Homelessness & Poverty (Report No. 111)

Resolved, That the American Bar Association supports the adoption of creative and comprehensive measures to address homelessness by eliminating illegal residential segregation, increasing the availability of affordable transitional and permanent housing and improving the accessibility of such housing to employment, schools, transportation, and human services. Such efforts should include:

(a) stronger enforcement of existing laws designed to eradicate discrimination in housing based on race, color, gender, disability or the presence of children in the family;

(b) affirmative plans to increase and preserve the supply of adequate affordable housing for low- and moderate-income families;

(c) regional initiatives to provide affordable housing that is accessible to employment, schools, transportation, and human services;

(d) programs to integrate communities by race and income to the greatest extent possible;

(e) provision of incentives and rewards such as incentive zoning and density bonuses to private builders and operators to encourage the planning and development of affordable housing in integrated communities;

(f) enactment of state, local and territorial laws (i) giving development proposals that comply with the standards of an approved affordable housing plan a presumption in favor of approval, (ii) creating special appeals processes to resolve disputes regarding affordable housing development proposals, including the use of mediation and conciliation services, and (iii) requiring regulatory agencies to establish that any denial of approval to such an application is based on health or safety factors that override the need for affordable housing.
I. Introduction

The United States faces a multi-layered housing crisis. Current statistics indicate that Americans reside predominantly in racially homogenous, segregated communities. Further, recent studies show a steep rise in homelessness and demonstrate that affordable housing is largely unavailable to very-low-income and low-income persons, a disproportionate percentage of whom are persons of color. These problems are intimately interconnected, both in their causes and in the mechanisms that maintain them. Alleviating America's current housing dilemma necessitates addressing concurrently segregation, housing availability, and inaccessibility to services.

The American Bar Association has a long history of supporting efforts to alleviate problems of homelessness and residential segregation. In 1972, the Association adopted recommendations of its Special Committee on Housing and Urban Development Law to "make decent, safe and sanitary housing available to all families at prices they can afford to pay." Included in the resolution was a recommendation calling for:

Elimination of jurisdictional differences in order to develop programs along metropolitan and regional lines rather than under the current narrow municipal zoning, building code

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2 As early as 1972, the poverty rate for African-Americans living in Chicago was 20% while the rate for their Euro-American counterparts was 5%; in Los Angeles, the rates were 22% for African-Americans and 9% for Euro-Americans; and in New York, the rates were 21% for African-Americans and 9% for Euro-Americans. Massey & Denton, American Apartheid, supra note 1 at 119; see also id. at 150 (observing that discrimination restricts the residential mobility of African Americans and thus undermines their social and economic well-being).

3 Id. at 179 ("No matter what their personal traits or characteristics, people who grow up and live in environments of concentrated poverty and social isolation are more likely to become teenage mothers, drop out of school, achieve only low levels of education, and earn lower adult incomes.")
and other restrictions, which impede development of housing that is soundly integrated along economic and racial lines and which inhibit comprehensive planning for future development of localities.

In 1986 the Association addressed homelessness by supporting, among other activities, the "adoption of public policies and programs that will contribute to the ability of homeless people to become productive citizens" and encouraging lawyers to begin implementing the recommendation.

Subsequently, the ABA created the Representation of the Homeless Project in its Section of Individual Rights and Responsibilities. The Project's mandate was to assist bar associations and other legal organizations established to meet the legal needs and concerns of homeless people. The Project was elevated to commission status in 1991 by the Board of Governors. Recommendations of the Project were adopted by the House of Delegates on several occasions, including recommendations on such housing issues as the need for due process in evictions of public housing residents suspected of drug-related activity (co-sponsored with the Standing Committee on Legal Aid and Indigent Defendants and the Section of Criminal Justice), the need for increased federal housing for the poor (co-sponsored with the Commission on Legal Problems of the Elderly and the Commission on Mental and Physical Disability Law), and on the responsibility of financial institutions to make affirmative efforts in their credit practices - particularly home mortgage loans among low-income and minority borrowers (co-sponsored with the Section of Business Law). The Commission has also developed a library of resources in the area of housing, including video and written material on the development of low-income housing and on the federal Community Reinvestment Act.

II. Need for ABA Policy at This Time

Every year since 1988, the Commission and its predecessor, the ABA Representation of the Homeless Project, has published a resource guide to bar association and law school homeless programs. This year the 1994 directory features over 80 pro bono homeless programs in 27 states in the District of Columbia. The guide highlights the outstanding work of many programs and illustrates how lawyers can ameliorate the plight of homeless individuals and families.

