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Overcoming Barriers to Scattered-Site Low-Cost Housing

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OVERCOMING BARRIERS TO SCATTERED-SITE LOW-COST HOUSING

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I. Introduction

The federal government has been involved in private housing endeavors for more than thirty years and has spent billions of dollars in an effort to improve the housing standards of the country. Its involvement has taken the form of mortgage guarantees, slum clearance, public housing, and encouragement of local developers and housing authorities. Yet a visit to any city in the country will demonstrate that very little progress has been made in housing the poor and preventing the spread of urban blight.

Inadequate housing in the inner city stands in sharp contrast to impressive housing developments in the suburbs. While more land is being used to provide better and more attractive houses for the middle- and upper-income strata of our society, urban renewal and highway projects have resulted in an overall reduction in the amount of low-cost housing available for the urban poor.[1] When low-cost housing is built to replace that which has been demolished, it is usually built on or near the site of the former, substandard housing, and within a few years it is suffering from the same blight which destroyed its predecessor.

Of course, the perpetuation of urban blight has more profound social causes than the mere location of housing. Unemployment, lack of incentive, poor schools, and the lack of a stable family structure undoubtedly contribute to the metamorphosis of low-cost housing projects into slums. It has become obvious in the past few years, however, that the success of low-cost housing programs depends upon breaking the cycle in which slums are cleared for new low-cost housing, only to have that housing reinfected by the same social problems that created the slums in the first place. The National Advisory Commission on Civil Disorders (The Kerner Commission) studied the problems of poor, minority groups in our cities. It conluded that low-cost housing should be located in areas outside the central city:

> Enactment of a national fair housing law will eliminate the most obvious barrier limiting the areas in which nonwhites live, but it

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[1] S. GREER, URBAN RENEWAL AND AMERICAN CITIES 3 (1965).

> will not deal with an equally impenetrable barrier, the unavailability of low and moderate income housing in nonghetto areas.
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> To date, housing programs serving low-income groups have been concentrated in the ghettos. Nonghetto areas, particularly suburbs, have for the most part have [sic] steadfastly opposed low-income, rent supplement, or below-market interest rate housing, and have successfully restricted use of these programs outside the ghetto.
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> We believe that *federally aided low- and moderate-income housing programs must be reoriented so that the major thrust is in nonghetto areas*. Public housing programs should emphasize scattered site construction, rent supplements should, wherever possible, be used in nonghetto areas, and an intensive effort should be made to recruit below-market interest rate sponsors willing to build outside the ghettos.
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> The reorientation of these programs is particularly critical in light of our recommendation that 6 million low- and middle-income housing units be made available over the next 5 years. If the effort is not to be counter-productive, its main thrust must be in non-ghetto areas, particularly those outside the central city. [Emphasis added].[2]

The Department of Housing and Urban Development has also recognized this need, and regulations have been issued to implement a policy of providing low-cost housing outside racially concentrated areas. HUD's Low-Rent Housing Manual states:

> The aim of a Local Authority in carrying out its responsibility for site selection should be to select from among sites which are acceptable under the other criteria of this Section those which will afford the greatest opportunity for inclusion of eligible applicants of all groups regardless of race, color, creed, or national origin, thereby affording members of minority groups an opportunity to locate outside of areas of concentration of their own minority group. Any proposal to locate housing only in areas of racial concentration will

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[2] REPORT OF NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 263 (1968).

> be *prima facia* unacceptable and will be returned to the Local Authority for further consideration.[3]

While the need to build low-cost housing outside the inner cities has been recognized by many authorities, major barriers exist which may serve to delay if not prevent the implementation of such a policy.[4] The federal government vests a large degree of control over the administration of federally assisted programs in local housing authorities,[5] which means that federal programs will be subjected to the prejudices and predispositions of local communities.[6] Thus, local land use planning regulations will determine the extent to which low-cost housing (usually of the multiple-unit variety) can be built in any particular location.

The effect of most zoning devices which have been used in suburban and non-ghetto city planning in the past few decades has been to erect substantial economic barriers around entire cities. These devices include minimum lot size requirements, density zoning, frontage requirements, single family restrictions, and minimum living space requirements. While such zoning practices may not be exclusionary in purpose, exclusion of minority groups has been the result. Moreover, since most minorities are heavily concentrated in low income groups, economic segregation will bring about a high degree of racial and ethnic segregation. Indeed it has been suggested that these economic barriers are the easiest and most effective form of such segregation.[7] In any case, a zoning scheme in which large areas of the outlying residential districts are restricted to large lot, single family developments will run counter to the recently articulated federal policy of encouraging the development of low-cost housing outside the center city area. This article will discuss various factors which hinder attempts to revise current zoning plans so as to allow the construction of low-cost housing in non-ghetto areas. It will also suggest ways of surmounting these obstacles and thereby implementing the federal policy.

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[3] DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, LOW-RENT HOUSING MANUAL, §205.1, para. 4g.

[4] There are, of course, some considerations which weigh against the adoption of such a policy, including the lack of adequate public transportation facilities in outlying areas and the possibility that low-cost housing applicants would prefer to live close to their present churches, schools and social facilities. When balancing these inconveniences against the conditions existing in the ghetto, it is probable that most low-income families would elect to make the necessary adjustments.

