1972

Housing Codes and the Prevention of Urban Blight - Administrative and Enforcement Problems and Proposals

Stephen J. Polaha

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Property Law and Real Estate Commons

Recommended Citation


Available at: http://digitalcommons.law.villanova.edu/vlr/vol17/iss3/3

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
HOUSING CODES AND THE PREVENTION OF URBAN BLIGHT — ADMINISTRATIVE AND ENFORCEMENT PROBLEMS AND PROPOSALS

I. INTRODUCTION

"The need to maintain basic, minimal standards of housing, to prevent the spread of disease and of that pervasive breakdown in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government. The growth of cities, the crowding of populations, the increased awareness of the responsibility of the state for the living conditions of its citizens, all have combined to create problems of the enforcement of minimum standards...."  

One of the most critical problems facing federal, state and local governments, city planners and lawyers alike is the improvement of housing conditions throughout the nation. This problem, though more pronounced in the cities, is not confined to them. Because of its cancerous growth, inadequate, unsanitary, unsafe and unfit dwellings can be found in almost all populated areas of the United States.  

Finding a workable solution to the housing problem is not an easy task. Housing is a complex entity involving architecture and engineering, as well as considerations of health, economics, finance, social welfare, culture and law. Housing legislation, by implication, suggests the existence of criteria which separate, to a certain extent, inadequate housing from that which is adequate. Although some data is available to provide guidelines for the creation of these housing standards, the sources are limited in scope and applicability. As a result, at almost all levels of government there is confusion as to exactly what should be done, specifically, how housing codes should be enforced, and what role, if any, 

3. Id. at 3.  
4. The National Commission on Urban Problems recognized that there is a paucity of empirical data establishing criteria for decent housing. The Commission also noted that "minimum" standards of health, safety and welfare are often inadequate to provide even a "minimum" level of performance for the bulk of the population. Even if present housing codes were elevated to the level of minimum standards of health, safety and welfare, and applied and enforced universally, they would not provide for the standard of housing and residential environment called for in the Housing Act of 1949; i.e., a decent home and a suitable living environment for every American family. Consequently, it was suggested that research and testing processes be established whereby a determination of standards for a decent home can be made. NATIONAL COMM’N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. No. 91-34, 91st Cong., 1st Sess. 273-75 (1968) [hereinafter cited as BUILDING THE AMERICAN CITY].
they should play in helping to provide an abundance of decent housing for the American people.\(^5\)

Commentators on urban renewal are generally in agreement that an effective plan aimed at the restoration of deteriorating cities must include: (1) the replacement of entire non-salvageable areas with publicly-financed, low-income housing; (2) the institution of programs and regulations for the rehabilitation of areas still capable of being brought up to minimum standards; and (3) the use of prophylactic measures coupled with strict enforcement techniques to preserve those areas which show the beginnings of blight, and those in which blight is at most a remote possibility.\(^6\)

Because of the urgency of the problem of urban decay, the slowness or failure of massive programs of clearance, redevelopment and relocation,\(^7\) and the fact that slum clearance is extremely expensive and often politically unpalatable, emphasis has been placed on housing codes as a remedial device in order to implement this three part plan.\(^8\)

It is the purpose of this Comment, initially, to analyze the problem of blight, the role of the housing code in blight prevention, and the shortcomings of the present housing code scheme in achieving its objective. Secondly, two proposals will be suggested, presenting workable solutions to the problem of initiating an effective housing code program.

II. HOUSING CODES: THEIR DEVELOPMENT, DEFINITION AND POWER

A. Historical Background

Building restrictions appeared frequently in the beginnings of American history. Since the colonial period, the necessity of imposing standards of housing construction and use in the interest of public safety and health

\(^5\) Id. at 273. It is suggested that it is often desirable to raise the minimum standards of housing codes from time to time as the condition of housing improves and as social and economic standards rise. However, as housing code standards are raised, there is a tendency to view a housing code as a tool to prevent and eliminate blight in fairly good neighborhoods, while forgetting that the primary role is one of setting minimum health and safety standards in low quality housing. Under this blight prevention approach, the poorer areas of the community are considered to be more appropriately treated through urban renewal rehabilitation. As a result, code enforcement is slackened, reduced to a complaint basis, or otherwise neglected in such areas. \(\text{Id.}\) at 290-91. See Slayton, Conservation of Existing Housing, 20 LAW & CONTEMP. PROB. 436, 439-40 (1955).

\(^6\) Editorial Note, Housing and Health Inspection: A Survey and Suggestions in Light of Recent Case Law, 28 GEO. WASH. L. REV. 421, 422 (1960). The recommendation of the National Commission on Urban Problems to the Housing Code Administration closely aligned itself to these purposes. The major goals set for the housing administration included: (1) protecting and maintaining minimum housing standards affecting personal health, safety or comfort, and amenity in all areas of the city; (2) preventing blight from spreading to areas with standard quality housing; and (3) upgrading basically sound and restorable "gray" areas. BUILDING THE AMERICAN CITY, \(\text{supra}\) note 4, at 296.

\(^7\) Boggan, Housing Codes as a Means of Preventing Urban Blight: Constitutional Problems, 6 WAKE FOREST INTRA. L. REV. 255 (1970).

\(^8\) Editorial Note, \(\text{supra}\) note 6, at 422.
has been realized.

However, it was not until the late nineteenth century that housing codes, resembling the form which they take today, began to develop. The first housing code, The Tenement Housing Act, was enacted in New York City in 1867. Applicable only to dwellings, it established minimum standards to be observed for "tenements." The Act proved ineffective, however, due mainly to inadequate enforcement. Nevertheless, it did represent the first attempt to employ the police power of the state to insure minimum standards of health and safety in the housing inventory.

A major development in the promulgation of housing codes was Lawrence Veiller's work on housing conditions, culminating in the New York Tenement House Law of 1901 and later in his model housing law, published in 1914. Salient features of the new New York law were its meticulous attention to problems of administration and enforcement of the law, and its formulation of rules which were objective and clear. The successful movement of tenement house reform was sustained by favorable judicial response when the constitutionality of the act was challenged. The courts were able to see the objectives of the movement,

9. To reduce fire hazards, for example, some early settlements prohibited the use of thatched roofs or wooden chimneys in housing construction. Such a measure was promulgated in 1626 by the Plymouth Colony, and in 1648 in the settlement of New Amsterdam. Mood, supra note 2, at 6. Others tried to prevent people from keeping hay, straw, pitch, tar and turpentine where the danger of fire was great. See J. McGoldrick, S. Graubard & R. Horowitz, BUILDING REGULATION IN NEW YORK CITY 34 (1944). In order to promote cleanliness, other colonists legislated against the placing of rubbish and filth in the street or enacted rules and regulations concerning the construction and maintenance of cesspools, drains and sewers. In 1850, the Sanitary Commission of Massachusetts recommended that the local boards of health be empowered to enact such rules and regulations. Mood, supra note 2, at 6.