February 1972.
August 1986.
August 1990.
Attorneys who volunteer their services in such programs increasingly report that efforts to alleviate homelessness and to provide permanent housing experience conflict with local land use and zoning regulations. Providers of services for homeless people, from soup kitchens to daycare centers to shelters, have had difficulty in establishing programs because of opposition from neighborhood communities. An important role of lawyers is to represent service providers and their homeless clients at zoning hearings and to seek to resolve disputes in other ways.

New consolidated plan requirements of the Department of Housing and Urban Development include a requirement that local communities examine local laws for any regulatory impediments to integrated housing. The Fair Housing Amendments Act of 1988 has been held applicable to zoning ordinances. The act, however, has an exception for reasonable local land use regulations relating to density. Lawyers can provide leadership in helping housing providers and neighborhood residents resolve disputes concerning the impact of necessary housing and related services on existing neighborhoods without allowing the local zoning laws to be used to exclude affordable housing and related homeless support programs.

Experiences of pro bono attorneys in locally sponsored housing programs indicate that this is an appropriate time for the Association to encourage greater efforts to adopt creative and comprehensive measures to address homelessness by eliminating illegal residential segregation, by improving the accessibility of poor neighborhoods to services, and by increasing the availability of affordable housing.

III. Implementation

Housing initiatives and construction incentive plans should provide for adequate housing for very-low-income persons and should reflect the need to construct housing for larger families. States


10 Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988), affirmed (per curiam) 109 Supreme Court 276 (1988).

11 Mount Laurel I represents one of the earliest judicial decisions to address the issue of exclusionary zoning and mandate the adoption of a fair share housing policy. 67 N.J. 151 (1975). The New Jersey Supreme Court held that the constitutional requirement of land-use for the protection of "the general welfare" entails ensuring meaningful access to affordable housing. Id. at 179-80. In this case, the state Supreme Court first enunciated the "Mount Laurel Doctrine: with the reasoning that the state constitution required equal protection for poor people, which it determined to be a suspect class. Id. at 173-81. The court also reasoned that access to housing is a fundamental right and thus warrants substantive due process protection. Id.
should encourage the development of creative housing plans by providing guidance and incentives to municipalities, regional housing authorities, or private builders. A state legislature may declare the lack of affordable housing to be a critical problem which threatens the economic, environmental, and social quality of life in the state. It should be the state's policy that a local jurisdiction may not reject or make infeasible affordable housing developments. Instead, all municipalities should be required to accept their fair share of low and moderate-income scatter-site housing in conformity with predetermined regional housing needs.

Creative and aggressive enforcement of the Fair Housing Act (FHA) is necessary. However, more zealous enforcement of the FHA is not alone sufficient to ameliorate the current housing crisis. The California courts have addressed the exclusionary zoning issue in a similar fashion. In Appel Development Co. v. City of Costa Mesa, the Court of Appeals struck down a referendum initiative that would have rezoned land on which a multi-family housing development had been approved to a zone allowing only single-family residential use. 178 Cal. Rptr. 723 (1981). In invalidating the initiative ordinance, the court looked beyond the municipal housing requirements and found a regional need for low- and moderate-income housing. See id. at 729. In Verdugo Woodlands Homeowners and Residents Association v. City of Glendale, the Court of Appeals rejected the homeowners' attempt to prevent the city council from granting building permits for multi-unit housing. 224 Cal. Rptr. 903, 907-08 (1986). The court rejected the homeowners' attempts despite the "state-mandated General Plan," which supported the homeowners' assertions because it restricted the area to lower density single residential units. See id.; see also Harold McDougall, "From Litigation to Legislation in Exclusionary Zoning Law," 25 Harv. C.R.-C.L. Rev. 623, 624 (1987).

California, for instance, requires municipalities to adopt comprehensive, long-term development plans, including a fair sharing element. Cal. Govt. Code §§ 65580-65589.8 (West 1983 & Supp. 1987). This housing element must include five-year projections as to how the municipality anticipates satisfying any outstanding need. Cal. Govt. Code § 65583(c).

For instance, the California fair sharing law prohibits municipalities from using land-use controls which unreasonably increase the cost of housing. Cal. Govt. Code § 65583.

