, Obiter Dicta and Correspondence

Page references in bold type are to Leading Articles; in plain type to Comments, Legislative Notes, Recent Decisions, Book Reviews, Obiter Dicta and Correspondence

Page references in bold type are to Leading Articles; in plain type to Comments, Legislative Notes, Recent Decisions, Book Reviews, Obiter Dicta and Correspondence

Page references in bold type are to Leading Articles; in plain type to Comments, Legislative Notes, Recent Decisions, Book Reviews, Obiter Dicta and Correspondence

Page references in bold type are to Leading Articles; in plain type to Comments, Legislative Notes, Recent Decisions, Book Reviews, Obiter Dicta and Correspondence

Page references in bold type are to Leading Articles; in plain type to Comments, Legislative Notes, Recent Decisions, Book Reviews, Obiter Dicta and Correspondence

TABLE OF CASES

Page references in bold type are to Leading Articles; in plain type to Comments, Legislative Notes, Recent Decisions, Book Reviews, Obiter Dicta and Correspondence

Page references in bold type are to Leading Articles; in plain type to Comments, Legislative Notes, Recent Decisions, Book Reviews, Obiter Dicta and Correspondence

Page references in bold type are to Leading Articles; in plain type to Comments, Legislative Notes, Recent Decisions, Book Reviews, Obiter Dicta and Correspondence

FORDHAM LAW REVIEW

VOLUME VI JANUARY, 1937 NUMBER 1

LEGAL ASPECTS OF LOW-RENT HOUSING IN NEW YORK

E. H. FOLEY, JR.†

WHEN Judge Crouch in the course of his opinion in the case of *New York City Housing Authority v. Muller*[1] remarked that the session laws of New York 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, he expressed a historical fact that is often overlooked in current discussions of the slum clearance and low-rent housing problem.

An analysis of the New York housing legislation which has been enacted during the past three-quarters of a century discloses that these laws fall into two classes: those which may be considered as negative, that is, which prohibit or restrict; and those which may be considered as positive, that is, which enable or encourage. It is a far cry from the earliest tenement house law of New York to the latest low-rent housing authority law in this state. Legislative action has noticeably progressed from efforts to protect the health and safety of tenement dwellers to a plan of bringing about the actual elimination of slums and the construction of adequate dwellings for families in the low-income brackets. A discussion of the legal aspects of the low-rent housing program in New York will be aided by a brief examination of the two types of enactments which have in the past characterized the legislative approach to this problem.

RESTRICTIVE HOUSING LEGISLATION

Tenement House Laws

The first important legislation of this type in New York was the Tenement House Law of 1867[2] which prescribed modest standards for the construction and use of residential buildings. It aimed to eliminate and

† Director, Legal Division, Federal Emergency Administration of Public Works.

1. 270 N. Y. 333, 1 N. E. (2d) 153 (1936), *aff'g*, 115 Misc. 681, 279 N. Y. Supp. 299 (Sup. Ct. 1935).

2. N. Y. Laws 1867, c. 908.

prevent the construction of fire hazards and unsafe buildings by including certain requirements for fire escapes and stairways, and by prescribing the kinds of materials which could be used in construction. In addition, this law was intended to eliminate and prevent unsanitary housing conditions by setting forth minimum requirements as to light and ventilation, the height and size of rooms, the number and size of windows, and regulations relating to the use of water closets and the use of basements.

As time went on the standards embodied in the Tenement House Law of 1867 were gradually raised. New standards were set and older ones were raised from time to time[3] until, with the enactment of the Tenement House Law of 1901,[4] the New York Legislature passed the most significant regulatory act in America's history of housing. This law, adopted after the exposé of the shocking tenement conditions in New York City by the Tenement House Commission of 1900[5] progressed far beyond preceding legislation in its detail, its scope and the high character of its standards. The Tenement House Law of 1901 which applied only to cities of the first class did practically nothing to bring about the elimination or the improvement of the tenements then in existence. For this reason there exist in New York City today thousands of "old law tenements" which were built before 1901 when the standards were still low. The Tenement House Law of 1901 has served directly or indirectly as the chief working model of the tenement-house legislation in other states.[6] Section 100 of the Tenement House Law of 1901 required that all school sinks in existing tenement houses be removed by January 1, 1903 at the expense of the owner and replaced by water closets. The constitutionality of such a provision was decided in the case of *Tenement House Department v. Moeschen,*[7] in which the New York Court of Appeals took judicial notice of the events leading up to the enactment of the 1901 Tenement House Law and upheld Section 100 as a proper exercise of the state's police power. The tenement house laws were consolidated in 1909[8] which code is still the law except as to cities of eight hundred thousand or more which are under the Multiple Dwelling Law[9] discussed later.

3. For a discussion of the tenement house reforms to 1900, see 1 FORD, SLUMS AND HOUSING (1936) 122-204; Fisher, *Housing Legislation and Housing Policy in the United States* (1933) 31 MICH. L. REV. 320, 328; DEFOREST AND VEILLER, THE TENEMENT HOUSE PROBLEM (1903).

4. N. Y. Laws 1901, c. 334.

5. Appointed by the Governor pursuant to N. Y. Laws 1900, c. 279.

6. 1 FORD, *op. cit. supra* note 3, at 205; Wood, *Housing: United States* (1932) 7 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 511.

7. 179 N. Y. 325, 72 N. E. 231, 70 L. R. A. 704 (1904), *aff'd,* 203 U. S. 583 (1906).

