

REAL PROPERTY LAW AND MASS HOUSING NEEDS*

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America faces unprecedented housing problems. Such are the needs for new housing, representing a backlog of demand aggravated by the cessation of normal building during the war and the sharp increase in the number of families, that the very extent of the need engenders extraordinary problems. Yet, there has been a continuity of practical experience, in the government's large-scale housing operations before and during the war, which provides a useful point of reference for the action now required. There has also been continuity in basic social, economic, and political structure, and with that, a continuity of the legal accompaniment. The continuity of that legal base and its adaptation to the changing housing problems of successive generations constitute the subject of this paper.

"Law is a living thing," in Justice Cardozo's apt phrase. Law is a tool, an instrument of the community and the policies by which it is governed. In real property law as it has evolved through centuries of Anglo-American history, one can see mirrored the progress of the world from a predominantly rural, medieval culture to a highly urban, industrialized system. In general this evolution has been accomplished with respect for the tradition of private property and without radical affront to the legal principle of *stare decisis*.

The shortcomings of the legal tools at hand are among the least of the obstacles to an adequate housing program today, although it must be acknowledged that in some matters the legal system has been sluggish in keeping up with the policy changes at other levels. The history of the refining of those tools, however, contains many an interesting story, and casts light on those legal problems which remain.

Without suggesting any sharp demarcation in dates, a breakdown of the history of the readjustment of real property law to developing housing needs into three stages will be useful for our analysis. *The first stage* is best characterized by the *laissez faire* era, when the primary function of government was to preserve order, and the courts supported on the whole an individualistic view of questions germane

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to housing. This general attitude persisted up to and through part of the nineteenth century. *The second stage* marks the emergence of the "welfare state," when reform movements, in revolt against the shocking slum conditions of the new urban communities, made their weight felt in restrictive and protective legislation, and local government began to adopt a positive approach to the problem of housing particularly for its relation to epidemics and disease. While much of the practice that characterizes this second period is still an integral part of the structure of housing law and legislation today, since the depression days of the 1930's a new chapter is being written, which we shall call *the third stage*. The welfare state has been emboldened. The state enters into partnership with private land owners, with local governments, with the citizenry, to lend its comprehensive powers and its resources to a fulfillment of housing needs.

FIRST STAGE—THE POLICE STATE AND LAISSEZ FAIRE

The common law of real property has unmistakably rural origins, as it was a rural England in which it took root some centuries ago. In that setting each man's home was his castle; and the right to quiet possession was a principal bounty of the legal system. To protect this possession, the law evolved a system of planning by private agreement: a doctrine of covenants was formulated whereby, upon a showing of "privity of estate" or an interest in the land in question, the courts enforced against takers with notice "covenants" or agreements which preserved certain values and uses found to "touch and concern" the land. Property values of the individual home were protected also by the doctrine of nuisance, which, for example, created a right to recover damages as a protection against noxious fumes exuded by a neighbor's business establishment—or which might even eliminate such offensive uses altogether. Furthermore, the pressure of the growing middle class against persistent feudal landholdings was reflected in the principle against restraints on alienation, and in other prohibitions of the creation of remote interests in land. The shortcomings (from the standpoint of housing thinking today) of the then prevailing social attitude and legal structure are dramatically revealed in the collection of revenue taxes on windows and chimneys.

Actually, in the earlier centuries the controls exercisable by the state over housing and town planning could not have been weak. Consider, for example, the deployment of governmental power for the comprehensive rebuilding of London after the great fire in the seventeenth century. At the same time the rights of the private home owner remained generally rather inviolate. With emancipation from the shackles of the medieval guild and the growth of a new sophisticated conception of the role of the state upon the advent of *laissez faire* thinking and practice, intervening centuries became progressively unused to central control. Thus, through the eighteenth and nineteenth centuries, first in England and finally in America, there were liberal concessions to growing trade and business with no brakes on the mounting slums which resulted from the exploitation of labor in concentrated urban communities.

"Hands off" may have been meaningful under the housing conditions of the relatively stable centuries preceding the industrial revolution; but certainly the centuries that saw the development of urban slums could only mock that inheritance of a rural land law. The official studies of housing conditions in the industrial centers by the middle of the nineteenth century tell a sorry tale.

SECOND STAGE—THE POLICE POWER AND THE WELFARE STATE

The emerging trend in the nineteenth century in reaction to revelations of the sordid conditions of the slums was in the direction of increased local governmental activity to correct such conditions, particularly for their relation to the public health. The administrative machinery was coming into being which made such attention to housing needs possible, as local government was undergoing considerable change during this century in consequence of this and other social conditions accompanying the industrial revolution; in response to such novel demands on municipal activity, new administrative posts gradually replaced justices of the peace.

In their tentative approaches to the urban housing problem, municipal officers proceeded under common law doctrines, generally but not invariably buttressed by some loose statutory brief for their authority which was related to the police power. Thus, at common law any private citizen could lawfully abate a nuisance; and now, like any private citizen, the municipal officer began to exercise such rights, and the nuisances were not mere highway obstructions and noxious uses of property, as in previous centuries, but even *homes* that might become fire hazards, or that were in such an advanced state of disrepair and insanitary living as to constitute immediate threats to safety and health. It was a haphazard process and a risky one. The common law tradition of collateral attack, whereby the public officer was liable for damages should the courts find subsequently that what he had abated was not a nuisance "in fact," persisted;¹ and no more could be done for abatement than was absolutely necessary, e.g., demolition would not be judicially upheld when mandatory repair or closure would suffice.² These risks naturally have acted as a serious deterrent to actions by municipal officers, even under color of statute or local ordinance,³ to demolish hazardous dwellings or even to compel repairs. There may be some functional justification for the action for damages as a protection to property rights from reckless action by local officers under such a defective administrative plan as has generally prevailed; although the municipal employee is clearly not in a good position economically to bear such risks, and may even be damage-proof.