11. The Act defined tenements as:

12. L. Friedman, supra note 10, at 29.


14. Id. at 36.

and validity was denied only where no true need for reform was seen.\textsuperscript{18} Despite this initial success, the thrust of the reform movement came to a halt during the turbulent twenties, because of the difficulty in enforcement of the housing laws, the lack of coordination in enforcement of the separate codes, inadequate understanding of the problem, poorly drafted laws, and court delay.\textsuperscript{19} Consequently, the housing code movement remained dormant until the enactment of the Housing Act of 1949,\textsuperscript{20} which created federal urban redevelopment\textsuperscript{21} and called for the appropriation and expenditure of federal funds to aid redevelopment projects.\textsuperscript{22}

Redevelopment was not, however, to be a panacea and problems arose: development costs were prohibitive, relocation of displaced families was a rapidly growing concern and blight was causing previously non-slum areas to deteriorate.\textsuperscript{23} As a result, the Housing Act of 1954\textsuperscript{24} was enacted to broaden the attack on blight by adding the concept of "urban renewal"\textsuperscript{25} to that of "redevelopment."\textsuperscript{26} Emphasis thus shifted from clearance alone to a comprehensive attack on blight, demanding that each municipality provide a "workable program" designed not only to eliminate slums, but also to include rehabilitation and conservation of deteriorating areas before they could become eligible for federal aid.\textsuperscript{27}

Increased emphasis and interest in housing codes, housing code standards and effective programs to enforce these standards was precipitated by the Housing Act of 1964\textsuperscript{28} and the Housing and Urban

\textsuperscript{18} See Grimmer v. Tenement House, 204 N.Y. 370, 97 N.E. 884 (1912); Bonnet v. Vallier, 136 Wis. 193, 116 N.W. 885 (1908).


\textsuperscript{21} The aim of redevelopment is the achievement of a sound, well planned neighborhood where slums once existed. Large areas, quite low in the scale of existing values — those not worth preserving — are cleared for future development. See Slayton, \textit{supra} note 5, at 436-37.


\textsuperscript{23} Note, \textit{supra} note 19, at 437-38.


\textsuperscript{25} Urban renewal is an over-all term, embracing the programs of redevelopment, conservation, public housing and the use of the tools of rehabilitation and housing law enforcement. Slayton, \textit{supra} note 5, at 438.

\textsuperscript{26} See note 21 \textit{supra}.

\textsuperscript{27} Although the Housing Act of 1954 broadened the program of federal assistance for urban redevelopment to include rehabilitation and conservation of deteriorated areas, cities continued extensive demolition in their urban renewal plans because it was more attractive for cities to proceed with clearance projects to eliminate marginal structures than to force their rehabilitation by code enforcement. One reason for this result was the fact that federal financial assistance was not extended to cities for code enforcement within urban renewal project areas. Comment, \textit{Federal Aids for Enforcement of Housing Codes}, 40 N.Y.U.L. Rev. 948, 968-69 (1965).

\textsuperscript{28} Housing Act of 1964, Pub. L. No. 88-560, § 301, 78 Stat. 785, as amended, 42 U.S.C. § 1450 (1970). In the years after 1954, it became clear that the "urban
Development Act of 1965.\textsuperscript{29} Under these Acts, a certified “workable program” is still a prerequisite for any community desiring to become eligible for federal financial aid for public housing, urban renewal, rent supplements and other related programs.\textsuperscript{30} Now, however, in order to have the “workable program” certified, the locality must have a minimum standards housing code and an effective program of enforcement to achieve compliance with the code.\textsuperscript{31}

The Housing Act of 1949 and its amended versions have vitalized interest in housing codes as a tool in urban redevelopment and preservation.\textsuperscript{29} The “workable program” approach remained inadequate for two reasons: (1) maximum use was not being made of existing housing inventories; and (2) social problems incident to tenant relocation were enormous. As a result, Congress enacted the Housing Act of 1964 which included among its provisions an integrated scheme providing both direct and indirect assistance for local code enforcement activities within urban renewal project areas. The new concept, included in the Housing Act of 1964, Pub. L. No. 88–560, § 301(b), 78 Stat. 785, as amended, 42 U.S.C. § 1460(c) (1970), authorized financing of projects designed to “eliminate the first stages of slums and blight and prevent the need for subsequent clearance or rehabilitation activities,” and consisting “entirely or substantially of a program of intensive code enforcement in an urban renewal area.” H.R. Rep. No. 1703, 88th Cong., 2d Sess. 12 (1964). Congress expected section 301(b) projects to be utilized in basically sound areas showing signs of deterioration and blight principally from noncompliance with local codes. A prime factor in Congress’ enactment of the section was the belief that the cost would almost always be less than the cost of carrying out the more traditional clearance or rehabilitation projects.\textsuperscript{id}


30. The Housing and Urban Development Act provides in relevant part that:

\textit{[N]}o contract shall be entered into for any loan or capital grant . . . unless (1) there is presented to the Secretary by the locality, a workable program for community improvement . . . for utilizing appropriate private and public resources to eliminate, and prevent the development or spread of, slums and unsanitary . . . to encourage needed urban rehabilitation, to provide for the reclamation of blighted, deteriorated, or slum areas . . . and (2) on the basis of his review of such program, the Secretary determines that such program meets the requirements of this subsection and certifies that the Federal assistance may be made available in such community. . . .


31. The present law now mandates that:

\textit{[N]}o workable program shall be certified or re-certified unless (A) the locality has had in effect, for at least six months prior to such certification or re-certification, a minimum standards housing code, related but not limited to health, sanitation, and occupancy requirements . . . and (B) . . . the locality is carrying out an effective program of enforcement to achieve compliance with such housing code.


tion. However, in order to better understand the use of this tool as one of the means of combating the problem of urban decay, the inquiry must first focus on possible limitations on the use of housing codes by a local government.

B. The Police Power and Its Limitations

Municipal corporations are empowered to draft, enact and enforce reasonable ordinances and regulations which govern buildings within the municipality. A housing code, as one application of the state police power, sets the minimum standards for the safety, health and welfare of housing occupants. Generally, these codes provide minimum standards in four main areas: (1) equipment and facilities contained in the structure; (2) light, ventilation and heating; (3) use, maximum occupancy, and conditions of occupancy; and (4) the level of maintenance of the dwelling unit as a whole and of its facilities and equipment. Each


[T]he Secretary is authorized to... make grants... to cities, other municipalities, and counties... of the United States for the purpose of assisting such localities in carrying out programs of concentrated code enforcement in deteriorated or deteriorating areas in which such enforcement, together with those public improvements to be provided by the locality, may be expected to arrest the decline of the area.