8. N. Y. Laws 1909, c. 99.

9. N. Y. Laws 1929, c. 713.

Zoning and Planning Laws

Along with the recognition of the necessity for establishing higher standards for new residential buildings came the realization that some method must be achieved of preserving the residential character of certain neighborhoods. Experience showed that slums might develop in the best residential section of a city when commerce and industry were permitted to encroach upon these areas. It was necessary to supplement the laws relating to buildings with laws dealing with entire sections of a city so that an orderly city plan could be formulated. For this reason the New York State Legislature in 1917 passed a statute permitting cities to enact zoning ordinances.[10]

Once the principle of zoning had become firmly established, attention was focused on the necessity for regional planning. Legislation in 1925 permitted the establishment of regional and county planning boards[11] with power to adopt a master plan to include the location of highways, parks and public facilities.[12]

The Multiple Dwelling Law

The latest enactment of the restrictive type of legislation in New York is the Multiple Dwelling Law of 1929[13] which affects New York City and any other city which elects to be governed by its provisions. This law, which supersedes the Tenement House Law of 1901 in so far as the

10. N. Y. GEN. CITY LAW § 20 (24) (1925).

For zoning laws relating to towns, see N. Y. TOWN LAW (1934) §§ 260-283; for village zoning laws, see N. Y. VILLAGE LAW (1934) §§ 175-179q.

11. N. Y. GEN. MUNICIPAL LAW (1932) §§ 239b- 239f.

For provisions for planning boards and official maps for cities, see N. Y. GEN. CITY LAW (1929) §§ 26-28. For town planning, see N. Y. TOWN LAW (1934) §§ 260-283.

12. Zoning ordinances have been sustained as not being in derogation of the Fourteenth Amendment to the Federal Constitution. Euclid v. Ambler Realty Co., 272 U. S. 365 (1926). In New York zoning has been held to be within the scope of the State's police power. Biggs v. Steinway, 229 N. Y. 320, 128 N. E. 211 (1920), *rev'g*, 191 App. Div. 526, 182 N. Y. Supp. 101 (1st Dep't 1920); Lincoln Trust Co. v. Williams Bldg. Corp., 229 N. Y. 313, 128 N. E. 209 (1920), *rev'g*, 183 App. Div. 225, 169 N. Y. Supp. 1045 (1st Dep't 1918).

The literature on zoning and planning is extensive. An adequate summary of the history of these topics appears in WOOD, RECENT TRENDS IN AMERICAN HOUSING (1931) 122-147. Reference should also be made to WILLIAMS, THE LAW OF CITY PLANNING AND ZONING (1922); BASSETT, ZONING PRACTICE IN THE NEW YORK REGION (1925); BASSETT and others, MODEL LAWS FOR PLANNING CITIES, COUNTIES, AND STATES, INCLUDING ZONING, SUBDIVISION, REGULATION AND PROTECTION OF OFFICIAL MAP (1935); FORD, *op. cit. supra* note 3, at 490-501; and to the publications of the Regional Plan Association, Inc., New York, N. Y.

13. N. Y. MULTIPLE DWELLING LAW (1936) §§ 1-367. The Multiple Dwelling Law is the result of a study by the Temporary Commission to examine and revise the Tenement House Law appointed under N. Y. Laws 1927, c. 569 and enlarged under N. Y. Laws 1928, c. 519.

City of New York is concerned, applies not only to tenements, but to hotels, apartment hotels, lodging and rooming houses, clubs and dormitories. It provides new standards for the maximum height of such dwellings and for the proportion of lots which may be occupied by such dwellings, requires larger courts and yards, the setting back of the higher stories in tall buildings so that they will not deprive the surrounding neighborhood of light, and contains measures of sanitation and for protection against fire and other dangers.

The Multiple Dwelling Law (which has been amended several times since its adoption in 1929[14]) was considered by the Court of Appeals in the case of *Adler v. Deegan.*[15] The owner of a multiple dwelling brought a suit to enjoin the Tenement House Commissioner from enforcing the provision of the Multiple Dwelling Law which required the petitioner to light the halls of his multiple dwelling. The grounds alleged for the invalidity of the statute was that it was enacted in violation of the home rule provision of the Constitution[16] because it related to the "property, affairs or government" of the City of New York and was not enacted as a general law or by the concurrent action of two-thirds of the members of each house of the Legislature upon a message from the governor declaring that an emergency existed. The Court of Appeals by a five to two decision held that the Multiple Dwelling Law, although general in form, was, within the meaning of the Home Rule Amendment, a special law, but that it was not enacted in violation of the home rule provision because it did not relate to the "property, affairs or government" of the city as those words are used in the Constitution. The basis of the decision was that the health and safety of the inhabitants of the City of New York were not a concern of that city alone but of the whole state, and the Multiple Dwelling Law, in so far as it was then in question, was a general health measure which was properly a subject for state legislation. The significance of this decision lies not alone in the fact that it recognized the validity of direct state action in the field of slum eradication and housing, notwithstanding the home rule provision,[17] but also in the fact that it laid a basis for the creation by the state legislature of appropriate instrumentalities to attack this problem of state concern.

Seventy years of effort by the New York Legislature to regulate the

14. N. Y. Laws 1932, cc. 620, 626; Laws 1933, cc. 210, 398; Laws 1934, cc. 528, 529, 530, 531, 532, 552, 719, 742; Laws 1935, cc. 336, 863, 864, 865, 866, 904, 941; Laws 1936, cc. 271, 321, 809.

15. 251 N. Y. 467, 167 N. E. 705 (1929).