[5] Low-Rent Housing Act §1, 42 U.S.C. §1401 (1964).

[6] In fairness, it should be pointed out that economic pressure, as well as prejudice, compels municipal opposition to low-cost housing. Most communities are dependent on property taxes for the major portion of their revenue. Thus, they understandably fear that an influx of low-income families will seriously decrease the community tax base while increasing the demand for services.

II. Barriers to Scattered-Site Low-Cost Housing

A. Judicial Attitudes

The conflict between the federal policy of scattered-site development and local policies of excluding low-cost housing is almost certain to result in numerous confrontations in the next few years if federal housing programs are expanded to the degree felt necessary by many authorities.[8] The present state of zoning law is inadequate to cope with these confrontations. Although zoning derives from the police power and thus must be exercised so as to promote the public health, safety, morals or *general* welfare, the courts have traditionally focused only on the welfare of the residents in the immediate neighborhood of the contested zoning restriction.[9] This myopic judicial vision has blinded judges to the possibility that building new apartments or dividing large mansions into apartments might provide additional low or moderately priced housing to ease the plight of persons in other parts of the community who are living in crowded, dilapidated and otherwise unhealthy housing. Traditional zoning principles are not determinative of questions raised by the location of low cost housing outside the center city for a second reason: different parties and thus different interests are involved. Whereas the owner or potential developer of a tract of land has a vital interest in the outcome of zoning litigation, the builder of a low-cost housing project is usually only an instrument of the federal housing program. While he is interested in realizing a monetary gain from his efforts, he is not overly concerned with the location of the project. Current judicial attitudes constitute a further barrier to the promotion of scattered-site, low-cost housing in non-ghetto areas in that the courts presume that municipal zoning regulations are valid, thus imposing the burden of proving their unreasonableness on the developers and builders.

This judicial approach was sanctioned by the Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*[10] That case upheld the constitutionality of a zoning regulation that excluded apartment buildings from residential areas.

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[7] *See generally* Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROB. 317, 330 (1955).

[8] *See* note 2 *supra*. The Housing & Urban Development Act of 1968 declared it to be the policy of the United States to develop six million units of low-cost housing during the next decade. 42 U.S.C.A. §1441a (Supp. 1968).

[9] *E.g.*, in Best v. Zoning Bd. of Adjustment, 393 Pa. 106, 141 A.2d 606 (1958) where the owner of a twenty-two room house was prevented by a local ordinance from dividing it into apartments, the Pennsylvania Supreme Court responded by holding that the ordinance was valid as long as "the public health, safety, morals or general welfare of the inhabitants of that part of the community affected" were found to have been promoted by the ordinance. 393 Pa. at 112, 141 A.2d at 612.

[10] 272 U.S. 365 (1926).

> With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, . . . that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. . . . Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.[11]

Euclid was decided long before the advent of a housing shortage of crisis proportions in our cities. Moreover, the Court in *Euclid* was not concerned with the fact that millions of poor persons were hopelessly caught in the web of inner city ghettos from which not even vast programs of public housing could remove them. Yet *Euclid* continues as authorization for the exclusion of multiple unit dwellings from major portions of urban and suburban residential areas.

These attitudes must be altered if we are successfully to relieve the social and physical tension within our cities by providing low-cost housing outside the concentration of the inner city. Rather than declining to consider a zoning scheme because of judicial deference to local zoning authorities, courts must be more willing to examine the propriety of governmental protection of the interests involved[12] and to take into account the larger, more urgent community needs in order to effect the overriding federal policy. Even the *Euclid* court foresaw that there would be cases in which the general public interest would so outweigh the interests to be advanced by the zoning scheme that the courts should not allow the ordinance to stand:

> It is not meant . . . however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.[13]

However, one searches in vain through the cases for any weighing of the *general* public welfare against the interests of the locality affected by a given zoning scheme. Zoning is no longer merely a conflict between factory owners, land developers and the residents of a given locality.

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[11] *Id.* at 394.

[12] *See generally* Comment, *The Battle for Apartments in Benign Suburbia: A Case of Judicial Lethargy*, 59 NW. U. L. REV. 345, 355-56 (1964).

[13] 272 U.S. at 390.

Zoning now involves a conflict between interests in suburban areas and forces within the cities surrounded by these areas. Now more than ever we can see the sociological ramifications of land use planning, and the federal policy of scattered-site low-cost housing will undoubtedly demonstrate the inability of our present zoning concepts and principles to respond to those factors.

B. Institutional Deficiencies

1. Absence of Metropolitan Planning

Since most city housing authorities are, to some extent, dependent on federal funding, they would normally recognize the federal guidelines urging construction of low-cost housing outside the older, more concentrated portions of the city. Where there exists a degree of cooperation, or even overlap of personnel, between the local housing authority and planning commission, scattered-site low-cost housing at least has effective machinery behind its development. If the city planning commission could be persuaded to recommend a suitable site and, if necessary, to recommend an appropriate zoning amendment, many of the possible institutional obstacles to scattered-site housing would be avoided.