42 U.S.C. § 1468 (1970). The purpose of this new program is to enable cities to avoid the cumbersome urban renewal process in order to get federal assistance for code enforcement in basically sound areas that have begun to show the signs of deterioration and blight. See Bryan, Concentrated Code Enforcement—What's Been Happening Under Section 117 in the Last Five Years?, 27 J. Housing 300 (1970); cf. H.R. Rep. No. 1703, 88th Cong., 2d Sess. 12 (1964).

32. 7 E. McQuillan, Municipal Corporations § 24.505, at 519-20 (3d rev. ed. 1968). These ordinances may control the erection, removal, repair, alteration, reconstruction and use of buildings. Id. at 518.

33. See, e.g., Philadelphia, Pa., Housing Code §§ 7-201 to 7-308 (1968).

34. The Philadelphia Housing Code, for example, requires that every dwelling contain the following minimum equipment and facilities: water closet and lavatory basin; bathing facilities; kitchen sink; and plumbing fixtures connected to an approved water system and an approved sewerage system. Philadelphia, Pa., Housing Code §§ 7-201(a), (b), (d) (1968). In addition, in every multi-family dwelling there must be approved common garbage and rubbish storage or disposal facilities. Id. § 7-201(1)(e).

35. The minimum standards for light and ventilation in the Philadelphia Housing Code prescribe, among other things, a minimum total window area for every habitable room measured according to floor space. Id. §§ 7-202(1)(a), (b). If windows are not found in each habitable room which can be easily opened and which face the outdoors, other devices may be used to maintain adequate ventilation. Id. § 7-202(1)(b). Additionally, every dwelling within 300 feet of a power line is to maintain electrical services, and have a central heating system capable of safely and adequately heating all habitable rooms to a temperature of at least seventy degrees Fahrenheit when the outside temperature is ten degrees Fahrenheit. Id. §§ 7-202(1)(h), (i).

36. Those sections of the Philadelphia Housing Code that regulate the maximum occupancy, conditions of occupancy and contents of structures contain provisions prohibiting the following: living space overcrowding; sleeping space overcrowding; and the use of basements for living purposes unless certain specific requirements are met. Id. § 7-204. For other examples, see Altoona, Pa., Housing Code § 6.1 (1962) (living space overcrowding); Reading, Pa., Housing Code § 8.3 (1968) (sleeping space overcrowding).

37. In the Philadelphia Housing Code, minimum standards are set for safe and sanitary maintenance of every foundation, exterior wall and roof; floor, interior wall and ceiling; window and exterior door; inside and outside stair, porch and any appur-
section further defines those provisions pertaining thereto and provides a comprehensive plan placing a person, whether owner-occupant or landlord, on notice as to what standards he is required to meet. In theory, at least, prescribing these minimum requirements operates to fix the minimum level of housing quality in a community, and potentially, therefore, to insure that the locality does not deteriorate. However, since the enactment of a housing code by a municipality is an exercise of the police power, the code prescribed is subject to all the limitations on that power. To be valid, therefore, especially where such ordinance restricts the use of private property, it must be reasonably necessary to promote or protect the public health, safety, morals, or general welfare. Additionally, both procedural and substantive due process requirements.
must be met, and the code must adhere to the demands of equal protection.\textsuperscript{45} Other constitutional limitations upon the exercise of the police power in the enactment and enforcement of housing codes include the prohibition of unlawful searches,\textsuperscript{46} unlawful delegations of authority\textsuperscript{47} and impairment of contract obligations.\textsuperscript{48}

Initially, the enforcement of a housing ordinance will not be interfered with unless its regulatory measures are unreasonable.\textsuperscript{49} Reasonableness is a question of fact, not abstract legal theory, and the facts must evidence an essential public need for the housing ordinance. In determining that fact, a court may recognize a presumption of reasonableness and give considerable weight to the legislative judgment.\textsuperscript{50} This factor, plus the expansion of the police power under the concept of public welfare,\textsuperscript{51} has enabled courts to consistently uphold the constitutional validity of the enactment of housing codes per se as a proper exercise of the police power.

\textsuperscript{45} See, e.g., Brennan v. City of Milwaukee, 265 Wis. 52, 60 N.W.2d 704 (1953). See pp. 499-500 infra.

\textsuperscript{46} In most housing codes, provision is made for the entry and inspection of the dwelling by municipal inspection officers. It is of practical necessity for the use of housing codes as an effective tool in blight prevention and elimination programs, to permit such a right of entry, since enforcement of housing codes necessitates interior and exterior dwelling inspection. However, right of entry provisions in housing codes may be attacked under the due process clause and upon the ground that they violate state constitutional provisions, analogous to the fourth amendment, prohibiting unlawful searches. Guandolo, supra note 41, at 28-29. See Editorial Note, supra note 6, at 421.

\textsuperscript{47} A lack of precise and definite standards may subject a housing code to attack upon the ground that it involves an unlawful delegation of authority. Guandolo, supra note 41, at 32-35. See, e.g., Richards v. City of Columbia, 227 S.C. 538, 555 88 S.E.2d 683, 691 (1955).


\textsuperscript{49} Richards v. City of Columbia, 227 S.C. 538, 551, 88 S.E.2d 683, 689 (1955). For additional cases, see note 42 supra.

\textsuperscript{50} See Rapid City v. Schmitt, 75 S.D. 636, 71 N.W.2d 297 (1955); Ferguson v. City of Columbus, 70 Ohio L. Abs. 277, 128 N.E.2d 196 (Ct. App. 1954). As to a comparable situation involving zoning ordinances, see Valley View Village, Inc. v. Proffett, 221 F.2d 412 (6th Cir. 1955); Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir.), cert. denied, 284 U.S. 634 (1931).

\textsuperscript{51} Recent decisions indicate a trend allowing the enforcement of various property standards under the police power where there is no immediate threat to health and safety, but where the general welfare is found to require such standards. See Thain v. City of Palo Alto, 24 Cal. Rptr. 515 (Cal. App. 1962); Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965); Boden v. City of Milwaukee, 8 Wis. 2d 318, 99 N.W.2d 156 (1959). One court stated:

The [police] power is not limited to regulations designed to promote public health, public morals or public safety or to the suppression of what is offensive, disorderly or unsanitary but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity. Wulfsahn v. Burden, 241 N.Y. 288, 298, 150 N.E. 120, 122 (1925).
power, although on occasion specific provisions of a housing code have been found to be constitutionally infirm.