16. N. Y. CONST., art. 12, § 2.

17. Commentators have stressed this aspect of the case. Comment (1929) 39 YALE L. J. 92; Comment (1929) 16 VA. L. REV. 189; Comment (1930) 24 ILL. L. REV. 596; Judicial Decisions (1930) 19 NAT. MUN. REV. 52; Comment (1930) 7 N. Y. U. L. Q. REV. 752.

use of existing residential buildings and to prescribe minimum standards for new construction failed to bring about the actual elimination of the overcrowded, unsanitary tenements and slum areas or the construction of safe and sanitary housing facilities within the reach of families with low incomes. In recognition of this fact, the Legislature has during recent years devoted its attention to the problem of setting up a basis for actually achieving slum clearance and low-rent housing projects.[18]

ENABLING HOUSING LEGISLATION

Tax Exemption

The first efforts of the New York Legislature to encourage the construction of new housing facilities were motivated not by the desire to provide adequate dwellings particularly for persons with low incomes, but to meet a general shortage of adequate housing for all classes. At the end of the war there was forcibly brought to the public attention the alarming lack of habitable dwellings in New York, especially in New York City. During the war, building construction had practically ceased. Meanwhile, population in the urban centers was increasing and the cost of building was rising.[19] It was natural that the New York Legislature, meeting in 1920, should direct its attention to the acute housing shortage. The time was ripe for a stride in the direction of positive legislation which would encourage new housing construction.

The method initially adopted by the Legislature to stimulate new building was the enactment in 1920 of an act providing for tax exemption.[20] This act permitted cities, counties, towns, or villages to exempt from local taxation until January 1, 1932 any new dwelling, except

18. For a discussion of New York State housing legislation, see Robbins, *Housing Legislation—In Retrospect and in Prospect* (1935) 6 QUARTERLY BULLETIN, NEW YORK STATE CONFERENCE ON SOCIAL WORK 21; for a discussion of housing legislation generally, see *Recent Trends in Housing Legislation* (1935) 8 TEMPLE L. Q. 99; for a general discussion of the housing problem, see Wood, *Slums and Blighted Areas in the United States* (1935) PWA HOUSING DIV. BULL. No. 1; for an exhaustive bibliography on various aspects of slum and housing problems in New York City and for a bibliography of housing bibliographies, see 2 FORD, *op. cit. supra* note 3, at 973-1002.

19. Report of the Housing Committee of the Reconstruction Commission of the State of New York, March 26, 1920.

20. N. Y. Laws 1920, c. 949, N. Y. TAX LAW (1924) § 4b (renumbered § 5 in 1933). Other laws growing out of the post-war housing shortage dealing principally with the rights and remedies of landlords and tenants in New York City and vicinity were N. Y. Laws 1920, cc. 942, 943, 944, 945, 947, 951. The constitutionality of these regulatory measures was sustained in Marcus Brown Holding Co., Inc. v. Feldman, 256 U. S. 170 (1921), *aff'g*, 269 Fed. 306 (S. D. N. Y. 1920), and Levy Leasing Co., Inc. v. Siegel, 258 U. S. 242 (1921), *aff'g*, 230 N. Y. 634, 130 N. E. 923 (1921), *aff'g*, 194 App. Div. 482, 186 N. Y. Supp. 5 (1st Dep't 1920). *Cf.* Block v. Hirsh, 256 U. S. 135, 16 A. L. R. 165 (1922).

hotels, begun before April, 1922.[21] New York City was the only city to take advantage of this act.[22]

Commentators do not agree on the effectiveness of the tax exemption form of subsidy. One has said, "There is no doubt that tax exemption broke the post-war residential building deadlock in New York City,"[23] and another has said, "Thus, although New York was ahead in percentage of increase, it may be questioned whether tax exemption 'broke the deadlock' or whether its rôle was the much less important one of stimulating a boom which was incipient at that time in New York as well as throughout the country."[24]

Whatever may have been its results, the significance of the 1920 Act is that it indicated an awareness by the New York Legislature of the housing shortage and a determination to encourage new construction through some form of subsidy.[25]

The next important positive step in the direction of subsidizing housing construction was the State Housing Law of 1926.[26] So far as subsidy through tax exemption is concerned, this Act restated the policy of the Legislature, but whereas the 1920 Act extended the tax exemption benefits to any builder, the 1926 Act confines these benefits to limited-dividend companies authorized to be created pursuant to that Act. Under this State Housing Law, limited-dividend companies complying with the terms of the act are exempt from certain state taxes, and municipalities are given the right to exempt the buildings and improvements of such companies from local taxation, in which case, such buildings and improvements are, to the extent of the local exemption, exempt from all state taxes.[27] In 1927, New York City took advantage of this act by granting twenty years' tax exemption on buildings erected before January 1, 1937, by limited-dividend companies operating under the State Housing Law.[28]

---

21. Extended to April 1, 1923 by N. Y. Laws 1922, c. 281.

22. City Ordinance 112, approved February 18, 1921 and by Board of Estimate and Apportionment, February 25, 1921. 1 Proc. Board of Aldermen (1921) 390; 1 Minutes Board of Estimate and Apportionment, City of New York (1921) 1242-44.

23. WOOD, *op. cit. supra* note 12, at 108.

24. Fisher, *supra* note 3, at 331.

25. The constitutionality of the tax exemption law was sustained in Hermitage Co. v. Goldfogle, 204 App. Div. 710, 199 N. Y. Supp. 382 (1st Dep't 1923), *aff'd*, 236 N. Y. 554, 142 N. E. 281 (1923).

26. N. Y. UNCONSOL. LAWS (State Housing Law) (1935) §§ 2251-2343.

27. N. Y. UNCONSOL. LAWS (State Housing Law) (1935) §§ 2289, 2300, 2301(b).

28. Local Law No. 9, enacted June 22, 1927. Sustained in Mars Realty Corp. v. Sexton, 141 Misc. 622, 253 N. Y. Supp. 15 (Sup. Ct. 1931).