The foregoing statement of the law governing the compulsory repair and demolition of substandard dwellings is, unhappily, almost as true today as it was fifty years ago. Legislation is piecemeal and unsatisfactory; of 20 municipal demolition ordinances studied in 1936, 18 were enacted to reduce fire hazards and only 2 to

¹ See *Health Department v. Rector, etc., Trinity Church*, 145 N. Y. 32, 39 N. E. 833 (1895).

² *Health Department v. Dassori*, 21 App. Div. 348, 47 N. Y. Supp. 641 (1897); cf. *Yates v. Milwaukee*, 10 Wall. 497 (U. S. 1870).

³ Ordinances for condemnation of defective structures have repeatedly been held constitutional, e.g., *York v. Hargadine*, 142 Minn. 219, 171 N. W. 773 (1919).

remedy insanitary and substandard facilities.⁴ Personal liability of municipal employees for damages is still good common law, although some states, by statute, grant immunity where the employee proceeded under a reasonable belief as to the existence of the facts,⁵ specifically outlaw private actions regardless of reasonableness,⁶ or simply transfer the liability in damages to the city.⁷

As the administrative process of compulsory repair of substandard dwellings and the demolition of hazardous ones develops, there are indications that the judicial process may accord correspondingly greater finality to administrative decisions. The basic judicial requirement is "a day in court."⁸ A slum dwelling does not require the summary action essential in the case of diseased cattle, which also may be destroyed by the municipal officer in his exercise of local police power. As bad housing is not a nuisance that requires summary action, from every point of view ample notice and hearing are desirable elements of the administrative process. Thus, increasingly the determination of whether or not the demolition shall proceed should become administrative rather than judicial.⁹ Whether a building is a nuisance at common law should no longer govern.¹⁰ Let the evidence be weighed not by the courts, who are laymen in this matter, but by experts who can appraise the condition of dwellings from the standpoint of fire prevention, structural safety, health and sanitation, and even moral hazard, by standards of objective validity, and formulate a general plan of repair and demolition in the light of total local housing need and supply.

The story of the development of municipal efforts with respect to the demolition of substandard dwellings presents a dramatic instance of the problems of readjustment of real property law to evolving housing needs. The nuisance doctrine provided a framework within which progress can be made towards the stimulation of more perfect administrative processes, resulting in increasing immunity from judicial review implicit in such modern formulas as that the administrative order shall be conclusive if supported by evidence.

The nuisance doctrine made a second contribution upon the emergence of the welfare state, namely, the technique of zoning. We have noted that the common law doctrine of nuisance for centuries acted as a haphazard control over, for example, the juxtaposition of offensive industrial to residential uses. The concept was capable of considerable extension; not only the smells and fumes of an establishment may be offensive, but also its height, which cuts off necessary light and air. Even unaesthetic appearance may be a "nuisance" to the area. At common law these and

⁴ Survey by P.W.A. Research and Information Branch, reported by EBENSTEIN, *LAW OF PUBLIC HOUSING* (1940) 11.

⁵ Such a statute was involved in *Valentine v. Englewood*, 76 N. J. L. 509, 71 Atl. 344 (1908).

⁶ See Milwaukee, Wis., code, section on demolition orders.

⁷ This is the New York law. See *Bellows v. Raynor*, 207 N. Y. 389, 101 N. E. 181 (1913).

⁸ See *People v. Board of Health*, 140 N. Y. 1, 35 N. E. 320 (1893).

⁹ *Horbach v. Butler*, 135 Neb. 394, 281 N. W. 804 (1938), and the principle of *New Hampshire Fire Ins. Co. v. Murray*, 105 F. (2d) 212 (C. C. A. 7th, 1939) may be harbingers of a new trend.

¹⁰ See *Reinman v. Little Rock*, 237 U. S. 171 (1915), and *Hadacheck v. Los Angeles*, 239 U. S. 394 (1916).

like extensions were little realized, but they were promised great scope when the zoning ordinance came into vogue. Zoning was to represent a coordinated effort by the local government to plan the height, density and setback of buildings and the distribution of residential and business uses, to the permanent social and economic benefit of the community. It first appeared in New York City in 1917, was quickly taken up as a model by other cities and was upheld by the Supreme Court as a legitimate exercise of the police power.¹¹

It should have been apparent from the beginning, however, that the zoning technique had serious limitations in being only prospective in operation. Zoning was introduced into built-up areas; and it was destined to have little or no effect on existing buildings or uses, although some thought is now being given to the constitutionality of provisions for the gradual elimination of non-conforming uses by a system of amortization.¹² With the years, other limitations of the zoning device have appeared, largely attributable to its administration. There have been local business pressures; indiscriminating variances by administrative boards on appeal; over-zoning for particular uses with resulting inflation of values; low standards; and spot rather than comprehensive zoning.