Substantive due process challenges under the fourteenth amendment and comparable state constitutional provisions may arise if a housing code is applied retroactively, or if there is a taking of property without just compensation. The courts have recognized that a proper exercise of the police power may require some minimum standards of housing, and have gone so far as to uphold codes whose requirements retroactively apply higher standards than those which were in existence when the building was originally constructed. The Supreme Court has asserted that "in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing law." To hold otherwise would preclude the taking of appropriate steps to end existing slums. Even though a housing code may be valid when retroactively applied, it may become invalid if it

52. The following decisions, for example, have expressly upheld specific code standards as reasonably related to the public health, safety, or welfare and violative of neither due process nor equal protection of the laws: Apple v. City & County of Denver, 154 Colo. 166, 390 P.2d 91 (1964) (apartments being used for cooking and eating must be equipped with kitchen sinks); State v. Schaffel, 4 Conn. Cir. 234, 229 A.2d 552 (1966) (exterior wood surface throughout must be adequately protected from decay); Chicago v. Miller, 27 Ill. 2d 211, 188 N.E.2d 694 (1963) (not more than two family units which are located in the same dwelling may share a single bathroom); City of Louisville v. Thompson, 339 S.W.2d 869 (Ky. App. 1960) (each dwelling unit must have a privately enclosed, inside flush toilet and a kitchen sink, both connected to an approved water and sewer system); Givner v. Commissioner of Health, 207 Md. 184, 113 A.2d 898 (1955) (all dwelling units must contain a bathing facility with hot and cold water except that two-story dwellings with not more than two dwelling units may share a bathing facility); Paquette v. City of Fall River, 338 Mass. 368, 155 N.E.2d 775 (1959) (there must be adequate outdoor screens); Boden v. City of Milwaukee, 8 Wis. 2d 318, 99 N.W.2d 156 (1959) (interior floors must not be buckled).

53. See, e.g., City of Columbus v. Stubbs, 223 Ga. 765, 158 S.E.2d 392 (1967), where the court found that painting of exterior wood surfaces or application of other protective covering, and installation of at least two electrical outlets in each room, among other items, were unreasonable and void as without any reasonable relation to public health, safety or morals. See also Safer v. City of Jacksonville, 237 So. 2d 8 (Fla. App. 1970).


56. Queenside Hill Realty Co. v. Saxl, 328 U.S. 80, 83 (1946). In 1940, the appellant in Queenside Hill Realty constructed a lodging house in New York, complying with all applicable laws then in force. In 1944, New York amended its Multiple Dwelling Law so as to provide that lodging houses of "non-fireproof construction existing prior to the enactment" of the amendment should comply with certain new requirements, including installation of an automatic wet pipe sprinkler system. Appellant asserted that its building did not constitute a fire hazard or a danger to its occupants; that it had a market value of $25,000; that the cost of complying would be $7,500; and that the benefits to be obtained by the changes were negligible. The Court held that the law does not violate the due process clause of the fourteenth amendment. Id. at 82.
involves a taking of private property without just compensation. In those states that have not established a "well nigh conclusive" presumption in favor of economic legislation, the ordinance will be upheld only if it is reasonably related to the protection of public health, safety, morals, or general welfare. The reasonableness of the relationship should depend upon a weighing of the imposition on those regulated against the importance of the governmental interest sought to be protected and the extent to which the challenged code provision is calculated to promote that interest.

A municipal ordinance must, in addition, withstand challenges that arise under the equal protection clause of the fourteenth amendment. Where housing codes create different requirements for different groups, it must be established that the classifications are reasonably related to the purposes of the statute. Equal protection delimits the extent to which a differentiation of housing areas or individual structures may be made with regard to the standards to be applied to each, and proscribes arbitrary and capricious enforcement treatment of the building involved. However, if the ordinance is otherwise reasonable, a classification need not be made with mathematical nicety or absolutely exclude all inequality. Moreover, a police power measure which may be unreasonably discriminatory in the light of public health, public safety and public morals objectives may nonetheless be held valid if the alleged discriminatory

---


58. The federal courts and some state courts have adopted a "well nigh conclusive" presumption in favor of economic legislation. See, e.g., Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961). Kansas, Colorado and Minnesota have adopted the federal position without qualification. See Note, 53 COLUM. L. REV. 827, 832-34 (1953). Economic legislation would include, for example, taxation and Sunday closing laws, but not legislation concerned with "suspect classifications" such as those based on race or a fundamental interest. See, e.g., McGowan v. Maryland, 366 U.S. 420 (1961); Quong Wing v. Kirkendall, 223 U.S. 59 (1912). A housing code would be considered a type of economic legislation since one of the main focuses of a zoned housing code or selective enforcement program would be to maintain or increase property values in a given area.

59. The cost of making housing improvements is a factor to be considered in ascertaining the reasonableness of the legislation. See Note, 69 HARV. L. REV. 1115, 1118 (1956). Dollar costs were considered too burdensome in LaSalle Nat'l Bank v. City of Chicago, 5 Ill. 2d 344, 351, 125 N.E.2d 609, 613 (1955); and Pondfield Rd. Co. v. Bronxville, 141 N.Y.S.2d 723, 726 (Sup. Ct. 1955). But see Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946); American Wood Prods. Co. v. City of Minneapolis, 21 F.2d 440 (D. Minn. 1927), aff'd, 35 F.2d 657 (8th Cir. 1929).


61. Bellerive Inv. Co. v. Kansas City, 321 Mo. 969, 987-88, 13 S.W.2d 628, 637 (1929). A permissive approach which does not require every classification to be drawn with mathematical nicety was expounded by the Supreme Court of the United States in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). See notes 114-16 and accompanying text infra.
requirement were judged upon the basis of a public welfare objective. 62 Therefore, if all within a proper classification are treated equally, the court will not disturb the classification unless it appears to be arbitrary and capricious and not related to the purposes of the legislation. 68

Thus, in making any proposals to effectuate a more workable solution to the problem of blight and deterioration, the possibility of constitutional infirmity must be considered.

III. THE PROBLEM OF BLIGHT

A. The Deterioration Process

When signs of blight, or indications of a forthcoming economic or racial change appear in an area, banks and other financial institutions, in anticipation of a potential decline of land values in the area, become hesitant to invest there. Individuals are deterred from purchasing homes and present homeowners are unable to obtain loans to finance needed improvements. As the neighborhood begins to deteriorate, present owners, whether they be occupiers or landlords, begin to lose faith or fear that future rental income will not be sufficient to warrant further investment, and therefore permit the property to go without basic maintenance. 64 This neglect hastens deterioration and overburdens community facilities, and as one structure after another becomes blighted, the character of the neighborhood worsens, investors will demand that their capital be returned more quickly, and the downward spiral accelerates. 65

The deterioration process and, consequently, the onset of blight, is induced by the interaction of structural, physical, political, economic and social factors. Structural factors concern improperly constructed housing, while physical factors relate to proximity of this housing to undesirable land uses. Political factors pertain to landlord and tenant law, municipal ordinances and codes, and the enforcement policies related to them. 66


64. One way to instill confidence in private owners, investors, and lenders that a neighborhood will improve in quality is a concentrated public campaign to enforce housing codes, health codes and similar measures. Private rehabilitation will begin to occur if owners and lenders are persuaded that a neighborhood actually will improve. However, this positive effect may also have adverse consequences particularly if owners abandon deteriorated buildings, or increase rents causing the less fortunate to move out. The President's Committee on Urban Housing, A DECENT HOME 105-06 (1969) [hereinafter cited as A DECENT HOME].