New Jersey's fair share legislation, which the New Jersey Supreme Court upheld as constitutional in Mount Laurel III, is an example of a state effort in support of integration and dispersed housing. 103 N.J. 1 (1986). Under N.J. Stat. Ann. §52:270-305 (West 1988), a statewide administrative body, the Council on Affordable Housing (COAH), divides the state into housing regions using regional planning criteria, and then calculates the present and foreseeable housing need in each region. It then allocates a fair share of low- and moderate-income housing to each municipality within the region. Municipalities subsequently are invited to submit specific fair share plans to explain how they intend to supply their designated housing need. Boger, supra note 4 at 1564 (footnotes omitted).
State and regional authorities must facilitate rather than impede efforts to provide housing opportunities for lower income households in such a manner as to achieve racial and income integration on a regional and municipal level. For example, states may create regional authorities with the power to adopt comprehensive planning schemes and incentive programs, such as density bonuses and tax breaks, to encourage compliance. Municipalities and private builders that abide by the comprehensive plan may receive tax incentives from the federal and state governments for construction of affordable housing and services. Another option is to repeal from local comprehensive plans the presumption of validity for housing elements rejected by the state housing authority.

Moreover, the amended Act still relies on a tort or criminal liability model that requires the identification of a violation, the detection of a perpetrator, and proof at trial that the perpetrator's act violated the federal housing status. Yet realtors, lenders, and sellers rarely reveal their intent to discriminate, and most injured parties remain unaware that the law has been violated. As a consequence, only a few of the meritorious cases actually have been litigated and even fewer have resulted in a favorable decision for the claimant. Massachusetts enacted such a measure, known commonly as the “Anti-Snow Zoning Law.” This statute empowers the state to invalidate local land-use controls which unreasonably burden the construction of low- and moderate-income housing. The Oregon fair share law, for instance, requires municipalities to permit manufactured housing, ease subdivision standards, and grant density bonuses to encourage the development of lower income housing. See N.J. Stat. Ann. §52:26D-312.a (authorizing municipalities to use density bonuses, mandatory set-asides, or other zoning devices to private developers to include low- and moderate-income units among their market-level homes in housing development).
While the states should have primary responsibility for these efforts, they should be monitored and assisted by the federal government. In extreme cases, the federal and state governments should withhold licenses for commercial and residential construction projects, deny tax rebates— including interest deductions to mortgages—and be willing to implement other measures to encourage action by recalcitrant municipalities. However, positive incentives should be preferred over punitive measures in implementing creative housing initiatives.

Comprehensive plans adopted by the states must account for racial and economic integration on a regional scale, and must focus on deconcentration of cities and neighborhoods by race and income as well as construct more affordable housing. To be effective, comprehensive planning and housing initiatives should have express racial goals, should work to serve the least well-off among eligible housing applicants, must affirmatively market housing to low-income residents in urban areas, must direct the private market in the construction of more affordable housing, and must require participation by all municipalities and jurisdictions in meeting the states’ housing and desegregation goals.

The recommendation also addresses the need for low-income people to live near employment centers and human services providers such as job training facilities and welfare offices. Because low-income people often do not have automobiles, they need to reside near public transportation routes. Finally, if poor children are ever to overcome the oppression of poverty, they must have access to good public schools, libraries, parks and other youth recreation and education sites. Homeless persons, too, will need to live in proximity to public transportation, job opportunities, and human services programs which help them out of indigence.

IV. Opportunity for Creative Leadership

a) State and local laws

Massachusetts, California, Connecticut, and Rhode Island have all enacted statutes

10 Massachusetts Executive Order 214, which was enacted to supplement the state’s “Anti-Snow Zoning Law,” authorizes punitive action against uncooperative municipalities. The Order mandates the disqualification of municipalities that implement exclusionary zoning measures from receiving discretionary development-related assistant grants administered by state agencies. Mass. Exec. Order No. 215 (1982).

11 Cal. Govt. Code, §§65569.5-6 (West 1993).
streamlining appeals of adverse land use decisions regarding proposed affordable housing developments. Massachusetts has taken the lead in encouraging the resolution of local disputes over affordable housing through consensus building techniques. It has been joined by a number of other states, including Connecticut, Florida, New Jersey, and Virginia.

Connecticut’s approach combines state financial assistance with efforts to reach consensus on regional housing plans. The program seeks to establish “negotiated investment strategies” leading to “regional fair housing compacts” that would provide increased housing for low- and moderate-income families within particular regions.

California has enacted a series of provisions designed to improve the procedural posture of affordable housing development proposals, including limitations on adverse design criteria, requiring specific public health or safety reasons for disapproving or reducing densities of housing developments that are consistent with local zoning and general plans, and imposing the burden of proof on local government when a developer or other person appeals a permit denial or density reduction.