The police power that is articulated in zoning ordinances to regulate the character of future neighborhoods likewise supports state laws and ordinances prescribing minimum standards of construction of residential and other buildings. These ordinances, dating principally from the beginning of the twentieth century, regulate such matters as room size, fireproofing, plumbing facilities, etc., and have played an important role in improving housing conditions from the standpoint of health and safety. Attempts to impose such raised standards retroactively are supported by the courts.¹³ Such are the economics of housing, however, that legislatures have repeatedly had to bow to pressure for moratoria¹⁴ or for special subsidy¹⁵ to bolster the program.

In the matter of specific building codes, reputed to obstruct the use of modern and often cheaper materials than those which they prescribe, it is undoubtedly true that while building codes are periodically being rationalized, their specific nature may make them unwieldy and inflexible, and also their formulation by local interests may make them excessively responsive to pressure from manufacturers and labor unions. Uniform codes are promoted, but except for the West Coast and certain other areas, have not been generally adopted. Some variation between geographic regions will, of course, always be essential. In this connection, it may be noted that in recognition of the critical situation created by backward codes, the courts permitted the government's wartime housing program to proceed in disregard of local codes.¹⁶

¹¹ *Euclid v. Ambler Co.*, 272 U. S. 365 (1926).

¹² See Note, *Amortization of Property Uses Not Conforming to Zoning Regulations* (1942) 9 U. OF CHI. L. REV. 477.

¹³ *Adamec v. Post*, 273 N. Y. 250, 7 N. E. (2d) 120 (1937).

¹⁴ See, e.g., N. Y. Laws 1944, c. 606; N. Y. Laws 1945, c. 338, §64.

¹⁵ See N. Y. Laws 1946, c. 321; cf. N. Y. TAX LAW §5-a.

¹⁶ *United States v. City of Chester*, 144 F. (2d) 415 (C. C. A. 3d, 1944)

A serious block to the progress of the programs both for the demolition of substandard housing and for the retroactive enforcement of higher housing standards has been the lack of decent alternative accommodations at low rents in which to house the families who must be displaced by these programs. The reconditioning of tenements into higher rental dwelling units causes such displacement no less than closure or demolition. This entire "second stage" suffers from a basic fallacy in its faith in the "filtering-down" process. In the era when the welfare state began to emerge, in the nineteenth century through the close of World War I and even until the depression years, it was comfortably assumed that the poor should live in second-hand housing and that there would be enough decent second-hand housing to go around. To reason why is fruitless; the fact is that the housing that gets filtered down is substandard to an important degree. Any program which proceeds alone to demolish the substandard housing or to correct substandard conditions (and thereby raise rents), in solving one problem has created another. Our economy is such, and the state of housing technology has been so imperfect, that probably more than one third of American families have been unable, throughout the industrial era, to pay the prices or rents of new housing, and there is never enough decent second-hand housing available to take care of their needs.

The poor chronically suffer from a shortage of homes. When, as in the years immediately on the heels of the first World War, the housing shortage became acute for everybody because there had been a cessation of new building, and serious inflation in rents was threatened, it was not inconsistent with the prevailing concept of the role of the state to enact emergency rent control laws, which were upheld by the Supreme Court as a legitimate exercise of the police power in response to emergency conditions. "Housing," said Justice Holmes in his opinion, "is a necessary of life,"¹⁷ thus sounding the bell for new and more constructive housing programs then about to emerge.

THIRD STAGE—THE PUBLIC WELFARE: GOVERNMENT IN PARTNERSHIP WITH PRIVATE ENTERPRISE

By the 1920's there was a growing realization in many circles of the appalling inadequacy of earlier approaches to the problem of urban slums, which was now nearly a century old. The slums were still there; perhaps more so. In addition to the chronic problem of the high cost of decent housing that made it inaccessible to masses of the people, the cities were beginning to suffer seriously from "blight"—decaying blocks not of old tenement areas, but of abandoned, ill-planned industrial and residential land, usually at inflated value, that was an eyesore to the community. The slums and blight were accompanied by an accelerated decentralization, and as the population fled from the unattractive core of the cities to the outskirts, they not only drained local budgets by the ensuing duplication of municipal services: sewers, streets, schools, subways, for the new peripheral residential developments, but further-

¹⁷ *Block v. Hirsch*, 256 U. S. 135, 156 (1921).

more, escaped beyond city limits, resulting directly in declining revenues which sat side by side with the mounting tax delinquencies from the bad areas in the center of town.

In that setting the remedies which composed the parcel of approaches characterizing the second stage were woefully inadequate—like trying to depose a king with a slingshot. Indeed, even if the local administrations had employed the earlier legal and legislative weapons with their greatest effectiveness, the job probably could not have succeeded against such a relatively free economy as characterized the era before the depression. The technique of zoning, for example, carries such implications of destruction to vested land values that it is obliged to come to terms with the power of the local landowners.

The approach of the third stage is drastic. It smacks of the socialism which in some form has become common to all the industrialized powers. The mood is not simply to pick out the individual bad dwellings, but to tear down the whole neighborhood and make it over again. Don't fuss to enforce compliance with revised standards; build new decent homes wholesale. Rather than anticipate a dislocation of demand and supply or a disparity between economic rent and income which warrants rent control as an emergency measure, control rents from the beginning, from the time that the house is built. This is an age of superblocks, which are themselves an affront to the tradition of small 50-foot lot holdings in America's cities. It is an age of bottomless private capital of insurance and trust companies and savings banks ready to enter the housing field, particularly the business of rental housing in the cities; thereby presenting a threat to the oldtime "speculative" builders who cannot compete with either the governmental advantages or the economies of bulk operation available to the large concerns.