Of course, such a result presupposes several crucial factors: the availability of suitable sites within the city; the willingness of local agencies to follow federal guidelines; and the willingness of the community to support scattered-site housing. However, it is possible that suitable land for such development does not exist within the boundaries of the city. Whereas the city may be motivated to cooperate with the federal government and local developers in order to provide additional low-cost housing, no similar incentive exists in the smaller, surrounding communities. They are usually satisfied to retain their semi-rural and residential character, and restrictive zoning has the support of most elements in the community. Given the fact that federal assistance in housing and urban development is largely dependent upon local initiative,[14] this problem will probably remain unsolved until effective metropolitan planning becomes a reality.

The lack of effective metropolitan planning is an almost insuperable barrier to the location of low-cost housing outside the boundaries of the principal city. Unfortunately, the federal government has chosen to administer its housing and urban development program along presently existing political and geographic lines with little or no thought as to whether these subdivisions are adequately structured to accomplish all the objectives of the federal program.[15] The fact is, of course, that they

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[14] *See* note 5 *supra*.

[15] N. LONG, LOCAL GOVERNMENT AND RENEWAL POLICIES IN URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 422, 430-33 (1966).

are not, and the result is the dissipation of vital resources through the absence of cooperation and the existence of economic and social competition between communities in a highly balkanized metropolitan system. A full discussion of the problems involved in effecting a system of metropolitan planning is not possible within the scope of this article. The problem is basically one of the redistribution of political power between forces that at present have no inclination to submit to such a process. However, serious thought must be given at the highest levels of the federal government to a restructuring of federal assistance to local communities, so that metropolitan areas can be dealt with as an interdependent whole. The most obvious solution would be to administer federal urban renewal programs through a state agency which would have the political power and authority to force local communities to plan and develop in cooperation with other communities in the metropolitan area.

Some encouraging steps have already been taken along these very lines. An excellent example of the way in which the states might respond to this need is provided by the Urban Development Corporation Act very recently enacted by the New York State Assembly.[16] By this act, the New York legislature created a public corporation with statewide powers to plan, coordinate and develop any residential, industrial or civic project which the directors of the corporation conclude will contribute to the alleviation of urban problems.

Although the act directs the corporation to operate in close coordination with local and municipal authorities, it specifically gives the corporation the power to override "the requirements of local laws, ordinances, codes, charters or regulations... when, in the discretion of the corporation, such compliance is not practicable and feasible."[17] Such an overriding power has obvious and significant implications in the context of overcoming local land use control restrictions. Though it is too early to predict the ultimate effect such a corporation might have on the implementation of a policy of scattered-site low-cost housing, it certainly appears that the corporation would have the authority to overcome the exclusionary effect of local zoning regulations.

There is, of course, no assurance that this New York corporation will use its power to compel scattered-site planning, for such a policy is conspicuous by its absence from the enumerated purposes of the act.[18] Moreover, the corporation is not specifically designated as the coordinator of federal housing funds for the state. Nevertheless, it does not seem unreasonable to anticipate that this function could be assigned to such a corporation, and that such an extension of its already far-reaching powers would go far in resolving the problem with which this article deals.

[16] New York Urban Development Corporation Act, SESS. LAWS ch. 174, (McKinney 1968).

[17] *Id.* §16.

[18] *Id.* §2.

2. Difficulties in Amending Zoning Plans

Although such potentially effective metropolitan planning does not presently exist or appear imminent in any other state, it should not be concluded that the federal policy of building low-cost housing outside inner city areas is therefore unfeasible. Most large cities have land within their boundaries that is located away from the racially concentrated portions of the city, land which might be suitable for low-cost housing. However, this land may not be zoned for such a purpose and efforts to change the zoning regulations may be frustrated. For one thing, the attitude of the local governing body is often parochial and protective of the interests of neighborhood elements. Moreover, some states permit zoning decisions to be subjected to referendum.[19] Therefore, if there is strong sentiment in the community opposed to the construction of low-cost housing in previously restricted neighborhoods, the development of outer-core land for low-cost housing may be permanently prevented.

III. Elimination of the Barriers

A. The Ranjel *Approach*

A unique judicial approach was recently taken by a federal district court in Michigan when the location of low-cost housing was challenged by referendum. The court decided the case without reference to the traditional Euclid principles which have heretofore greatly restricted the ability of courts to review the exericse of zoning power. In *Ranjel v. City of Lansing*,[20] the local housing authority had determined that additional low-cost housing was needed to replace that which was being cleared for highway projects and urban renewal. The federal government authorized the City of Lansing to proceed under the Department of Housing and Urban Development's Turnkey Program, through which a local developer plans and builds the housing and is then reimbursed with the proceeds of municipal bonds guaranteed by the federal government.[21] Plans were drawn, a site was selected outside the center city on

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[19] *Hurst v. Burlingame*, 207 Cal. 134, 277 P. 308 (1929); *State ex rel. Hunzicker v. Pullman*, 168 Okla. 632, 37 P.2d 417 (1934); *Jackson v. Denver Producing & Ref. Co.*, 96 F.2d 457 (10th Cir. 1938); 1 R. ANDERSON, AMERICAN LAW OF ZONING §4.24 (1968); Annot. 122 ALR 789 (1939).

[20] 293 F. Supp. 301 (W.D. Mich. 1969).