65. See Note, Enforcement of Municipal Housing Codes, 78 HARV. L. REV. 801 (1965). Since tenants often cannot afford higher rents, landlords may increase their returns either by overcrowding, or deferring maintenance and repairs. Id. The answer to the problem would be either subsidies by the federal government, or tax reform in the slum areas as an aid to rehabilitation. See A DECENT HOME, supra note 64, at 102-04 (1969).

66. Note, Conservation of Dwellings: The Prevention of Blight, 29 IND. L.J. 109, 109-11 (1953). If there is a strong housing code in force, there is a possibility
Economic factors include purchase and rental prices of land, repair and maintenance costs, population income and general economic stability. Social factors, on the other hand, concern the habits, personal standards, problems and education of the community's population.

Although time, by itself, is not a cause of blight, a distinct chronology is discernible in the development of a blighted area. Every decayed area has been built, has become undesirable, and then has been allowed to deteriorate until it has become a slum. The first stage, or construction period, is predominated by the structural and physical factors previously mentioned, while in stage two, the property loses its desirability primarily because of economic considerations. The physical deterioration of the property, characteristic of stage three, occurs primarily because of political factors, and the final stage, or the actual conversion of the land into a slum, is a period in which social factors predominate.

B. The Role of the Housing Code In Blight Prevention

1. The Need

Through the enforcement of housing codes, cities and other municipalities attempt to arrest the deterioration spiral and to insure that conditions dangerous to health and safety do not develop. Where such conditions have developed, the municipalities then try to compel correction. Although the surest permanent solution to the problems of the worst slums is clearance followed by a program of urban redevelopment according to a comprehensive plan, such measures are expensive and politically difficult to achieve. Cities, cognizant of this fact, have placed greater emphasis upon the enforcement of regulatory ordinances, and have that the property will become more undesirable because the ordinance imposes the expensive duty to maintain. The landlord may refuse to make the badly needed repairs and threaten to tear down the dwelling. As a result, the city is required to make a choice which often results in a slum. Id. at 119. Flexibility in standards and enforcement procedures has been suggested as an effective method of relieving this situation. See W. Nash, Residential Rehabilitation: Private Profits & Public Purpose 93 (1969).

67. See Note, supra note 66, at 111.
68. See notes 64 & 65 and accompanying text supra.
69. See Note, supra note 66, at 113-14.
70. In 1966, it was estimated that there were 1,995,000 existing, occupied, dilapidated units, and approximately 4,170,000 non-dilapidated, substandard units of which 3,759,000 were estimated to be occupied. ("Substandard units" may be defined as units which are dilapidated or which lack one or more of the following plumbing facilities: inside hot running water, flush toilet for private use, bathtub or shower for private use.) R. Hale & A. Frischler, Present State of Housing Code Enforcement 61 (1968).
71. Note, supra note 59, at 1115. See also Note, 68 Harv. L. Rev. 1422 (1955).
72. In many urban centers housing is deteriorating more quickly than it can be replaced. It has become economically impossible for private investors to provide adequate housing for low income groups, and it will take many years for subsidized public housing to fill the gap. Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum. L. Rev. 1254, 1254-55 (1966).
realized that code enforcement remains the principal method by which they can insure that minimum housing conditions are maintained.\textsuperscript{74}

To better appreciate the need for housing codes, the functions of zoning ordinances and building codes should be understood. Zoning ordinances\textsuperscript{75} are designed primarily to maintain desirable land uses,\textsuperscript{76} density of population\textsuperscript{77} and building size\textsuperscript{78} while, at the same time, checking the spread of undesirable ones. Zoning laws, however, have been held to be prospective in application,\textsuperscript{79} and existing nonconforming uses continue to have an undesirable effect on the neighboring residential dwellings. Thus, zoning has no effect on a decaying but conforming structure,\textsuperscript{80} or possibly a permissible non-conforming structure.\textsuperscript{81}

Similarly, building codes are primarily concerned with the structural safety of new and renovated buildings. Scrutiny and enforcement of compliance is during the construction period only, and since such a code does not compel renovation and only operates prospectively, it has little impact on existing housing until actual renovation is commenced.\textsuperscript{82} Existing housing is maintained and regulated, therefore, only through the use

\textsuperscript{74} Note, supra note 65, at 802–03. The purpose of code enforcement is to retard the spread of physical and environmental blight, and to eliminate structural and environmental conditions which do not meet standards of health and safety. See Dick & Pfarr, Detroit Housing Code Enforcement and Community Renewal: A Study in Futility, 3 PROSPECTUS 61, 62 (1969). But see Note, supra note 73, at 480 n.44 for certain acknowledged drawbacks of a code enforcement policy. For example, in addition to the increase in rents, there is a shift in investment away from new housing construction to the extent finances are used to make repairs.

\textsuperscript{75} Zoning ordinances are a valid exercise of the police power and will be upheld provided their provisions are not arbitrary and unreasonable, and have a substantial relation to the public health, safety, morals or general welfare. See Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926). \textit{See also} Nectow v. City of Cambridge, 277 U.S. 183 (1928).

\textsuperscript{76} See Katobimar Realty Co. v. Webster, 20 N.J. 114, 118 A.2d 824 (1955). The \textit{Katobimar} court noted that "[t]he essence of zoning is territorial division in keeping with the character of the lands and structures and their peculiar suitability for particular uses, and uniformity of use within the division." \textit{Id.} at 123, 118 A.2d at 829.


\textsuperscript{78} See, e.g., Lionshead Lake, Inc. v. Wayne Township, 10 N.J. 165, 89 A.2d 693 (1952), \textit{appeal dismissed}, 344 U.S. 919 (1953) (minimum house size requirements upheld).

\textsuperscript{79} See Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930). The court held that although the zoning ordinance is valid, it could not be applied retroactively to the type of use it prohibited (an institution for the treatment of mentally disturbed persons) where it would cause substantial injury and where the continuation of the use did not constitute a nuisance. \textit{Id.} at 321, 295 P. at 22. However, in City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954), the court upheld a zoning ordinance which called for a discontinuance of a nonconforming use in a residential zone since it allowed the plaintiff a five year period of grace in which to relocate. \textit{Id.} at 461, 274 P.2d at 45. For cases taking variant approaches on the retroactive validity and application of housing codes, see notes 55 & 56 and accompanying text supra.

\textsuperscript{80} Note, supra note 19, at 439.

\textsuperscript{81} See note 79 supra.

\textsuperscript{82} See Note, supra note 19, at 439.
2. The Use

Within the broad context of community development goals, housing codes can have their greatest impact in retarding deterioration and upgrading the quality of housing in city "gray" areas where housing deterioration has reached moderately serious proportions. Codes are also useful as a stopgap holding action in the worst areas of a community; i.e., in those areas which require urban renewal. An effective application of code administration is the maintenance of a community's good areas, and the prevention of the formation of blight pockets.