In this era of group control rather than piecemeal operation, the government is a partner, silent or active, of substantially all activity related to the provision of housing. In the 1930's when the bottom fell out of the home mortgage market, the government stepped in to take the rap; HOLC bought up three billion dollars worth of mortgages. Home financing practice has been rationalized and revolutionized as a result of federal legislation. Now everyone is drifting into tenancy and home ownership is more of an illusion than ever.¹⁸ In every aspect of housing whether industrial or rural, rental or home owned, private ownership and control become relative. The government is ubiquitous, and where not the government, something akin to it which is in effect private government, in the form of mammoth lending institutions or housing companies.

From the days when the courts were the repository of the principal controls that were exercised over housing—by rules relating to restraints on alienation, to nuisance, covenants, quiet possession—the initiative has passed to the legislative branch. The courts rationalize a continuity in this progress of urban civilization in upholding the validity of such legislative programs as expressions of governmental power to

¹⁸ See CHARLES ABRAMS, *REVOLUTION IN LAND* (1939).

adjust to changing conceptions of need, through the flexible formula of "public purpose." In terms of legal tools these new developments probably have their greatest significance in the expansion of the power of eminent domain, and in the implications of the new program for the tax power.

Use of the Taxing Power

This period is characterized by a deliberate use of the taxing power to stimulate housebuilding or improvements by grants of immunity from liability for taxes. The experience in New York State is a case in point. After World War I, in a move to overtake the housing shortage the legislature permitted county and city units to grant certain tax exemptions on the value of all new residential buildings constructed within a given period.¹⁹ In 1926 New York indulged in limited tax exemption for the so-called limited dividend housing projects authorized in that year, to be constructed by private companies regulated by law as to rents and profits.²⁰ When the federal government's public housing program of direct construction by the government of housing for low-income families, made its advent in the 1930's, tax exemption by the localities was an integral part of the plan for low rents,²¹ combined with a provision for annual subsidies by the federal government; and the formula was with some amendment adopted by the State of New York in its public housing program launched under the new State Constitution in 1938.²² Subsequently, the principle of "urban redevelopment" (to be discussed presently) began to be incorporated in the state program, and by laws passed in 1941 and in 1942 as amended in 1943, the state authorized the grant of tax exemption in varying forms to induce private capital to venture into slum clearance and rehousing operations.²³ Finally, as part of the program for meeting the World War II housing shortage, a formula of tax exemption and abatement has been authorized by the legislature to stimulate for residential use the rehabilitation of now vacant and boarded-up tenements.²⁴

With the validity of these various tax devices established,²⁵ the lawyer's role becomes one principally of legislative draftsman. In that capacity he could well pause to consider whether past use of the taxing power in connection with the housing program has been indiscriminate. Government has progressed far since the days of William III, when a revenue tax on windows was a discouragement to decent housing standards. But in its eagerness to exploit the technique of immunity from taxes as an inducement to housing construction, has it appreciated fully the over-all implications for municipal finance, or the differing effects of tax exemption in the differ-

¹⁹ N. Y. TAX LAW §5.

²⁰ N. Y. Laws 1926, c. 823, §30, now N. Y. PUBLIC HOUSING LAW, Art. IX.

²¹ The public housing authority makes a formal payment to the municipality "in lieu of taxes," however, in amounts up to 10 per cent of the shelter rents on such aided projects.

²² N. Y. PUBLIC HOUSING LAW, §52.

²³ N. Y. Laws 1941, c. 892; Laws 1942, c. 845; Laws 1943, c. 234.

²⁴ N. Y. Laws 1946, c. 321.

²⁵ *E.g.*, *Hermitage Co. v. Goldfogle*, 236 N. Y. 554, 142 N. E. 281 (1923), *aff'g* 204 App. Div. 710, 199 N. Y. Supp. 382 (1923); *Roche v. Sexton*, 268 N. Y. 594, 198 N. E. 420 (1935), *aff'g* 243 App. Div. 687, 277 N. Y. Supp. 939 (1935).

ing situations to which it is being applied? The general tax on real property, representing the most substantial source of local revenue, is already burdened by increasing demands on the municipal budget, increasing tax delinquencies and constitutional limits on the permissible tax rate. Moreover, real estate tax income follows people,²⁶ and while tax exemption to public housing developments may involve no out-of-pocket bounty by the city, as the people there housed come largely from tax-delinquent slum property, tax exemption (frequent though not invariable) to private companies housing middle-income families represents a loss in the amount of their taxpaying capacity, only partially offset to the extent that such people might have followed the suburban trend and moved out beyond the city limits altogether. And when tax exemption is authorized together with liberal terms of tax abatement to stimulate the rehabilitation of old tenements that could more profitably be torn down and displaced by new housing, here may be the most wasteful kind of policy decision. Tax exemption as a device continues to be promoted, however. It is a feature of the General Housing Bill (S. 1592) which will probably be reintroduced at the next Congress, providing for tax exemption not only for public housing, but also as a municipal contribution to schemes of slum clearance and redevelopment. A related development is the recent ruling by the Commissioner of Internal Revenue which allows income-tax concessions to builders of multi-family apartment houses.²⁷