[21] The Turnkey Program provides for faster and less expensive development of low-cost housing by utilizing the resources of private industry. The local developer bears the expense of the project until such time as he conveys it to the local housing authority. This process allows development to proceed sooner than if the authority were required to float the bonds before construction could begin. *See* 24 C.F.R. §1520.6(b).

an attractive twenty-acre tract in accordance with HUD regulations, and an appropriate zoning amendment was granted by the city council to allow the developer to proceed. The amendment authorized development of the tract pursuant to a community unit plan in which the overall density of the area as developed would not be greater than that permitted by the existing single unit restriction. Large portions of the tract were to be left open for garden and recreation facilities. Although the planning board and city council had found that the new development would not adversely affect abutting properties and that the plan would be consistent with the health, safety, morals and general welfare of the community, a citizens' group sought to rescind the amendment by circulating petitions for a referendum. They obtained enough signatures to put the referendum, seeking to nullify the amendment, on the ballot.

At this point a group of Negroes and Mexican-Americans who resided in Lansing's "ghetto" and who were potential applicants for the low-cost housing filed suit in the Federal District Court for the Western District of Michigan seeking to enjoin the referendum. They claimed that if the referendum were successful, it would deny them badly needed housing which would otherwise be available under a federal program, and that they were being discriminated against and denied equal protection of the law on account of their race or color in violation of the fourteenth amendment.

Certainly if the housing development were a simple federal project, built and administered by the Federal Housing Administration, local zoning regulations could be ignored by virtue of the supremacy clause.[22] However, in *Ranjel* the only involvement of the federal government was its effort to encourage the local housing authority to undertake the project by underwriting the bonds used to finance it. Therefore, the supremacy clause argument was not necessarily compelling. The court in *Ranjel,* however, accepted the argument on the ground that the project reflected an important federal policy. It found that the selection of the site for the Turnkey Project was largely a result of the federal policy to encourage only scattered-site construction of low-cost housing and to avoid areas of racial concentration:

> We may assume that the project as proposed is compatible with, and even in furtherance of, long range plans of the City of Lansing. We find that the federal government has fully complied with its self-imposed obligation to work within the framework of local plans. However, the proposed referendum at this point unduly impedes implementation of

[22] United States v. City of Chester, 144 F.2d 415 (3rd Cir. 1944) (Federal government may proceed without regard for local building requirements when constructing housing in support of national defense activities.)

> federal policy under the supremacy clause and must be enjoined.
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> If referenda of this type were consistently permitted, it would be possible for racially motivated people to totally prevent implementation of the congressional policy of building low cost housing outside the ghettos of our cities in order to ease racial tension and secure a better life for many of our citizens. Such a potentiality to frustrate the federal constitutional and statutory policy cannot be tolerated.[23]

Thus it appears that the court in *Ranjel* was willing to consider important policy considerations opposed to the zoning regulation and found that those considerations outweighed the right of the community to zone as it desired. It must be borne in mind that in this case the planning commission and local governing body were actually in agreement with the court as to the correct course of action. However, in some states, including Michigan, the referendum procedure gives the electorate authority to rescind legislative zoning determinations. The court was willing to restrict the exercise of that authority by the electorate when it found that the public interest would not be served by the proposed regulation.

Although the *Ranjel* court accepted the supremacy clause theory, the main thrust of its opinion was based on the finding that the attempt to prohibit construction of the low-cost housing project through restrictive zoning amounted to a denial of fourteenth amendment rights. The conclusion that the referendum was motivated by racial prejudice was based upon the expert testimony of sociologists and city planners and recent studies which attempted to determine the cause of racial concentration in the cities.[24] The establishment of racial motivation was, of course, the major hurdle for the plaintiff, for without a finding of such motivation, the court would have been limited to the somewhat tenuous federal supremacy grounds in order to grant an injunction. However, once it was determined that the zoning referendum was in purpose and effect a device to keep minority groups out of the neighborhood, there was ample authority to enjoin it.[25] Thus, the court frustrated attempts by

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[23] 293 F.Supp. at 310-11.

[24] *Id.* at 306-07.

[25] Reitman v. Mulkey, 387 U.S. 369 (1967) (Declaring unconstitutional a state constitutional provision which would have prohibited open housing legislation); Shelly v. Kraemer, 334 U.S. 1 (1948) (Declaring unconstitutional the judicial enforcement of racially restrictive covenants in the sale and purchase of real estate); Progress Dev. Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961) (Holding that the fourteenth amendment prohibited a community conspiracy to condemn land for a public park in order to prevent the construction of an integrated housing development.)

community inhabitants to defeat an amendment to existing zoning regulations which was favored by the planning commission and which would have allowed the construction of low-cost housing in non-ghetto areas.

The court's elaborate analysis might not have been necessary, for it is arguable that its decision to enjoin the referendum would follow from the application of traditional zoning principles. Since *Euclid,* courts have always based their analysis on a presumption of validity for the legislative act of zoning. It is assumed, unless proven otherwise, that the zoning regulation under attack is a rational scheme designed to promote health, safety, morals and the general welfare. In *Ranjel,* however, the planning commission and the city council had already determined that the general welfare of the community would be promoted by enacting the amendment rather than by reinstating the former restriction, which was the goal of the referendum. This finding by those bodies in the community charged with the responsibility for land use planning should have been enough in itself to rebut the presumption of validity for the previously existing restriction. The burden should then have been placed upon those supporting reimposition of the single family restriction to justify it in relation to the public health, safety, morals and general welfare. The mere desire, even of a majority of the community, may not serve to prohibit a given land use, absent some rational plan finding its purpose in the *general* welfare. Since it was local and federal policy to alleviate urban problems through the construction of scattered-site, low-cost housing, the general welfare would not have been advanced by the desired restriction, and the court, applying traditional zoning principles, could have invalidated the restriction.