C. Failure of Codes to Prevent Blight

From a careful inspection of local neighborhoods, or even from a casual observation of the community, an observer can quickly discover that the relative condition of decay of buildings varies from neighborhood to neighborhood or from street to street. A single standard code cannot remedy these dissimilar situations unless, of course, this standard is not enforced uniformly. For example, the formulation of code standards which provide minimum standards for the "good," "gray" and "worst" areas, would be effective in the slums, but will necessarily prove to be inadequate in realizing the conservation potential of the code in basically sound areas. Conversely, a standard which is designed for conservation would be, at best, only partially enforceable in the slums. In short, it is

83. For example, the Philadelphia Housing Code includes by reference the Philadelphia Electrical Code, Plumbing Code and Fire Code. PHILADELPHIA, PA., HOUSING CODE §§ 7-202(h), (i), 7-205(e) (1968).

84. Residential areas which are basically sound but which are declining in quality are often designated as "gray" areas.

85. NATIONAL COMM'N ON URBAN PROBLEMS, NEW APPROACHES TO HOUSING CODE ADMINISTRATION 1 (1969) [hereinafter cited as NEW APPROACHES].

86. Id. Under the Housing Maintenance Code of New York City, three distinct purposes are intended: (1) to preserve decent housing; (2) to prevent adequate or salvageable housing from deteriorating to the point where it can no longer be reclaimed; and (3) to bring about the basic decencies and minimal standards of healthful living in already deteriorated dwellings, which, although no longer salvageable, must serve as habitations until they can be replaced. M. TEITZ & S. ROSENTHAL, HOUSING CODE ENFORCEMENT IN NEW YORK CITY, vii (1971).

87. The proper level of standards is what can be made acceptable in the community under an effective enforcement program. If code standards are incorporated into a housing code which are too high for the economic status of the owners of the property or too high for general acceptance in the community, general breakdown of the enforcement program may result. Guandolo, supra note 41, at 37.

88. Note, supra note 59, at 1118. The setting of standards too low for the community in general has been advanced as one of the two major causes for the failure of most housing codes to accomplish fully their objective of eliminating blight. The second major cause of failure has been a deficiency in enforcement procedures. Note, supra note 19, at 440-41. See note 93 and accompanying text infra.
a difficult task to set a uniform standard high enough to deal effectively with blight, even at its early stages, and at the same time not to create a standard so high as to make compliance unreasonably difficult. 89

The problem is compounded in deteriorated areas, particularly the slums. As the economic desirability of property decreases, there is a tendency to allow it to deteriorate. 90 Thus, if a strong minimum standards ordinance is in force, there is a distinct possibility that the property will become still more undesirable where the ordinance imposed a prohibitively expensive duty to maintain. In addition to the economic deterrents, political factors may also have adverse consequences since the poor often lack the political power to maintain a sustained regulatory effort on their behalf. 91

The problem of identical standards to remedy conditions which are clearly not identical is only worsened by calling for a “vigorous enforcement of housing codes,” 92 and commentators are in general agreement that the present housing code administration and enforcement scheme has not been effective in halting or reversing urban blight. 93 Since, as has been pointed out, it is not economically feasible to “bulldoze” entire areas of decay, and it is not an effective practice to maintain a uniform standard in all areas, other solutions must be found to make an affirmative use of housing codes on a city wide basis.

89. Note, supra note 19, at 440.

90. Note, supra note 66, at 119. This is explicable when, from a market analysis approach, a distinction is made between three classes of residential buildings. The first class is that of the deteriorated building having a short economic future incapable of profitable rehabilitation. A second class of buildings could be rehabilitated economically, but the potential return on investment is marginal. A third class is that where rehabilitation could take place economically and grant a satisfactory return on investment. See J. Buckley, Housing Code Administration and Enforcement 1, 18, May 7, 1971 (unpublished research design, University of Pennsylvania Dep't of City Planning).

91. Ackerman, Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies, and Income Distribution Policy, 80 YALE L.J. 1093 (1971). In addition, successful code enforcement does not yield great political dividends for the incumbent administration. Id. at 1093–94. When an area deteriorates, housing officials often do not insist on compliance with all code standards in areas scheduled for clearance, but only those necessary for health and safety. See New Approaches, supra note 85, at 28. Such an enforcement policy is clearly possible either by disregarding the ordinance altogether, or by enforcing the vague standards set down in most housing codes to fit the occasion. This type of enforcement of a uniform code necessitates constitutional inquiry based on equal protection. Nevertheless, it, in itself, is a part of another possible solution to the blight problem. See pp. 515–22 infra.

92. Building the American City, supra note 4, at 306.

93. See, e.g., Gribetz & Grad, supra note 72, at 1255. “Enforcement of housing codes . . . through inspection, posting of violations, administrative devices, and, ultimately legal remedies and sanctions, has failed in recent years to halt or reverse urban blight.” Id. See also Note, supra note 65.
IV. PROPOSALS

A. The Zoned Housing Code

1. Introduction — A Workable Method of Arresting The Spread of Blight

The zoned housing code concept appeared as early as 1927, when it was suggested that the same principle of flexible standards which was applied so successfully in zoning, be incorporated in new housing legislation so that different code requirements would be imposed in different districts. More recently, a similar proposal was made in Wisconsin to enact state enabling legislation which would authorize the City of Milwaukee to establish such a code. The zoned housing code would supplant the ordinary housing code, and instead of providing only one set of maintenance standards for the entire community, would prescribe variable standards by establishing different housing code districts or areas in which different sets of standards would apply.

Under the zoned housing code, areas for protection, rehabilitation and demolition, corresponding to what is frequently termed the "good," "gray" and "worst" areas of the community, would be created to allow for varying intensity of enforcement. Different minimum standards appli-