A different approach to the use of the taxing power for housing was proposed in the last century by Henry George and his followers: site value taxation, which would, it is argued, have the effect of correcting the chronic underbuilding of low-cost housing. By removing the tax on improvements and imposing it on land so as to tax increments in land value (more accurately termed "site" value), the cost of land is bound to drop appreciably, thereby stimulating building activity.²⁸ The high costs of city land have resulted in unreasonably high "densities," i.e., families per acre, to make enterprise profitable; the densities and the high rental costs which nevertheless result drive the population out to the periphery of the towns, creating in turn the difficult problems of transportation, *et al*, alluded to above. Once building is adequately stimulated in town at lower cost, densities and land use are readily amenable to control.

The optimum solution would be a municipal land authority with plenary powers to determine a pattern of land use and to provide for the necessary regulation, taking account of population and industrial trends, recreational needs, and so forth.²⁹ It would seem to be the rational solution to the maze in which cities now find themselves. A similar proposal was advanced by a British parliamentary commission headed by Lord Uthwatt a few years ago. The Uthwatt Report (giving substance

²⁶ See Tugwell, *The Real Estate Dilemma* (1942) 2 PUBLIC ADMINISTRATION REV. 27.

²⁷ Under this ruling, depreciation may be accelerated in the earlier years of the life of the building, rather than charged off on an equal annual installment basis. N. Y. Times, Sept. 5, 1946.

²⁸ See Buttenheim, *Unwise Taxation as a Burden on Housing* (1938) 48 YALE L. J. 240.

²⁹ See McDougal, *Municipal Land Policy and Control* (1945) 242 ANNALS (of the American Academy of Political and Social Science) 88, 93.

to the ancient English principle that title to all land was ultimately in the Crown) recommended that all land should *ipso facto* be declared in public ownership, thereby converting existing ownerships into leasehold and facilitating public regulation of land use.

Use of the Power of Eminent Domain

Second to no legal power in significance in this connection is the power of eminent domain, whereby large areas are directly acquired for clearance, replanning and rehousing. The necessity for employing the power of eminent domain in any comprehensive attack on the slums is manifest, in view of the tangle of multiple ownerships and hold-outs in sites to be acquired. And the government's venture into the construction of houses, whether by its own agencies or by publicly regulated companies, from the start has been linked with the program of slum clearance. Thus, while the need for condemnation power might have been avoided were housing developments to be confined to vacant land on the periphery, it could not be avoided if the provision of housing was to be part of a program of clearing away the slums in the heart of the cities.

The government first ventured into large scale housing as part of the "make-work" program of the Public Works Administration in the middle 1930's. The program became permanent with the passage of the United States Housing Act in 1937. Under the formula developed by the federal legislators, for every public housing unit to be provided by the localities with federal aid, there would have to be "equivalent elimination" of a like number of substandard units. Public housing projects are commonly constructed on former slum sites.

The second principal context for the use of the power of eminent domain in connection with housing is illustrated by the Urban Redevelopment Corporations Law passed in New York State in 1941. The gist of this legislation is a principle of slum clearance by self-help, whereby lot owners take the initiative in pooling their interests, covering an area of perhaps several city blocks, into a single corporation. They take back stock proportionate to the value of their respective interests, and the corporation undertakes clearance and rebuilding according to plan. Through the 1930's there had been serious consideration of the advantages of such a procedure for the remaking of commercial no less than residential areas, but positive action was balked by the problem of forcing into the scheme those owners who were not willing to cooperate. Accordingly, under the 1941 law such redevelopment corporations were granted the benefits of the condemnation power and the recalcitrant minority could thenceforth be silenced, upon receiving compensation in full for the value of its property.³⁰

³⁰ As we have noted earlier, this was not the first instance of governmental aid to private companies for the provision of housing, as New York had in 1926 enacted a law whereby limited dividend housing companies were granted limited tax exemption on certain conditions. The limited dividend companies operating under the 1926 law do not, however, enjoy any power of condemnation, exercisable either directly or on their behalf.

The third principal setting for the exercise of the condemnation power is the form of urban redevelopment more recent than the 1941 law and altogether more popular. "Urban redevelopment" is still in its infancy, the first legislative provisions dating only from 1942. It involves the clearance of urban land, usually fairly central slum or blighted area, and its replanning and rebuilding for a variety of suitable private and public uses. Logically, such redevelopment could incorporate wide use of old structures, such as churches or decent residential properties or particular commercial establishments; this has been widely done in England, but the limited experience under redevelopment laws in this country has so far not produced such examples. A redevelopment here generally connotes the wiping clean of a large city area, e.g., 18 city blocks on the lower East Side of Manhattan, and its replanning, involving usually considerable rationalization of the street plan to accommodate superblocks. The emerging pattern of the legislation is proposal of redevelopment scheme by private company which enters into contract with the city and accepts a certain amount of supervision and control of both fiscal and physical planning and sometimes also of rents. The extent to which the power of condemnation is essential for these drastic clearance programs must be apparent.