Limited-Dividend Companies

The necessity for enabling and encouraging the construction of new housing facilities *within the reach of families with low incomes* was recognized by the Legislature in the State Housing Law.[29] This law (originally intended to include a state housing bank, a portion of the program which failed of enactment), creates a State Board of Housing and provides for two types of limited-dividend housing companies, "public," which have the power of eminent domain, and "private," which do not have such power. To qualify for the benefits of the Act, limited-dividend companies must provide one-third of the capital necessary for low-rent housing projects, the remainder of the cost of such a project to be raised by first mortgage loans at an interest rate not to exceed 5%. Maximum rents which may be charged are restricted to $12.50 a room per month in Manhattan, $11.00 in other parts of the metropolitan area and $9.00 in the rest of the state, and the maximum dividends on the stock of the companies are restricted to 6%.

The New York Housing Law was the first legislation to have a really constructive effect on the quality of urban housing, a conclusion borne out by the character of the projects constructed under the law[30] and recognized by the Emergency Relief and Construction Act of 1932[31] which permitted the Reconstruction Finance Corporation to make loans to housing corporations which were subject to regulation similar to that contained in the New York Act.

Low-rent housing for persons in the lowest income brackets, however, was not achieved on any effective scale by the "private" limited-dividend companies.[32] High land values and inability to condemn, lack of tax exemption on land and ineligibility for direct subsidies[33] coupled with the incentive for profit, even though restricted, make it virtually impossible for private limited-dividend companies to bring rents within the reach of families in the lowest income brackets.[34] Sentiment is

29. For a historical background of this law, see Report of the Commission of Housing and Regional Planning for Permanent Housing Relief (LEGIS. DOC. No. 66).

30. See annual reports of New York State Board of Housing from 1927 to 1936.

31. 47 STAT. 709, 15 U. S. C. A. § 605(a) (1932).

32. For a brief summary of early limited-dividend planned low-rent projects in the United States, grouped into the three major classifications of philanthropic, investment and cooperative, see *Urban Housing* (1936) PWA HOUSING DIV. BULL. No. 2, at 55-62.

33. The necessity for a subsidy in order to achieve low-rent housing is well recognized. See Mayer, *Can We Have a Housing Program?* (Oct. 9, 1935) 141 NATION 400 and *A Practical Housing Program* (Oct. 16, 1935) 141 NATION 432; testimony of Messrs. Clas, Ryan, Stern, Straus, Johnson, Woodbury and of Mrs. Wood in *Hearings Before Committee on Education and Labor on S. 4424*, 74th Cong., 2d Sess. (1936).

34. Five of the limited-dividend companies operating under the State Housing Law in 1935 charged more than an average of $12 per room per month, five others charged more than an average of $10 per room per month, and only one charged as low as an

rapidly crystallizing toward the conclusion that this objective can not be realized unless low-rent housing and slum clearance are undertaken not only for the public but by the public. "Public" limited-dividend companies, although authorized by the State Housing Law, were not set up, and it was not until the Housing Authorities Law of 1934 was enacted that the Legislature utilized the public corporation as the instrumentality for attacking the slum clearance and low-rent housing problem.

Housing Authorities Law

The Housing Authorities Law[35] amends the State Housing Law by authorizing any city in the state to set up local authorities which are declared to be bodies corporate and politic, with broad power to undertake slum clearance and low-rent housing projects. An authority set up pursuant to this Act is managed by a board of five members appointed by the mayor of the city to serve for staggered terms of five years. The members receive no salary but the expenses incident to the exercise of their duties are reimbursable. Each authority is empowered to engage in research and investigations, plan, construct, reconstruct, improve, alter or repair and operate housing projects, to take over and operate projects by lease or purchase, to act as agent in the acquisition, construction, operation or management of housing projects, to acquire necessary real or personal property by eminent domain or otherwise, to borrow money and accept grants, and to do any and all things necessary or desirable to obtain the financial aid of the Federal government in undertaking the construction and operation of any project of the authority or in connection with any housing plan or undertaking of the Federal goverment. In no case is an authority authorized to issue a bond which would be an obligation of the state or the municipality in which the authority operates. A city setting up an authority is authorized to cooperate with it by advancing funds for expenses, by opening and closing streets and providing parks and by assisting in the condemnation of land.

There seems to be no doubt that the future of housing in New York is bound up in the success of the housing authorities such as those authorized under this Housing Authorities Law.[36] The practical ad-

average of $8.85 per room per month. Report of the State Board of Housing, LEGIS. DOC. No. 41 (1936) Table XIV, 76.

35. N. Y. UNCONSOL. LAWS (State Housing Law) (1935) §§ 2310-2328.

36. Reports in summary form of housing authorities in New York City (established Feb. 20, 1934), Schenectady (established Feb. 6, 1934), Buffalo (established Oct. 13, 1934), Yonkers (established June 24, 1935) and Syracuse (established Sept. 9, 1935) appear in the Report of the State Board of Housing, LEGIS. DOC. (1936) No. 41, 27-32.

vantages of local responsibility[37] and freedom from legal questions involved in Federal construction and operation[38] are but two aspects which point to the municipal housing authority as the means best adapted for a sustained attack on the low-rent and slum clearance problems. Moreover, the experience of the Federal government in this field during the past four years has resulted in the realization that the initiation, planning, construction, financing and operation of low-rent housing should be left with the cities.[39]

THE FEDERAL LOW-RENT HOUSING PROGRAM

When the Federal Emergency Administration of Public Works began to formulate a comprehensive program of public works in 1933,[40] the inclusion of housing projects was considered by all to be one of its most important component parts. Such projects accomplished in the fullest degree the primary objective of the PWA program—to provide employment—and at the same time supplied safe and sanitary dwellings which were so vitally needed throughout the nation. The normal method of financing a local project by PWA is through a loan and grant to the non-Federal public body which undertakes the construction of the project.[41] But cities in 1933, although willing to under-

37. Alfred, *Municipal Housing* (December, 1935) National Public Housing Conference.

38. For example, the power of the Federal government to condemn land for a low-rent housing project is not settled. See United States v. Certain Lands in the City of Louisville, 78 F. (2d) 684 (1935).