The *Ranjel* case represents a significant breakthrough in the realm of zoning law. Instead of intoning the traditional phrases which since *Euclid* have been used to uphold restrictive zoning schemes, the court in *Ranjel* used a realistic constitutional analysis along with a well-reasoned application of public policy to prohibit the reimposition of a patently exclusionary, if locally popular, land use control device. The circumstances leading up to *Ranjel* offer a remarkable example of how local opposition armed with traditional zoning law principles can threaten the realization of important federal and local housing goals. Before suit was filed in the federal court in *Ranjel,* the Michigan state courts had declared that since zoning was subject to referendum in Michigan, the electorate had the requisite power to defeat the project through reimposition of an adverse zoning device.[26] Thus, even though local officials strongly favored the project, they were bound by the exclusionary tactics of the local citizen group. The state courts did not inquire as to the validity of the zoning scheme involved nor was it concerned with the motivation of its advocates. It was satisfied when it found that the

[26] 293 F.Supp. at 305. The case arose when the Lansing City Clerk refused to certify the referendary petitions.

zoning power could be exercised by referendum. The rejection of this judicial attitude by the *Ranjel* court is a hopeful sign. However, that attitude is still prevalent and it threatens to deter attempts to relocate low-cost housing outside crowded city centers.

The first inquiry that courts must be willing to make is whether valid reasons exist to segregate multiple-unit dwellings from single-family neighborhoods. The standard reasons for such exclusion have been protection against fire hazard, the need for fresh air and light, and the danger of increased traffic congestion. However, when low-cost housing is built on large tracts so that the overall density of the area is not appreciably greater than it would be if developed for single-family houses, as was the case in *Ranjel,* those reasons cease to have any validity. It is also argued that multiple-unit housing will destroy the character of the neighborhood and lower the value of existing property. In those states which accept such an argument (and not all do), it should be incumbent upon the courts to look behind this allegation to determine whether it is true, and even if true, whether the factors which cause the reduction in property value are appropriate for a community to take action against. Clearly the courts may enforce regulations which protect property owners against the noise and dirt of a factory which someone desires to build in a residential area. It is equally clear that a Negro influx should not be equated with an industrial nuisance, and that courts therefore should not "protect" real estate values from a reduction which might be caused by Negroes moving into an area.

Few, if any, courts have been willing to undertake the probing analysis necessary to determine the true motive behind a particular zoning scheme as the federal district court did in *Ranjel.* Given the presumption of validity for the legislative or administrative act of zoning, the plaintiff in a case attacking a particular regulation has an "extraordinary burden" to show that no facts or conditions exist which would authorize the municipality to enact the contested zoning scheme.[27] However, the Constitution "nullifies sophisticated as well as simple minded modes of discrimination"[28] and the courts should be as willing to prohibit one form as the other. Until they do so there is a serious danger that our cities will continue to perpetuate the present system of economic and racial segregation which threatens their very existence.

B. Overcoming Official Opposition to Scattered-Site Low-Cost Housing

The finding in *Ranjel* of constitutionally prohibited racial motivation in the use of restrictive zoning devices is certainly a significant and hopeful step in reducing the barriers to scattered-site low-cost housing.

[27] City of El Paso v. Donohue, 163 Tex. 160, 165, 352 S.W.2d 713, 716 (1962).
[28] Gomillion v. Lightfoot, 364 U.S. 339, 342 (1960).

The *Ranjel* approach alone, however, is not sufficient to eliminate all barriers to the implementation of such a housing policy. It provides a solution for that situation in which the local planners and other government officials support the development, and the only opposition comes from the affected citizenry. In many communities this situation will not exist, as local planners and other officials will frequently reflect the attitudes of those in the community opposed to suburban low-cost housing. New steps will have to be taken to eliminate the barriers presented by official resistance and inaction.

The low-rent housing and urban renewal programs of the federal government currently operate under a system of local responsibility and initiative.[29] Federal assistance is dependent upon the submission by local public housing authorities of definitive plans for urban renewal and low-cost housing developments.[30] Thus if no requests are made for urban renewal and low-cost housing assistance, the federal government will take no action. However, most medium-sized and large cities are interested in receiving financial assistance from the federal government for urban renewal programs; so with regard to such cities the financial power of Washington should be a significant factor in promoting the federal policy of scattered-site low-cost housing. For those smaller, suburban communities which do not have the incentive to embark upon redevelopment and low-cost housing programs, the offer of federal financial assistance wil not be an effective device. More stringent measures may be required in these cases if the federal government is to accomplish its objective of providing low-cost housing in suburban areas.

Two measures are suggested which may be effective in overcoming local opposition to scattered-site low-cost housing: (1) legislative and administrative enactments conditioning the grant of urban renewal and housing funds upon acceptance of the federal policy; (2) the use of federal eminent domain to acquire land for low-cost housing developments in the suburbs. The first suggestion is more suitable for use with larger cities which are anxious to receive federal urban renewal funds, while the second device might be appropriate for those communities in which opposition to the federal policy would not be outweighed by the desire to obtain federal assistance.