The power of eminent domain can be exploited for housing also through excess condemnation, whereby, by condemning more land than is needed for the public improvement which is the subject of particular condemnation proceedings, the city comes into possession and ownership of lands thereupon available for the creation of residential communities under public ownership or control.³¹ This is not a bold approach, however. Town planners regard with envy the experience of many European cities, such as Stockholm and Copenhagen, where a large portion of the city area is municipally owned; the European experience inspired a novel section in the New York Constitution of 1938 (Art. 18, Sec. 9) to the effect that any city may acquire "by purchase, gift, eminent domain or otherwise," such property as it may deem "ultimately" necessary for its housing program, though temporarily not required.

Proposals are made from time to time for the cities to take the initiative in buying up slum lands and replanning them, thereafter selling or letting to private ownership, according to the scheme that has evolved. While the merit of such proposals is clear to the city fathers, the stark matter of cost has been the usual obstacle to action. Hence the trend towards redevelopment by insurance companies and savings banks, which have a large reservoir of private capital and are both willing to make the investment and in a position to do so. Their investment is not a complete answer, however, as there remain central areas which because of excessive costs cannot profitably attract clearance and necessarily involve an out-of-pocket loss upon readjustment at proper use value. The formula in the Wagner-Ellender-Taft Bill,

³¹ Where slum clearance is the subject of condemnation proceedings, excess condemnation is a device for acquiring control over land adjacent to the development. See Note, *The Constitutionality of Excess Condemnation* (1946) 46 COL. L. REV. 108.

which as S. 1592 passed the Senate at the last session of Congress and will be reintroduced, purports to provide the answer: federal aid to the municipalities by annual contributions substantially making up the difference between the cost of the land and the new use value. This scheme has been satirically described as "the slum dole,"³² and undoubtedly has the effect of bailing out landlords of slum property to their profit.

Slum clearance and rehousing did not have to be approached by the costly slum dole method, although now there do not seem to be feasible alternatives. Under English law, no condemnation award is given for buildings judicially determined to be unfit for human habitation. In this country, constitutional guarantees of payment of full compensation preclude any such socially desirable solution. A more wisely and widely developed use of the nuisance doctrine discussed earlier in this paper, requiring demolition of unsafe and insanitary housing, would have accomplished the same result. This is still possible, although at the risk of an unfavorable reaction of the courts upon subsequent condemnation, akin to the feeling of some courts, in spite of formal doctrine, that the city is bound to condemn at something at least approximating the assessed value that it had itself placed on property for purposes of taxation.³³

Every extension of the power of condemnation requires judicial support of the legislative finding that the land is to be acquired for a "public use." When this question arose in connection with the federal government's public housing program, the government lost in the lower courts, which were not inclined to interpret traditional authorities liberally so as to permit the government to go into the business of housing.³⁴ Before taking the issue to the Supreme Court, decentralization of the program for administrative considerations was decided upon and the legal question became moot. Within a relatively few years, proponents of the program of public housing had succeeded in establishing in state courts that housing qualified as a public purpose.³⁵ Decisions *contra* are clearly an anachronism, such as the ruling of the Ohio court a few years ago.³⁶

The legality of condemnation as an aid to redevelopment of the first kind described above, a cooperative scheme of the present lot owners, has never been contested in the courts, the war years having interrupted any plans that might have materialized. The grant of the power of condemnation to redevelopment companies, as that term is usually understood, has been ruled upon in both New York and Illinois, and in both cases the courts found the requisite "public use."³⁷ A

³² Abrams, *The Slum Dole—A New Challenge to Public Housing* (February, 1944) CHC Housing News 1.

³³ See ORGEL, VALUATION UNDER EMINENT DOMAIN (1936) 515.

³⁴ *United States v. Certain Lands in the City of Louisville*, 78 F. (2d) 684 (C. C. A. 6th, 1935).

³⁵ *N. Y. City Housing Authority v. Muller*, 270 N. Y. 333, 1 N. E. (2d) 153 (1936) and other decisions cited by McDougal and Muller, *op. cit. infra* note 36, at page 46.

³⁶ See McDougal and Muller, *Public Purpose in Public Housing: An Anachronism Reburied* (1942) 52 YALE L. J. 42.

³⁷ *Murray v. LaGuardia*, 291 N. Y. 320, 52 N. E. (2d) 884 (1943); *Zurn v. City of Chicago*, 389 Ill. 114, 59 N. E. (2d) 18 (1945).

peculiar wrinkle of the New York case is that the very civic groups most interested in promoting rehabilitation of slum areas by extensive use of governmental powers, opposed the grant of condemnation under the Redevelopment Companies Law and challenged the law's constitutionality. The New York State Constitution (Art. 18, Sec. 2) authorizes the grant of the power of condemnation for slum clearance and redevelopment *either* to a municipality *or* to a private company "regulated by law as to rents, profits, dividends and disposition of its property or franchises." Under the New York statute, it was argued, the condemnation power, although given nominally to the municipality, actually put the municipality in the position of an agent for a company which could not have qualified as a regulated company within the intendment of the constitutional provision. But the New York court would not look behind the language of the statute and upheld it, on the principle that clearance of slums alone constituted a sufficient public purpose. In this connection, it is of interest that there is now a statute in New York which does no more than make express the power of municipalities to acquire substandard and insanitary areas by condemnation.³⁸

The provision for the grant of the power of condemnation in the New York Redevelopment Companies Law of 1943, which has been used as a model for other jurisdictions, states that not only is the contemplated redevelopment in each case a "public use," it is a "superior" public use. The implications of its being a superior public use are serious for all public buildings, schools, fire houses, churches, and even limited dividend housing projects on the site. The expression "superior public use" must be galling to the thousands of families as well as business establishments that are peremptorily displaced by redevelopments of the size of those now emerging.