39. *A Look Forward at Housing and PWA*, an address by Hon. Harold L. Ickes, on Nov. 17, 1936, before the United States Conference of Mayors.

40. Pursuant to title II of the National Industrial Recovery Act [48 STAT. 200, 40 U. S. C. A. § 401 (1933)]. Section 202(d) [40 U. S. C. A. § 402(d) (1933)] of this Act authorized the inclusion in the comprehensive program the "construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects." In 1935, the Congress, in appropriating $4,880,000,000 for relief, work relief and public works, authorized the use of $450,000,000 for housing [49 STAT. 115 (1933), 15 U. S. C. A. § 728 note (1936)]. The function of carrying out the urban slum-clearance and low-rent housing program was delegated to Administrator Ickes by the President in his Executive Orders No. 6252 of Aug. 19, 1933 and No. 7064 of June 7, 1935. In 1936, the Congress amended title II of the National Industrial Recovery Act with respect to housing. (Pub. L. No. 837, 74th Cong., 2d Sess.). This last amendment is discussed in Brabner-Smith, *The Government's Housing Program to Date* (1936) 22 A. B. A. J. 631.

41. See Report of the Business of the Federal Emergency Administrator of Public Works for the Period Ending Feb. 15, 1934, SEN. DOC. 167, 73d Cong., 2d Sess., transmitted pursuant to SEN. RESOL. No. 190; Circular No. 1, The Purposes, Policies, Functioning, and Organization of the Emergency Administration [of Public Works], July 31, 1933; Testimony of the Federal Emergency Administrator of Public Works during the Hearings on the First Deficiency Appropriation Bill, 1936, May 18, 1936, before the Subcommittee of the Committee on Appropriations, U. S. Senate, 74th Cong., 2d Sess.

take the construction of low-rent housing projects, could not do so because the necessary positive enabling legislation was lacking.[42]

To initiate its housing program, PWA made loans to seven limited-dividend housing companies.[43] Although these projects were successful from the point of view of creating employment, these companies, for reasons already pointed out, were unable to construct housing projects within the reach of families in the lowest income brackets. PWA under its statute can make outright lump sum grants in aid of a housing project only to states, municipalities and other public bodies. The inability to achieve low-rent housing projects when they were financed entirely by loans to limited-dividend private housing companies prompted PWA to turn to the only other method then open for accomplishing its objectives; namely, direct Federal construction. At the present time some fifty Federal slum clearance and low-rent housing projects have been undertaken by PWA throughout the country.[44] The first of these projects to be placed in operation was in Atlanta; all of them are expected to be in operation within a year.

Experience of the Federal government with direct construction and operation of housing projects has demonstrated that the responsibility for initiating and acquiring land for new low-rent housing projects, undertaking their construction, and supervising their operation are matters which should be placed in competent local hands and that the functions of the Federal government in this field should be those of sharing the financial burden and making available technical assistance and the results of its research.[45]

The recognition of these facts has been reflected in the suggestions made by PWA for enactment of state housing legislation and the action by the states upon these suggestions. In response to requests from the governors of many states, PWA drafted housing bills, somewhat along the lines of the New York Housing Authorities Law, which offered a basis for effective cooperation between the Federal government and local agencies.[46]

42. For a discussion of inadequate state legislation to enable municipalities to participate in the public works program in 1933 and the part played by PWA in drafting, when requested, remedial or enabling legislation, see Foley, *Some Recent Developments in the Law Relating to Municipal Financing of Public Works* (1935) 4 FORDHAM L. REV. 13.

43. These seven are: Alta Vista, Va.; Boulevard Gardens, Woodside, Queens, N. Y.; Boylan, Raleigh, N. C.; Carl Mackley Houses, Philadelphia, Pa.; Euclid Housing, Euclid, Ohio; Hillside Homes, Bronx, N. Y.; and Neighborhood Gardens, St. Louis, Mo. For a description of each of these projects, see *Urban Housing, supra* note 32, at 79-82.

44. A description of each of these projects is contained in *Urban Housing, id.* at 82-105.

45. This conclusion is borne out by the method of Federal cooperation proposed in the Wagner-Ellenbogen Housing Bill (S. 4424, 74th Cong., 2d Sess.) which passed the Senate near the end of the 74th Congress.

46. Some twenty states have enacted statutes creating or authorizing the creation of

The use of the housing authority as an instrumentality for undertaking and financing low-rent housing projects is a sound, feasible, business-like way of approaching the low-rent housing problem. The authority can be managed by experts trained in this highly specialized and technical field. Its lack of power to tax, to exercise police power, to enact penal ordinances, to regulate the use of streets, to license,—all are factors which meet with the approval of those who are concerned with the threat of rising taxes and overlapping governmental functions. It qualifies as a public body eligible for financial assistance from the Federal, state and municipal governments.

It remains, therefore, to determine whether the adaptation of the authority concept to the field of slum clearance and low-rent housing rests on a sound legal basis.

THE NEW YORK MUNICIPAL HOUSING AUTHORITY

Historical Background

It is not to be supposed that there were no legislative precedents in New York for the creation of a public corporate instrumentality, without the power to tax but with power to construct and finance projects on a self-liquidating basis. Almost thirteen years before the adoption of the Housing Authorities Law, the Port of New York Authority had been created by a compact between the states of New York and New Jersey with the consent of the Congress of the United States.[47] This Port Authority was constituted as a body corporate and politic, with authority to purchase, construct, lease, operate and make charges for the use of terminals or transportation facilities. It was given the power to borrow money for the corporate purposes of the Authority on the security of bonds payable from its revenues.