---

95. The Commissioner of Health of the city of Milwaukee, Dr. E. R. Krumbiegel has proposed such legislation. For a discussion of this proposal, see Slayton, Urban Redevelopment Short of Clearance: Rehabilitation, Reconditioning, Conservation, and Code Enforcement in Local Programs, in Urban Redevelopment: Problems and Practices 315 et seq. (C. Woodbury ed. 1953). For a decentralized plan involving citizen participation, see Babcock & Boselman, Citizen Participation: A Suburban Suggestion for the Central City, 32 Law & Contemp. Prob. 220 (1967). The city would be subdivided into administrative districts following historic neighborhood boundaries. A neighborhood board would then be created to set standards, enforce them, grant variations from them, and seek judicial implementation of its decisions. When violations are found, the offender would be brought before the neighborhood board, and they would set a time table for compliance. Code regulations concerning housing density, open space, architectural design and aesthetics could vary from neighborhood to neighborhood, as the citizens of that neighborhood choose. Id. at 222-24.
96. For a thorough treatment of the zoned housing code concept, see Guandolo, supra note 41, at 42-44. See also Lehman, Building Codes, Housing Codes & the Conservation of Chicago's Housing Supply, 31 U. Chi. L. Rev. 180, 200-02 (1963).
97. It has also been suggested that the code districts may be closely approximated by urban renewal classifications. Urban renewal is itself a kind of zoning that classifies areas into those that are beyond redemption, those that need extensive rehabilitation, and those that are to be conserved. As areas are bounded and labeled, a housing code is imposed upon the area resulting in varying degrees of severity according to classification. S. Parratt, Housing Code Administration & Enforcement 6, 7 (1970). Furthermore, housing codes designed for protection of both health and economic value would be integrated with zoning ordinances. Id. at 132.
98. The "worst" areas are the slums, the "gray" areas are those that are basically sound but declining, and the "good" areas are those that have not been touched by blight. See New Approaches, supra note 85, at 29-32. A conservation and rehabilitation program is recommended to be used in basically sound areas; that is, ones worth conserving. It is a program designed to maintain the economic and social values of a neighborhood where it is desirable to improve these values. For definitions of "redevelopment" and "urban renewal," see notes 21 & 25 supra.
cable to each of these areas would be prescribed with these standards being graduated upward in relation to the quality of the housing in the area in question. Additionally, a classification by housing types would be established by which another graded set of standards for private dwellings, two-family dwellings, multiple-family class A and class B dwellings would be included in the code. There would also be a distinct set of minimum criteria for each of the above illustrated dwelling types in rehabilitation and protection areas, although there would be no need for such a variation in a demolition area where any further specialization of standards is unnecessary. The enactment and effective enforcement of a zoned housing code, similar to that outlined above, would overcome the impasse presented by the application of a single-standard code to communities that are diversified and complex.

2. A Problem of Constitutional Validity

Whenever legislation creates diverse requirements for similar groups, it runs the risk of violating the equal protection clause of the Constitution. Thus, a housing code may be found constitutionally infirm upon the ground that it arbitrarily establishes classifications, or it establishes different requirements for those in the same class, or the classification is not reasonably related to the purposes of the statute.

Generally, a classification is valid if it touches "all [and only those] persons who are similarly situated with respect to the purpose of the law." In determining this purpose, the court may properly consider

99. Guandolo, supra note 41, at 43.
100. Id. The upkeep of buildings, other than residential dwellings, would be required to be kept at a level of maintenance and repair commensurate with the general level of maintenance of similar structures in the same neighborhood. Id.
101. As noted earlier, a specific housing code provision may also violate the due process clause of the fourteenth amendment if it is not reasonably related to the purposes of the statute. See notes 57-59 and accompanying text supra. If low standards have been set, however, these will not give rise to due process objections. See Givner v. Commissioner of Health, 207 Md. 184, 113 A.2d 899 (1955); Petrusiansky v. State, 182 Md. 164, 32 A.2d 696 (1943); Adamc v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955); Brennan v. City of Milwaukee, 265 Wis. 52, 60 N.W.2d 704 (1953). More serious due process problems can be expected to arise if municipalities accept current arguments for conservation-oriented codes, which will inevitably have provisions with less direct health and safety justifications. See Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955) (dissenting opinion). However, it is submitted that even if health and safety justifications are not readily apparent, the reasonableness of such codes can be founded on the general welfare clause of the Constitution. For a discussion of this suggestion, see pp. 510–13 infra.
104. City of Columbus v. Stubbs, 223 Ga. 765, 767, 158 S.E.2d 392, 394 (1967). See Appeal of Medinger, 377 Pa. 217, 104 A.2d 118 (1954), where the Supreme Court of Pennsylvania held that a zoning ordinance which divided the township into various districts and prescribed a different requirement as to the minimum habitable floor area in each district was not shown to promote the health, morals, safety or general welfare of the inhabitants.

Published by Villanova University Charles Widger School of Law Digital Repository, 1972

17
not only statutory language but also legislative history, prior law, accompanying legislation, enacted statements of purpose, formal public pronouncements and general public knowledge.\(^{106}\) While taking these factors into consideration, the court is expected to protect constitutional rights while at the same time maintaining proper respect for legislative determinations.\(^{107}\) In this enterprise, where suspect classifications\(^{108}\) or fundamental interests\(^{109}\) of the public are not at stake, a court may attribute to the legislation any reasonably conceivable purpose which would support the constitutionality of the classification where that purpose is unclear.\(^{110}\) Proper judicial restraint and the presumption of constitutionality necessitate that the court give the legislature the benefit of any doubt about its purpose.\(^{111}\)

Once a purpose has been attributed to a statutory classification, equal protection analysis still demands that a court determine whether the classifications drawn in a statute are reasonable in light of its purpose,\(^{112}\) and does not stop at a finding that all within the statutory class are treated equally.\(^{113}\) Unless it is palpably arbitrary,\(^{114}\) a classification is likely to be upheld,\(^{114}\) and if any state of facts which would sustain the classification's rationality can be reasonably conceived, its existence must be assumed.\(^{115}\) Only when the relationship between the classification and purpose is obviously strained or when the classification is otherwise objectionable\(^{116}\) should courts intervene on equal protection grounds.

where the Court stated that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." \(\text{Id. at 415.}\)


107. \(\text{Id. at 1078.}\)

108. A suspect classification would be one based on race, lineage and alienage. \(\text{See, e.g., Korematsu v. United States, 323 U.S. 214 (1944).}\)


110. \(\text{See, e.g., Two Guys from Harrison–Allentown, Inc. v. McGinley, 366 U.S. 582 (1961). This approach has become common in economic regulation cases. See also McGowan v. Maryland, 366 U.S. 420 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948).}\)

111. \(\text{See, e.g., Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Board of River Port Pilot Commrs, 330 U.S. 552 (1947). There is a movement away from judicial restraint in the areas of race and personal rights; however, in the area of economic legislation the conceivable purpose approach seems to have retained its vitality. See note 110 supra.}\)


113. \(\text{Id. All the members included in a classification must be treated equally. See, e.g., Powell v. Pennsylvania, 127 U.S. 678, 687 (1887). However, judicial inquiry does not end with a showing of equal protection among the members of the class. McLaughlin v. Florida, 379 U.S. 184, 191 (1964).}\)

114. International Harvester Co. of America v. Missouri, 234 U.S. 199, 215 (1914); Metropolis Theater Co. v. City of Chicago, 228 U.S. 61, 70 (1913).