Displaced families present an acute problem even when the nation is not suffering from a housing shortage, as for families living in slums there is a housing shortage in the best of times. It would be ironic indeed if the effect of slum clearance projects on a wide scale were simply to drive families into bordering tenements, thereby depreciating those properties and producing equally unsatisfactory slums overnight. Legislative drafters have made some stabs at this problem, by requiring that the city examine the provision that is to be made for displaced families, before it gives its approval to any redevelopment scheme; and some laws (compare the Wagner-Ellender-Taft Bill) legally obligate the redevelopment company to give preference in its selection of tenants to families from the site area.

Redevelopment Projects and Minority Groups

The implications of large scale redevelopment are particularly keen for minority groups living in the project areas. Negroes and other non-white persons are affected by redevelopment projects in several ways: On the one hand, there are very few

³⁸ N. Y. Laws 1945, c. 887, adding Sec. 71-i to the MUNICIPAL LAW. The reader may be confused as to the necessity for this statute, in view of Art. 18, Sec. 9 of the New York Constitution referred to earlier; and indeed, many lawyers did not consider it necessary, but it was politically expedient at the time of passage.

areas to which they are able to move, because of the prevalence of restrictions against non-white occupancy. Moreover, as the pattern of housing for minorities in this country is such that Negroes must generally live in cast-off housing rather than new housing, it may be presumptively regarded as unlikely that they would be admitted to tenancy in the redevelopment project, unless there were some legal obligation to force their access.³⁹

Upon analysis, it may appear to be a municipal rather than private responsibility to determine the availability of housing for families displaced by such large scale redevelopment schemes, as only the municipality can have the facilities for an adequate study of the distribution of housing and of housing needs in the locality. From the standpoint of social desirability, it would seem that redevelopment companies, enjoying the status of "superior public use," and frequently the recipients of tax exemption as well as other extensive public bounty, should be obligated to accept tenants without discrimination as to race, creed or color and to give preference to displaced families. As the result of a clamor over this issue in New York City's first and largest redevelopment project, Stuyvesant Town, New York City now has a local law providing for the withdrawal of the benefits of tax exemption from any housing or redevelopment company found to discriminate by reason of race, creed or color.⁴⁰ A like provision has been written into the state redevelopment law in Pennsylvania.⁴¹ An effort has been made⁴² and will be repeated to have such non-discrimination policy enforced as a matter of constitutional law, on the theory that as government is contractually and otherwise involved with private redevelopment companies, it in effect participates in the discrimination, in violation of the guarantees of the Fourteenth Amendment.

Public housing has had a different history; the New York State Law (the only state public housing program in the country) specifically provides against discrimination in tenant selection,⁴³ and this is also federal practice, although not provided for by statute. While non-discrimination by public housing authorities is general, segregation within the project is still common, however.

In this era of large scale demolition and rebuilding with their special threat for minority groups, the latter make persistent efforts to extend the non-discrimination policy which governs public housing and is on the road to governing redevelopment.

³⁹ This problem was well illustrated last spring, when the Planning Board of East Orange, New Jersey, recommended a twenty-year redevelopment plan and the local Negro community noted with consternation that it involved the proposed clearance of virtually 100 per cent of the areas occupied by Negroes. As some of these areas included well-kept, owned homes, it was suspected that the replanning scheme might have been motivated by a desire to drive "undesirable" elements out of East Orange, restoring it to its place as a lily-white suburb for the professional white class. The New Jersey Redevelopment Companies Law, modelled after the New York statute, imposes no real obligation on redevelopment companies to present a plan for the rehousing of displaced families, to give preference to displaced families in the selection of tenants, or to accept tenants without discrimination as to race, color or creed.

⁴⁰ CITY OF NEW YORK, ADMINISTRATIVE CODE §J41-1.2.

⁴¹ PA. STAT. ANN. (Purdon, Supp. 1945) tit. 35, §1711(a)(1) and (8).

⁴² *Eliot Pratt, etc. v. LaGuardia et al.*, 182 Misc. 462, 47 N. Y. S. (2d) 359 (1944) *aff'd* 268 App. Div. 973, 52 N. Y. S. (2d) 569 (1944), lv. to appeal denied, 294 N. Y. 842.

⁴³ N. Y. PUBLIC HOUSING LAW §223.

Such efforts are made particularly when public aid or the grant of governmental power is involved, as in connection with the bill to stimulate the rehabilitation of tenements in New York by a liberal grant of tax exemption and abatement.⁴⁴

Eventually, there will be a movement for the elimination of discrimination in all private housing, just as some states have succeeded in enacting legislation, on the FEPC model, to eliminate discrimination in private employment. In private housing accommodations, discriminations are generally rife. Tens of millions of Americans who are members of minority groups suffer from a peculiarly limited market in housing and are segregated in black belts or in ghettos. It is easily demonstrable that such persons have to pay much more for their housing than white families, and also are obliged to pay such excessive prices for the most substandard homes.⁴⁵ The implications of this situation for our democracy, our economy, and our political and social development would fill volumes; only one of the many aspects of this difficult problem was reflected in the circumstance that in the Detroit race riots of 1943 the rioters came from segregated areas, not from mixed housing areas.