Although the Court of Appeals in New York had not passed upon the validity of the enabling acts relating to the Port of New York Authority, this authority functioned so successfully that the Legislature

housing authorities. Ala. Laws 1935, No. 56; Colo. Laws 1935, c. 132; Del. Laws 1934, c. 16; Ill. Laws 1933-34, p. 159; Ky. Laws 1934, c. 113; La. Laws 1936, No. 275; Md. Laws 1933, Ex. Sess., c. 32; Mass. Laws 1935, c. 364 as amended by Laws 1935, c. 449; Mont. Laws 1935, c. 140; Neb. Laws 1935, c. 29; N. J. Laws 1933, c. 444; N. Y. Laws 1934, c. 4, as amended by Laws 1935, c. 310; N. C. Laws 1935, c. 456; Ohio Laws 1933, 1st Sp. Sess., p. 56; Pa. Laws 1935, No. 191 (not limited to housing); R. I. Laws 1935, c. 2255; S. C. Laws 1934, No. 783, as amended by Laws 1935, No. 301, and Laws 1935, No. 345; Tenn. Laws 1935, Ex. Sess., c. 20; W. Va. Laws 1933, 2d Ex. Sess., c. 93; Wis. Laws 1935, c. 525. Hawaii also has a housing authority act, Hawaii Laws 1935, Act 190, Series D-168. For a discussion of the Kentucky Act, see Pumphrey, *Housing Legislation in Kentucky* (March and May, 1936), 24 KY. L. J. 306, 470.

47. The compact was authorized by N. Y. Laws 1921, c. 154 and N. J. Laws 1921, c. 151 and was approved by Joint Resolution of Congress, 42 STAT. 174 (1921).

of New York saw fit from time to time to adapt the framework of the Port of New York Authority Act to the problem of making possible the construction and operation of other types of projects. By the time the Legislature was seeking a practical method of accomplishing public low-rent housing, it had already created authorities such as the Power Authority of the State of New York,[48] The New York State Bridge Authority,[49] the Pelham-Portchester Parkway Authority,[50] the Jones Beach State Parkway Authority,[51] the Saratoga Springs Authority,[52] the Thousand Islands Bridge Authority,[53] the American Museum of Natural History Planetarium Authority,[54] the Lower Hudson Regional Market Authority,[55] the Central New York Regional Market Authority,[56] the Industrial Exhibit Authority,[57] the Beth Page Park Authority,[58] the Buffalo and Port Erie Public Bridge Authority[59] and the Tri-borough Bridge Authority.[60] Aside from these legislative precedents, there was little to guide the Legislature in the framing of a statute authorizing the creation of housing authorities.[61] Since the enactment of the Housing Authorities Law, however, there have been important judicial pronouncements by the courts of New York deciding the various questions inherent in this type of legislation. These questions fall into three groups: those relating to the creation of the authority, those relating to the debt-incurring power of the authority, and those relating to the power of the authority to acquire property by eminent domain.

The Creation of the Authority

In the case of *People* ex rel. *Hon. Yost v. Becker*,[62] the Court of Appeals held that the Legislature was prohibited by the Constitution

48. N. Y. Laws 1931, c. 772, as amended by Laws 1933, c. 448.

49. N. Y. Laws 1932, c. 548, as amended by Laws 1933, c. 677, and Laws 1936, c. 686.

50. N. Y. Laws 1933, c. 68.

51. N. Y. Laws 1933, c. 70.

52. N. Y. Laws 1933, c. 208.

53. N. Y. Laws 1933, c. 209, as amended by Laws 1936, c. 272.

54. N. Y. Laws 1933, c. 214, as amended by Laws 1933, cc. 816, 817.

55. N. Y. Laws 1933, c. 231, as amended by Laws 1935, c. 844.

56. N. Y. Laws 1933, c. 232, as amended by Laws 1935, c. 846, Laws 1936, c. 370.

57. N. Y. UNCONSOL. LAWS (Fairs and Exhibitions) (1936) §§ 1521-1533.

58. N. Y. Laws 1933, c. 801.

59. N. Y. Laws 1933, c. 824.

60. N. Y. Laws 1933, c. 145, as amended by Laws 1936, c. 555.

61. See, however, opinion of Hon. Charles Evans Hughes to Hon. Julian A. Gregory, Chairman, Port of New York Authority, dated Nov. 10, 1925, on the validity of the organization and powers and immunities of and status of bonds then proposed to be issued by the Port of New York Authority.

62. 203 N. Y. 201, 96 N. E. 381 (1911).

from creating civil divisions of the state for political purposes, other than counties, towns, cities and villages. Was an authority such a civil division of the state the creation of which was beyond the power of the Legislature? The first authority case decided by the New York Court of Appeals involved the Buffalo Sewer Authority which had been created under a special act of the Legislature to construct and finance sewage facilities to relieve the Niagara and Buffalo Rivers and Lakes Erie and Ontario from pollution by the raw sewage and waste of the City of Buffalo and other municipal corporations in the County of Erie.[63] In this case, *Robinson v. Zimmermann,*[64] the court did not directly pass upon the power of the Legislature to create an authority, but in the later case of *Gaynor v. Marohn,*[65] the court, after referring to the act creating the Buffalo Sewer Authority, unequivocally stated that the State may create such an agency for the purpose of carrying out a state duty or function. It is significant that in listing instances in which the New York Legislature had selected authorities as appropriate instrumentalities to perform a state function, the court cited the Municipal Housing Authorities Law.[66]

The creation of an authority or the power to create an authority, however, must be clearly evident from express statutory enactment. The efforts of the City of New York to establish an authority for the purpose of constructing and financing a municipal power plant to serve a portion of the city and its inhabitants were defeated for the reason that there was no act of the Legislature creating or providing for the creation of such an authority.[67] A complete restatement of the law of New York relating to the creation of authorities was set forth by the Court of Appeals in the case of *Suffolk County v. Water Power and Control Commission,*[68] in which the court stated: "Moreover, there can be no doubt that the Legislature may create or provide for the creation of an authority for various purposes where there is no attempt to grant it general powers of local government."[69]

63. N. Y. Laws 1935, c. 349.

64. 268 N. Y. 52, 196 N. E. 740 (1935).