1. Withholding Federal Funds

The Department of Housing and Urban Development has already issued regulations designed to encourage local housing authorities to locate low-cost housing outside areas of racial concentration.[31] It is not

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[29] *See* note 5 *supra*. *See also* Slum Clearance and Urban Renewal Act, 42 U.S.C. §1451 (1964).

[30] Housing Cooperation Agreement Law, 42 U.S.C. §1415(7) (1964); Slum Clearance and Urban Renewal Act, 42 U.S.C. §1451 (1964).

[31] *See* note 3 *supra* and accompanying text.

clear, however, what sanctions would be available to HUD against a local program not in compliance with these provisions, for the Low Rent Housing Manual merely says that plans which fail to meet this requirement "will be returned to the Local Authority for further consideration."[32] While this provision seems to authorize HUD to disapprove all *new* housing projects that do not conform to the federal policy, it does not specifically condition the grant of *other* urban renewal or housing funds on the adoption by the city of a comprehensive plan for providing low-cost housing outside the inner city. Such a more explicit provision would be an effective step in the realization of that goal.

Another means by which the federal government could encourage scattered-site low-cost housing is through administration of the Model Cities program. Since competition is keen for the limited funds available, the federal government is in a position to require all Model Cities applications to demonstrate not only the city's willingness to construct low-cost housing outside the center city but also affirmative plans containing specific potential sites for such developments. This requirement along with the threat of withholding all federal housing funds from a given city should be sufficient to cause most local housing authorities in large cities to begin thinking of and planning for scattered-site developments. Of course, it must be realized that this device will only be effective in the case of medium-sized and large cities which are anxious to receive federal funds.[33]

At this point it might be wise to reflect upon the ramifications of the federal intervention suggested. It should be understood that the problem of scattered-site low-cost housing is only one facet of the national housing policy. The most important goal of that policy is "a decent home and a suitable living environment for every American family . . . ."[34] However, experience has shown that merely tearing down and rebuilding slums will not accomplish our ultimate purpose. It follows that scattered-site low-cost housing is an important part of our present policy and that it justifies the somewhat severe measures which are suggested. While our entire program of urban development and low-cost housing should not be sacrificed in order to realize this goal, we should do all within the power of the federal pocketbook to insure that low-cost housing is located in an environment that will permit its inhabitants to realize fully the improvement in living conditions that it is our goal to provide.

Given the desirability of the goal of scattered-site low-cost housing, some question remains as to the authority of HUD to adopt regulations which would be binding on local authorities and to withhold funds from those cities which fail to comply. Title VI of the Civil Rights Act of

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[32] *Id.*

[33] *See* note 41 *infra*.

[34] Housing Acts, 42 U.S.C. §1441 (1964).

1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin ... be denied the benefits of. . .any program or activity receiving Federal financial assistance."[35] A strong argument could be made that minority groups who are unable, because of local exclusionary practices, to find public low-cost housing in an environment conductive to the accomplishment of federal housing goals are in effect being denied the benefits of the federal housing program because of their race, color or national origin. Since Title VI also authorizes the federal agencies to establish regulations and, if necessary, withhold funds in order to achieve the objectives of the statute, there appears to be sufficient authority for the regulations which are proposed.[36]

With respect to some federal housing projects, however, the authority to withhold funds under Title VI may be questionable. The reach of Title VI extends only to federal financial assistance "... by way of grant, loan, or contract *other than a contract of insurance or guaranty*...." [Emphasis added].[37] Since many federal low-cost housing efforts take the form of insurance and guaranty, a substantial part of the housing program might be excluded from the protection of Title VI.[38] Corrective legislation may be necessary to remedy this exclusion, if all federally assisted low-cost housing is to be included in the policy of encouraging scattered-site developments.[39]

2. *Federal Eminent Domain*

Perhaps the most perplexing problem in the federal government's efforts to encourage non-ghetto low-cost housing is the fact that some of the most suitable sites are located in suburban communities that not only

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[35] Civil Rights Act of 1964, 42 U.S.C. §2000d (1964).

[36] *Id.* at §2000d-1.

[37] *Id.* The emphasized language was apparently inserted to make it clear that the withholding of funds provisions of Title VI were not to apply to single-family dwellings financed through FHA or VA guaranteed mortgages. 1964 U.S. CODE & CONG. SERV. 2438-39.

[38] For example, the following FHA programs which relate to low-cost housing would probably be excluded from the operation of Title VI because of the stated limitation: Multifamily housing mortgage insurance (24 C.F.R. Part 207, 12 U.S.C. 1713, 1715b); Cooperative housing mortgage insurance (24 C.F.R. Part 213, 12 U.S.C. 1715b, 1715e); Urban renewal mortgage insurance and insured improvement loans (24 C.F.R. Part 220, 12 U.S.C. 1715b, 1715k); and low-cost and moderate-income mortgage insurance (24 C.F.R. Part 221, 12 U.S.C. 1715b, 1715). For those HUD programs definitely included within the scope of Title VI, *see* 24 C.F.R. Part I, Appendix A.