It is ironic that the federal government, which has made a notable contribution towards breaking down discrimination in housing by its policy of non-discrimination under the public housing program, has with another hand buttressed and encouraged the growth of restrictive housing practices. The Federal Housing Administration (the government's mortgage insurance agency) has for years been expressly instructing its field men in the merits of restrictive covenants for the stabilization of property values, and has discouraged the lending of money at easy credit for the modernization and building of homes for non-white families. Some day the courts will be presented with the challenge of evaluating the legality of such FHA practice under our Federal Constitution and Congressional laws.⁴⁶

The usual method for preventing Negroes and other unwanted elements from acquiring or occupying property is by use of the covenant. As we have seen, the covenant is one of the oldest legal tools available for the preservation of property values against depreciating uses. Covenants could be of inestimable use today in preserving physical standards of property replanned under comprehensive redevelopment schemes; under the doctrine of *Tulk v. Moxhay*,⁴⁷ covenants which a purchaser takes with notice are enforced against him. The use of covenants, in schemes for the general development of a residential area, to avoid ownership or occupancy by persons of a particular race, creed or color has developed recently. A perversion of the original purpose of this legal principle—yet, virtually every American jurisdiction that has passed on its validity has upheld such a discriminating covenant (whether written into the deeds upon the platting of a subdivision, or whether a separate agreement hastily signed by contemporary property owners upon a threat of infil-

⁴⁴ See note 24 *supra*.

⁴⁵ See unpublished study by Corienne Robinson, "Condition of Dwellings by Rentals by Race," based on 1940 Census (Federal Public Housing Authority Library).

⁴⁶ *Cf. REV. STAT. §1978 (1875)*, 8 U. S. C. (1940) §42.

⁴⁷ (1848) 2 Ph. 774, 41 Eng. Rep. 1143.

tration). Where such agreements also prohibit sale or lease to persons of particular race, creed or color, they would seem to fall squarely within the prohibition of the old English rule of the invalidity of restraints on alienation to whole groups of people, and in deference to common law principles, many courts have struck down covenants in this form, while at the same time upholding the validity of the covenants against use.

In the dozens of law suits now pending for enforcement of such anti-racial covenants in reliance on earlier decisions, important constitutional questions are being raised, notably the matter of enforceability as an infraction of the equal protection clause of the Fourteenth Amendment of the Federal Constitution.⁴⁸ Reference is also made to the Chapultepec resolution and to the provision in the Charter of the United Nations obligating the United States government to prevent within its borders discrimination on grounds of race, color or creed.⁴⁹

Covenants by land owners to keep out racial and other groups would seem to constitute a conspiracy that should be denied enforcement at common law, housing being "a necessary of life" and a subject of trade. A conspiracy against minority groups in their strivings for decent housing is currently one of the subjects of an anti-trust proceeding instituted this year by the Department of Justice against 37 banking and insurance companies of New York.⁵⁰

In this setting of restrictive practices cutting down their market for housing, the housing shortage is not new to the minority groups. They have always suffered from a shortage and all its evils, and the present acute housing shortage which is being suffered on an unprecedented scale by all Americans intensifies their plight and accelerates the need for an early legal and practical solution: a challenge to the statesmanship of the judiciary.

* * * *

¹ In time of housing shortage, even the attempt to remove deficient housing and to build new houses is frustrated by the lack of accommodations for the families to be displaced, thus postponing what cannot afford to be postponed any more than the construction of homes for veterans: the demolition of unsafe and insanitary housing. And in time of housing shortage, a certain amount of jerry building is inevitable; a certain amount of waste in the provision of facilities for projected new subdivisions, is inevitable. In this speculative boom the necessity for sensible plan-

⁴⁸ See McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional* (1945) 33 CALIF. L. REV. 5.

⁴⁹ See, for example, *Anderson v. Ausetz et al.*, pending before California Supreme Court (docket no. L.A. no. 19759), and *Kemp and Lutz v. Rubin*, pending before New York Supreme Court, Queens County; *cf. re Drummond Wren* [1945] O.W.N. 795 (Ontario).

⁵⁰ Figures produced as a result of the 1940 census which would seem directly to support the anti-trust suit are findings that the non-white population pays on the average a higher interest return on first mortgages than the white group. See *op. cit. supra* note 45. Special discrimination in the cost of credit is particularly curious in view of the findings of the National Association of Real Estate Boards that Negro families constitute at least as good a risk as mortgagors as white families, and maintain their property well.

ning gets lost, and much is constructed in a hurry that can then be repented at leisure.

The limitations of this paper have naturally made impossible any thorough analysis of the legal issues which agitate the problem of veterans' housing today. This has been only an outline of the trends, pointing up some of the provocative questions. Attorneys close to the housing scene find interest centered particularly in building codes; federal legislation to bring down the prices and rentals of homes through liberal public aid; restrictive covenants and problems incident to interracial occupancy; planning and zoning controls over new subdivisions, already mushrooming on the periphery of cities; the revival of cooperative housing and other mutual home ownership plans. The difficulties which the housing and planning problem present will be minimized by an appreciation on the part of lawyers and other social scientists of the trends which are involved, and of their role in perfecting the necessary legal tools and otherwise devising legal and practical solutions for apparent dilemmas.