65. 268 N. Y. 417, 198 N. E. 13 (1935), sustaining in part, N. Y. Laws 1935, c. 842.

66. For a collection of statutes creating or authorizing the creation of authorities in New York as well as in other states, see Foley, *Revenue Financing of Public Enterprises* (1936) 35 MICH. L. REV. 1, 35-38.

67. Tierney v. Cohen, 268 N. Y. 464, 198 N. E. 225 (1935). For a discussion of this case, see Foley, *The Case of Tierney v. Cohen* (1936) 5 FORDHAM L. REV. 73.

68. 269 N. Y. 158, 199 N. E. 41 (1935).

69. The statute under consideration in the Suffolk County case authorized the Board of Supervisors of any county to create a county water authority (N. Y. Laws 1934, c. 847, as amended by Laws 1935, c. 176). There is no requirement in the statute for a finding of fact as to the necessity for such an authority. Prior to the decision in the *Suffolk County* case, the New York Legislature had validated the creation of the New York

The Debt Question

The problem here is whether the obligations of a housing authority are debts of the state or of the municipality in which it operates within the meaning of the provisions of the New York Constitution relating to state[70] or municipal[71] indebtedness. In support of the proposition that obligations of a housing authority are not such debts, two lines of reasoning are available.

In the first place, the constitutional provisions involved refer to the state and to counties and cities, but do not refer to instrumentalities of the state such as an authority. It has already been pointed out that the housing authorities are created as separate legal entities, distinct from the state itself and from the political and civil subdivisions of the state. For this reason, the obligations of the authority, if they are to be considered debts at all, can only be debts of the authority.[72] The authority is the only obligor on its bonds or other forms of indebtedness. Its obligations are by their terms enforceable only against the authority and in no case enforceable against the state or any other public body of the state. The separate corporate status of an authority was recognized by the Court of Appeals in the case of *Robertson v. Zimmermann,*[73] in considering whether the obligations of the Buffalo Sewer Authority were debts of the City of Buffalo within the meaning of the constitutional debt limitation.

At the time the Buffalo Sewer Authority proposed to issue its obligations, the City of Buffalo had remaining a constitutional debt-incurring power of only $6,000,000. If the bonds proposed to be issued by the Buffalo Sewer Authority in the amount of $15,000,000 would have constituted debts of the City of Buffalo, the Court of Appeals would have had to condemn the proposed method of financing. Instead, the Court upheld the proposed method of financing, pointing out that the bonds

City Housing Authority (N. Y. Laws 1935, c. 311), the Buffalo Housing Authority (N. Y. Laws 1935, c. 312) and the Schenectady Housing Authority (N. Y. Laws 1935, c. 313). In most states, legislation authorizing the creation of housing authorities requires a finding of fact by the local governing body as to the necessity for the authority. *E.g.,* R. I. Laws 1935, c. 2255, § 4.

70. N. Y. CONST. art. VII, § 4.

71. N. Y. CONST. art. VIII, § 10.

72. Where a statute did not create an authority as a separate corporate instrumentality, the New York Court of Claims held that the State was liable in an action on a contract entered between the authority and an architect. Brocklay v. State, 158 Misc. 424, 285 N. Y. Supp. 773 (Ct. Cl. 1936), construing N. Y. Laws 1933, c. 246 which created the Industrial Exhibit Authority. The statute was amended and reenacted by N. Y. Laws 1934, c. 304 which created the Industrial Exhibit Authority as a public benefit corporation.

73. 268 N. Y. 52, 196 N. E. 740 (1935).

would be obligations only of the authority, payable only out of funds of the authority and hence would not be debts of the City of Buffalo.

Nor are the obligations of an authority debts of the state, and for the same reason, to wit, they are executed by officers of the authority in the name of the authority and in no way bind the faith and credit of the state or pledge the state's taxing power to their payment. There are numerous judicial precedents in other states holding that obligations of such a separate public corporation are not debts of the states which have created them or of the public bodies in which they operate or which they may overlap.[74]

The second line of reasoning in support of the proposition that obligations of an authority are not debts within the meaning of any constitutional provision is founded upon the so-called "special fund doctrine." Under this doctrine, obligations of a public body which are payable solely from the income of the project for the construction or improvement of which the obligations are issued, do not constitute debts of such public body within the meaning of a constitutional debt limitation or restriction. The special fund doctrine has been adopted by courts in practically every state in which constitutional debt questions have arisen with respect to the issuance of revenue obligations.[75]

In the State of New York, the earliest case involving revenue financing was *Newell v. People,*[76] in which the Court of Appeals held that the issuance by the state of obligations secured by revenues of existing canals, violated the provisions of the 1846 Constitution which made specific provision for the use of canal revenues.[77] The dicta of the Court of Appeals in the *Newell* case went far beyond what was necessary for the holding in that case. In a more recent case,[78] involving revenue financing by a village, the Court of Appeals upheld this method of financing.