[39] It may be argued that the present proviso in Title VI, designed to exclude FHA and VA guaranteed mortgages from the operation of Title VI, is too broadly framed, and that such a limited purpose can be accomplished with language specifically directed to those programs.

do not want scattered-site housing but also do not want low-cost housing in any form. These are the small and medium-sized communities of middle and upper class families which surround every large city and which by virtue of the present political structure are completely autonomous. It is in such communities that the most restrictive zoning devices are adopted and vigorously enforced. Since their "urban" problems are either minor or non-existent, they are almost completely untouched by federal housing programs and policies.[40]

When low-cost and public housing was considered a problem uniquely applicable to the city, no one was concerned with the suburbs. Now that we understand that low-cost housing is a problem that must be attacked from a metropolitan standpoint, the basic assumptions and policies behind the federal housing program must be reevaluated. The first of these to require examination is the matter of local initiative. Quite obviously, local initiative cannot be relied upon to accomplish a goal which is opposed by those who have that initiative. If the purpose is to be achieved, then, we must develop new programs which do not depend upon urban development and housing plans which are submitted by the community itself. The federal government must be willing to intervene in a more direct fashion in order to accomplish the objective of providing low-cost housing in the suburbs.

If local and state officials refuse to participate in the construction of scattered-site low-cost housing, the alternative to accomplish the federal goal seems to be the exercise of eminent domain by the federal government to acquire land on which to construct the desired housing within the community.[41] This was the manner in which the federal government first attempted to provide low-cost housing. Between 1934 and 1937, 21,441 units were so constructed by the Public Works Administration on land acquired and retained by the federal government.[42] This program was abandoned in favor of a policy of local control in the 1937 Housing Act.[43]

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[40] Of course, many purchases of homes in the community will be subsidized through mortgage guaranties of the VA or FHA, *but see* note 37 *supra*.

[41] It could be argued that cooperation of suburban communities in low-cost housing could be obtained through the threat of withholding federal funds from projects in the community other than housing. Federal subsidies for planning studies, sewage disposal systems, highways, and many other local concerns are much desired by the suburbs, and the withholding of funds from these projects might be an effective weapon with which to compel those communities to make room for low-cost housing developments. Such withholding of funds is not presently authorized by Title VI of the Civil Rights Act of 1964, however, because the use of that statute to secure compliance with federal nondiscrimination policies is "limited in its effect to the particular program, or part thereof, in which such non-compliance has been so found, . . ." 42 U.S.C. §2000d-1 (1964). It seems clear that new legislation would be required to authorize such cross-conditioning of federal grants for the purpose of effectuating a policy of scattered-site housing.

[42] P. WENDT, THE ROLE OF THE FEDERAL GOVERNMENT IN HOUSING 4 (1956).

[43] Pub. L. 412, 75th Cong., 50 Stat. 888 (1937).

Before deciding whether a shift in the federal policy of deferring to local initiative is feasible, two threshhold questions must be answered. First, do any constitutional impediments exist to prevent such direct action by the federal government? Second, does the nature of the problem warrant the drastic step of repudiating what has been the federal policy since 1937 of working through state and local agencies?

While the power of eminent domain is not expressly delegated to the federal government by the Constitution, the limitation in the fifth amendment that private property shall not be taken for a public use without just compensation impliedly grants such a power.[44] However, the constitutionality of the use by the federal government of its power of eminent domain for the purpose of constructing low-cost housing has not been clearly decided by the Supreme Court. Indeed, in *United States v. Certain Lands in the City of Louisville*,[45] the Court of Appeals for the Sixth Circuit held that the Public Works Administration did not have the authority to exercise eminent domain to acquire land for low-cost housing; however, the continued vitality of this case is questionable. The rationale of the *Louisville* case was that the condemnation of private land by the federal government for the purpose of building low-cost housing for private individuals did not constitute a public use.[46] In light of the broadened concepts of public use subsequently adopted by the Supreme Court, it is unlikely that the federal government's low-rent housing programs could be challenged on that basis. In *Berman v. Parker*,[47] the Court found that the condemnation of land for urban renewal projects in the District of Columbia was for a public use, despite the fact that the land was subsequently resold to private developers.[48] In effect, the Court equated a "public *use*" with a "public *purpose*." The Court then held that Congress is the proper body to define the concept of public purpose and the extent of the power of federal eminent domain: "The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."[49]

Since *Berman* dealt with the peculiarly local congressional power in the District of Columbia, a question remains as to the extent of the power of the federal government to engage in matters, such as housing,

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[44] It has long been established that the power of eminent domain inheres in the sovereignty of the federal government. United States v. Gettysburgh Elec. R.R., 160 U.S. 688 (1896); Chappell v. United States, 160 U.S. 499 (1896); Cherokee Nation v. Southern Kan. R.R., 135 U.S. 641 (1890); Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885); Kohl v. United States, 91 U.S. 367 (1876).

[45] 78 F.2d 684 (6th Cir. 1935).

[46] *Id.* at 686-88.

[47] 348 U.S. 26 (1954).

[48] *Id.* at 33-34.