24 Lauren J. Resnick, Mediating Affordable Housing Disputes in Massachusetts, 45 Ariz. J. 15, 17, 20 (reporting that, between 1969 and 1989 more than 35,000 affordable housing units were proposed, 17,000 were built, and about 25% of cases appealed to the state housing appeals committee were resolved through the auspices of the Mediation Service, a state agency).
The City of Portland, Oregon received a 1995 Planning Award from the American Planning Association for its Strategies for Fair Housing program. Amendments to the zoning ordinance were adopted by the city council to treat all types of special housing involving status of at least 30 days like any other residential housing. Short-term housing, less than 30 days, is permitted in all residential structures after a shortened review process. Large shelters are reviewed under objective standards, and preference is given to areas without large concentrations of poverty for location of publicly funded housing and shelters in an effort to scatter them throughout the community. A siting coordinator is employed by the city to help implement the ordinance by overseeing a "good neighbor" policy that emphasizes regular communication between housing and shelter providers and the neighborhoods.26

A 1994 study by the Rutgers University Center for Urban Policy Research for the U.S. Department of Housing and Urban Development, reviewed 30 state and local programs offering regional housing opportunities for lower income households, and reached the following conclusions:

Notwithstanding that population growth in the United States has slowed in the 1990's relative to the 1980's, current housing demand far exceeds housing supply at the lower end of the income scale (Apgar 1993, 100). Lower-level demand is there; it has surfaced in the demographic profile of crowding and will surface in the lawsuits of those who challenge existing zoning.

From the developers point of view, the future is in the lower-middle sector of the unsubsidized market, and if nothing else exists, the upper portion of the subsidized market. For a State or locality not to recognize these demographic and market realities is to bury its head in the sand.

States and localities must follow the lead of their pathbreaking kinsmen and begin to institute the means by which affordable housing can be developed in their suburbs. This includes requiring local housing plans as a planning device; and authorizing and permitting inclusionary zoning, affordable housing finance techniques, and other affordable housing mechanisms as implementation measures to achieve this.

The wheel of regional mobility enhancement need not be invented anew. It is already alive and well in 30 States and localities. The programs contained in this report require a long look and broad-based emulation by nonparticipating States and localities to bring them into the arena of lower-income housing production.

Suburban opportunity should be available to all. In the near future it will be sought by many, and few legitimate reasons exist for States and localities to deny it. The programs collected here must be transmitted to the public not as the remarkable

accomplishments of a few, but as the leading edge of a new wave of activity at the State and local levels at the dawn of the 21st century.  

b) Reducing Local Opposition to Nontraditional Housing

Conversations with representatives of nonprofit housing organizations, after review of the current literature on the topic, have identified opportunities for lawyers to assist affordable housing efforts by participating in community-based efforts to reduce local opposition to apartments or other forms of multi-family housing in single-family residential neighborhoods.

The search for affordable housing for both low- and moderate-income families often leads to forms of housing that do not comply with local land use regulations designed to promote single-family, detached housing on relatively large lots. Accessory housing, group homes, townhouses, and apartment clusters are some examples. Opposition to such forms of housing may in many cases be caused by a fear of the unknown - a concern that the introduction of non-traditional forms of housing into a single-family residential neighborhood will somehow cause harm to the neighborhood.

Analysts have identified two basic strategies that nontraditional housing providers use to communicate with prospective neighbors: (1) a collaborative, high profile approach in which direct contact is made with representatives of the community in advance of commencement of operations; and (2) an autonomous, low profile approach in which the interests of potential housing consumers are emphasized and advance contact or "permission to enter a neighborhood is not sought." The 1988 Amendments to the Fair Housing Act, along with the enactment of the Americans with Disabilities Act and the Cranston-Gonzalez National Affordable Housing Act are believed to have established a legal basis for a "rights-based" strategy of "aggressive autonomy" characterized by "independent siting

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82 Robert W. Burchell, David Listokin, Ariene Pashman, Regional Housing Opportunities for Lower Income Households 68 (HUD, 1994).

83 M. Dear, Gaining Community Acceptance 35-38 (Robert Wood Johnson Foundation 1991) (stressing the importance of careful analysis before a particular strategy is chosen).

84 42 USC §3601 et seq. (1988).

85 42 USC §12101 et seq. (1990). See 42 USC §12212, encouraging use of alternative methods of dispute resolution "where appropriate and to the extent of authorized by law."

actions on the part of facility operators and advocates.\textsuperscript{27}

Lawyers can work to defuse these fears through analysis of particular proposals, discussion with affected residents, and mediation of disputes between proponents and prospective neighbors. The June, 1990 issue of the Arbitration Journal contains an excellent analysis of the potential use of mediation as a technique for resolving site-specified public policy disputes, which often flare up when apartments or other forms of multi-family housing are proposed as affordable housing.\textsuperscript{28}

The HUD Advisory Commission on Regulatory Barriers to Affordable Housing submitted its recommendations in early 1991. Areas of concern identified by the Commission included zoning ordinances, subdivision controls, building codes, impact fees, permit requirements, environmental regulations, and rent controls. Since most of these are locally implemented, major efforts at change will have to be locally based. Knowledgeable real estate lawyers can examine the impact that current practices have on housing for low- and moderate-income families in their communities and help craft modifications to local regulations that remove artificial barriers to affordable housing without jeopardizing the legitimate interests of affected communities.