In *Robertson v. Zimmermann,*[79] the Court of Appeals cited with approval cases in other jurisdictions which had upheld revenue financing as a legal means of undertaking public improvements. There appears to be little doubt that the New York Court of Appeals, having recognized that the obligations of an authority do not pledge the taxing power either of the state or of the municipality in which it operates, would hold that such obligations being payable solely from revenues as

74. These cases are cited and discussed in Foley, *supra* note 66, at 6-22.

75. Substantially all the cases in this country dealing with the special fund doctrine are collected in Foley, *ibid.*

76. 7 N. Y. 9 (1852).

77. N. Y. Const. of 1846, art. VII, § 3.

78. Kelly v. Merry, 262 N. Y. 151, 186 N. E. 425 (1933).

79. 268 N. Y. 52, 196 N. E. 740 (1935).

opposed to taxation, are not debts within the meaning of the New York Constitution, even of the obligor on the bonds were the state itself or a city. Such a holding would be entirely consistent with the decision in *Bank for Savings v. Grace*[80] from which it can be inferred that the Court of Appeals will construe the debt-restricting provisions of the Constitution as applying to the issuance of obligations payable from taxes, direct or indirect, and not to obligations payable solely from the revenues of the undertaking for the construction or improvement of which the obligations are issued.[81]

An aspect of the debt question still unsettled under the decisions of the Court of Appeals is the effect of a mortgage as additional security for the bonds of an authority, sometimes considered to be necessary in connection with bonds of a housing authority, in order to attract private capital. In jurisdictions outside New York there are cases holding that a foreclosable mortgage on state or municipal property given as additional security for a revenue obligation renders such obligation a debt within the meaning of a constitutional provision limiting state or municipal indebtedness. More recently, the weight of authority has been to the effect that so long as the mortgage covers property acquired with the proceeds of the bonds, the obligations are not debts notwithstanding a mortgage is given.[82]

In a case where the obligations are those of an authority, there is an additional reason for holding that a mortgage may be given on any property of the authority, however acquired, without violating constitutional debt provisions. Since an authority has the power to take title to property in its own name, to hold such property for its own use and to alienate such property in its discretion, the fact that the obligations of such an authority are secured by a lien on its property as well as upon its revenues should not make such instruments debts of the state or of any public body of the state other than the authority.

Power to Acquire Property by Condemnation

More important to the successful operation of a housing authority than to any other type of authority is the power to acquire property by condemnation. The constitutional question incident to the exercise of such power is whether low-rent housing is a public use for which prop-

80. 102 N. Y. 313, 7 N. E. 162 (1886).

81. Consistent with this conclusion is the case of Longken v. City of Long Beach, 268 N. Y. 532, 198 N. E. 390 (1935), in which the Court of Appeals upheld, as not being debts of a city, bonds issued by the city payable from special assessments on property of a district established by the city.

82. For a collection of cases discussing the effect on the debt question of a mortgage as additional security for a revenue obligation, see Foley, *supra* note 66, at 17, notes 68, 69.

erty may be condemned. Although there were judicial precedents upholding the use of public moneys for carrying on a program of housing for persons of low income,[83] the exercise of the power of eminent domain for such purpose had never been passed upon until the case of *New York City Housing Authority v. Muller*.[84] The case involved an action by the New York City Housing Authority to condemn land for use as a site for a low-rent housing project. The proceedings were resisted by the owner of the property to be condemned on the ground that the taking of his property would be in violation of the federal and state constitutions because it was not to be devoted by the authority to a public use. In a decision which marks a significant advance in the law relating to municipal housing, sustaining the power of the New York Housing Authority to acquire the necessary land for a low-rent housing project through the exercise of the power of eminent domain, Judge Crouch for the New York Court of Appeals described the implements available to the state in its attack on the low-rent housing program as follows:

"The fundamental purpose of government is to protect the health, safety, and general welfare of the public. All its complicated activities have that simple end in view. Its power plant for the purpose consists of the power of taxation, the police power, and the power of eminent domain. Whenever there arises, in the state, a condition of affairs holding a substantial menace to the public health, safety, or general welfare, it becomes the duty of the government to apply whatever power is necessary and appropriate to check it. There are differences in the nature and characteristics of the powers, though distinction between them is often fine. (Citing cases). But if the menace is serious enough to the public to warrant public action and the power applied is reasonably and fairly calculated to check it, and bears a reasonable relation to the evil, it seems to be constitutionally immaterial whether one or another of the sovereign powers is employed."

The *Muller* case may well mark the turning of the tide. The seventy years of session laws sprinkled with the efforts of the Legislature to utilize its power of taxation and police power may now give way to an era of legislative action directed to the actual accomplishment of slum eradication and the construction of low-rent housing.

---

83. Green v. Frazier, 44 N. D. 395, 176 N. W. 11 (1920), *aff'd*, 253 U. S. 233 (1920); but see *In re* Opinion of Justices, 211 Mass. 624, 98 N. E. 611 (1912) and *In re* Opinion of Justices, 195 N. E. 897, 98 A. L. R. 1364 (Mass. 1935). *Cf.* Libby v. Portland, 105 Me. 370, 74 Atl. 805 (1909); for a city: Willmon v. Powell, 91 Cal. App. 1, 266 Pac. 1029 (1928); see Simon v. O'Toole, 108 N. J. L. 32, 155 Atl. 449 (1931). *Cf.* Hoskins v. City of Orlando, 51 F. (2d) 901 (C. C. A. 5th, 1931).

84. 270 N. Y. 333, 1 N. E. (2d) 153 (1936). This case is noted in (1936) 5 BROOKLYN L. REV. 327; (1936) 5 GEO. WASH. L. REV. 131; (1936) 31 ILL. L. REV. 113; (1936) 12 J. LAND & PUB. UTIL. ECON. 193; (1936) 84 U. OF PA. L. REV. 902; (1936) 45 YALE L. J. 1519. See also Comment (1936) 10 ST. JOHN'S L. REV. 280, 287.