[49] *Id.* at 32, *citing* United States *ex rel* TVA v. Welch, 327 U.S. 546 (1946).

which are arguably of only local concern.[50] In *City of Cleveland v. United States*,[51] it was argued that the acquisition of land by the federal government for the purpose of providing low-cost housing was a local function constitutionally reserved to the states and was not among the powers delegated to the federal government. In that case, the Federal Public Housing Authority acquired land in Cleveland by condemnation and constructed low-cost dwelling units which were subsequently leased to Cleveland Metropolitan Housing, an agency of the state of Ohio. The Supreme Court affirmed the district court finding that even though housing problems were local in origin, the evil of slum conditions had become so widespread that it was a menace to the national welfare, and that Congress could properly deal with the subject on that basis.[52]

The *Cleveland* case is not directly applicable to the question of the use of eminent domain for federal low-cost housing, because the decision which the Court reached there was that the federal government could exempt lands so acquired from local taxation. In reaching this conclusion, however, it was necessary for the Court to hold that the federal government had not exceeded its delegated powers by such an exercise of eminent domain. Therefore, the *Cleveland* case provides considerable authority for the proposition that the federal government can become directly involved in the encouragement of scattered-site low-cost housing.

The *Berman* and *Cleveland* cases should be ample authority to overcome any lingering doubts that the *Louisville* case might cast on the constitutionality of direct federal action in the acquisition of sites for low-cost housing. Even if the use of federal eminent domain can withstand a constitutional attack, it is nevertheless undeniable that the question of repudiating the policy of local initiative strikes close to the heart of the federal housing program. That policy reflects the feeling that since housing is basically a local problem, local agencies should have some voice in the administration of a housing program.[53] It is also based on the assumption that the need for low-cost housing will be best understood by local authorities, and that therefore the federal government should not intervene until there has been a determination by the local authority that such a need exists.[54] This rationale is questionable in a

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[50] In practically all the states where the issue has been raised, public housing and urban renewal have been held proper subjects for the exercise by the states of the power of eminent domain. *See* 26 AM. JUR.2d *Eminent Domain* §42 (1966). In *Berman*, the Court upheld an analogous congressional exercise of its police power in the District of Columbia. The question then is the extent of such a federal power beyond the confines of the District of Columbia.

[51] 323 U.S. 329 (1945).

[52] *Id.* at 331.

[53] 1949 U.S. CODE CONG. SERV. 1551.

[54] *Id.* at 1551-52.

modern context. The need for scattered-site low-cost housing transcends the boundaries of the community, and the federal government seems to be the only authority willing and able to meet that need.

Yet the question remains whether the policy of scattered-site housing is sufficiently important to justify such draconian measures. The answer is probably dependent on the degree to which the policy can be advanced under the current means of administering the federal housing program. If enough land is available within the boundaries of those communities which are concerned with the problems of low-cost housing to accomplish the desired goal, then the present federal policy is probably adequate. If there is a serious shortage of available sites, however, then the federal government must consider the more serious steps which are suggested.

The shift to the policy of local initiative was undertaken in 1937 in order to take advantage of local resources and municipal tax benefits which allowed local authorities to offer their own obligations, secured by federal *guaranties,* at rates lower than those at which the federal government could borrow.[55] Since the same considerations exist today, it is likely that direct federal control would be possible only at a higher cost, either to the government or the residents of the low-cost housing. Again it must be asked whether the policy is worth the price, and the answer lies in a determination of the extent to which present programs can meet the need.

The mere fact that federal housing programs have always been initiated and administered by local authorities should not prevent inquiry into whether more direct means could better accomplish more recently articulated objectives. Perhaps it would be possible to retain the essential elements of local initiative in most cases and provide for direct intervention only where absolutely necessary to overcome serious local opposition. This would be a difficult program to administer both practically and politically. Such selective intervention compels difficult determinations as to when intervention becomes "absolutely necessary." Moreover, local authority would be jealously guarded not only at lower levels of government but also within Congress itself. These factors must not be allowed to stand in the way of a vital federal policy the frustration of which could seriously threaten the effectiveness of the entire federal low-cost housing program.

IV. Conclusion

There exists a serious danger that land use planning as it is presently applied and interpreted may hinder current efforts to develop low-cost housing outside the racial concentration of our center cities. This threat

[55] P. WENDT, *supra* note 42, at 5.

is aggravated by the fact that the present state of zoning law is inadequate to cope with the conflict. Decades of judicial deference to local zoning authorities has resulted in a failure to develop meaningful principles that can be applied in the context of the present strife between the inner and outer cores of our cities.

The solution lies in two dimensions. First, federal legislative and administrative policies must be clarified so that adequate encouragement exists for local housing authorities to develop a realistic program of scattered-site low-cost housing. Second, the courts must be alert to question the true motivation behind local land use control, and where racial motivation is found, the courts must be willing to protect federal goals by overriding local exclusionary policies. If we are to solve the problems that have caused a major crisis in most of our cities, land use planning must be conducted with due regard for all the interests of the community in mind, not just those which have traditionally been protected by restrictive zoning. When our cities are divided into districts and zoned so that the poor and the otherwise oppressed members of society are locked into self-perpetuating slums from which not even the expenditure of billions of federal dollars can release them, then the machinery of a democratic government is being used for decidedly anti-democratic ends. It is at this point that the courts and the Congress should intervene to ensure that the restrictions which are placed on land use do not unduly hinder the accomplishment of important and well accepted government policies, while at the same time depriving millions of persons of advantages which would otherwise be theirs.