V. Scope of the Resolution

The resolution commits the ABA to a collaborative effort with state and local bar associations in which individual and collective talents of lawyers would be contributed to comprehensive local efforts to eliminate illegal residential segregation, improve the accessibility of poor neighborhoods to services, and increase the availability of affordable housing. The focus of the work urged in the resolution is on the development of programs to encourage greater integration of housing and accessibility to services related to affordable housing, as well as non-adversarial techniques to resolve disputes that may arise between housing and service providers and residents where the housing is to be located.

VI. Conclusion

This fair housing policy continues and strengthens the Association’s commitment to representing low-income people, expanding opportunity for social and economic advancement, and preserving our system of justice as well as improving the justice system and access to it.

Respectfully submitted,
Peter W. Salisch, Jr.
Chair, Commission on Homelessness and Poverty
August 1995


\textsuperscript{28} Resnick, Mediating Affordable Housing Disputes in Massachusetts: Optimal Intervention Points, 45 Arb J 15 (1990).
GENERAL INFORMATION FORM

Submitting Entity: Commission on Homelessness and Poverty

Submitted By: Peter W. Saich, Jr. Chair

1. Summary of Recommendation(s).
The recommendation supports the adoption of creative and comprehensive measures to address homelessness by eliminating illegal residential segregation, increasing the availability of affordable transitional and permanent housing and improving the accessibility of such housing to employment, schools, transportation, and human services.

2. Approval by Submitting Entity.
Real Property Section, April 30, 1995

3. Has this or a similar recommendation been submitted to the House or Board previously?
In 1972, the Association adopted recommendations urging the availability of decent, safe, and sanitary housing to all families at prices they can afford. Included was a recommendation calling for the elimination of narrow municipal zoning building codes and other restrictions that impede the development of housing.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?
In addition to the policy referred to in (3) above, the Association adopted policy in 1986 that supports legislation to: (1) prohibit discrimination on the basis of transient or homeless status; (2) address the need for emergency relief to individuals and families without permanent shelter; (3) encourage public and private initiatives to increase the supply of habitable low-cost housing in the U.S.; and (4) adopt public policies and programs that will contribute to the ability of homeless people to become productive citizens. In 1987, the Association adopted policy that recommends amendment of the federal fair housing legislation to enhance the ability of the U.S. Department of Housing and Urban Development to resolve housing discrimination complaints easier. In 1992, the Association adopted policy supporting increased funding and development of well-managed, secure public and federally assisted housing and housing programs for the poor and elderly.

5. What urgency exists which requires action at this meeting of the House?
Attorneys who volunteer their services increasingly report that efforts to alleviate homelessness and to provide permanent housing experience conflict with local land use and zoning regulations. Providers of services for homeless people, from soup kitchens to daycare centers to shelters, have had difficulty in establishing programs because of opposition from
Ill neighborhood communities. Further, the U.S. Congress has proposed significant cuts in funding for programs aimed at helping homeless people including housing programs based at the U.S. Department of Housing and Urban Development. Hence, there is a growing need for the development of temporary and permanent housing for the homeless.

6. Status of Legislation. (If applicable.) N/A

7. Cost to the Association. (Both direct and indirect costs.) N/A

8. Disclosure of Interest. (If applicable.) N/A

9. Reforms:
   Bar Association of Metropolitan St. Louis
   Commission on Legal Problems of the Elderly
   Commission on Mental and Physical Disability Law
   Consortium on Legal Services and the Public
   Forum on Affordable Housing
   Government and Public Sector Lawyers Division
   Hispanic National Bar Association
   Judicial Administration Division
   National Bar Association
   National Conference of Women's Bar Associations
   Section of Administrative Law and Regulatory Practice
   Section of Individual Rights and Responsibilities
   Section of Litigation
   Section of State and Local Government Law
   Steering Committee on the Unmet Legal Needs of Children
   Young Lawyers Division

10. Contact Person. (Prior to the meeting.)
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11. **Contact Person.** (Who will present the report to the House.)
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12. **Contact Person Regarding Amendments to This Recommendation.** (Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/Net number of the person to contact below.) No known amendments at this time.
   Please refer comments to:
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