115. \(\text{See, e.g., Lindsley v. Natural Carbonic Gas Co, 220 U.S. 61, 78 (1911).}\)

116. \(\text{See notes 108 & 109 and accompanying text supra.}\)
Since challenges to the formulation of a zoned housing code will almost always be a matter of state concern, the inquiry now focuses on establishing an equal protection basis under state law, while keeping in mind the federal position on the issue. Perhaps the most clearly expressed indicia for compliance with the equal protection requirements is found in *Brennan v. City of Milwaukee*.\(^{117}\) In that case, the Supreme Court of Wisconsin held that a city ordinance, requiring installation of a bathtub or shower in apartments containing more than three rooms, was not based upon a substantial distinction which makes one class really different from another, and, therefore, was violative of the equal protection clause of the Constitution.\(^{118}\) The classification by the number of rooms was not a natural classification for the purposes to be accomplished; *i.e.*, personal cleanliness, affecting public health, where the number of occupants could not be determined according to the number of rooms, and it was the occupants who were to be affected by the health regulation.\(^{119}\) Borrowing from *State ex rel. Ford Hopkins Co. v. Mayor and Common Council*,\(^{120}\) the court applied the following general rules upon which classifications are to be based in the proper exercise of the police power:

1. All classifications must be based upon substantial distinctions which make one class really different from another.
2. The classification adopted must be germane to the purposes of the law.
3. The classification must not be based upon existing circumstances only.
4. To whatever class a law may apply, it must apply equally to each member thereof.\(^{121}\)

The first requirement set down by the *Brennan* court is considered a question primarily to be determined by the legislature, and consequently, the classification adopted by the legislature is not to be disturbed by the

---

117. 265 Wis. 52, 60 N.W.2d 704 (1953).
118. The court stated that:
   The basis upon which a classification may validly rest must be reasonable and founded on material differences and substantial distinctions which bear a proper relation to the matters or persons dealt with by the legislation and to the purpose sought to be accomplished. A mere arbitrary distinction in no wise relevant to the subject of legislation will not justify a departure from that equal protection of the laws commanded by the Fourteenth Amendment . . . .

*Id.* at 55, 60 N.W.2d at 706.
119. *Id.* at 56-57, 60 N.W.2d at 707.
120. 226 Wis. 215, 276 N.W. 311 (1937).
121. 265 Wis. at 55, 60 N.W.2d at 706. In *State ex rel. Risch v. Board of Trustees*, 121 Wis. 44, 98 N.W. 954 (1904), the same general rules were held essential for constitutional classification with the following addition to number three: "[I]t must not be so constituted as to preclude addition to the numbers included within a class." *Id.* at 54, 98 N.W. at 957. Furthermore, a fifth rule was added:
   That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

*Id.*
courts unless it is manifestly unreasonable. Therefore, if any state of facts can reasonably be conceived which would support the tendered classification, the ordinance must be held not to be violative of the equal protection clause. In City of Chicago v. Miller, an ordinance provided that the occupants of not more than two family units which are located in the same dwelling may share a single bathroom. The defendant contended, citing Brennan, that the classification according to the number of rooms rather than to the number of persons who are to use the bathroom is an unnatural classification and is purely arbitrary. The Miller court suggested that in Brennan the probable relation between apartment size and occupancy was ignored, and proper weight was not given to the legislative judgment in imposing classifications. Relying on these considerations, the Miller court, in holding that the classification was not manifestly unreasonable, stated that:

A legislative classification need not be scientific, logical, or consistent but need only have a reasonable basis when considered with reference to the purpose of the legislature.

It seems that a zoned housing code would be able to meet the “substantial distinction” requirement of Brennan if the municipality is able to overcome an initial evidentiary burden. The classification must be supported by evidence demonstrating the fact that the delineation of the different types of areas under the code is based upon differences in characteristics and conditions which reasonably justify the application of different standards. Although it is true that the lines of demarcation between protection, rehabilitation and demolition zones may be difficult for a legislature or an administrative body to draw, the lack of a clear natural dichotomy should not destroy the validity of all attempts to formulate a distinction or the ultimate classification involved. Perhaps, even the difficulty in making such a “substantial distinction” has been overstated. The municipal government could use its expertise in the

123. See also Lindley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Gilman v. Newark, 73 N.J. Super. 562, 575, 180 A.2d 365, 372 (1962). In determining whether the requisite facts are reasonably conceivable:

[A] judge may draw upon his general knowledge, yet the further removed a judge's private experience is from the economic scene in which the law is to function, the greater will be his reluctance to conclude that a claimed factual basis is merely fanciful. Restaurant Ass'n v. Holderman, 24 N.J. 294, 301-02, 131 A.2d 773, 776-77 (1957). Furthermore, it is a well established rule that classifications will not be denied constitutional grace simply because they are not mathematically precise or fail to absolutely exclude all traces of inequality. Bellerive Inv. Co. v. Kansas City, 321 Mo. 969, 987, 13 S.W.2d 628, 637 (1929).
124. 27 Ill. 2d 211, 188 N.E.2d 694 (1963).
125. Id. at 219, 188 N.E.2d at 699.
126. Id. at 220, 188 N.E.2d at 699. See Note, supra note 59, at 112.
127. 27 Ill. 2d 211, 220, 188 N.E.2d 694, 699. See Hansen v. Raleigh, 391 Ill. 536, 63 N.E.2d 851 (1945). See also note 61 supra.
128. Guandolo, supra note 41, at 43-44.
129. See Note, supra note 59, at 1121.

http://digitalcommons.law.villanova.edu/vlr/vol17/iss3/3
fields of zoning and urban renewal to a profitable advantage when setting
down areas for the zoned housing code, and this would be particularly
ture if the zoned housing code closely approximates the zoning and urban
renewal areas.\textsuperscript{130} Zoning by use, type, and size of structure is not in-
herently different from zoning according to the relative degree of decay
which is the proposed basis for zoned housing codes. Practically speaking,
it would not be too surprising to find that slum or "gray" areas consist
largely of industrial or commercial uses. A block by block inspection
and observation of housing conditions by city officials may readily suggest
the required intensity of enforcement needed in each area. It is posited
that this collection of empirical data, used properly by housing experts,
would enable them to make supportable delineations when drafting a
zoned housing code. The classification would truly have a reasonable
basis since, as commentators have generally agreed, a housing code
enforced uniformly throughout a city has been ineffective because of the
vast differences in deterioration.\textsuperscript{131}

The second requirement specified by the \textit{Brennan} decision mandates
that the classification be reasonably related to the ultimate legislative
purpose. A legislative act is not constitutionally infirm if it bears a
reasonable relationship to the public purpose,\textsuperscript{132} and the courts will not
substitute their judgment for that of the legislature if such reasonableness
is fairly apparent.\textsuperscript{133} It is submitted that if the purpose of the legislature
is viewed as the protection of the public health and safety, then the
classification of a city into three housing code zones would not pass
constitutional muster. Such a purpose may be challenged on the ground
that a housing code established for areas of prevention, and possibly
even areas of rehabilitation, bears no reasonable relationship to the
protection of the public health and safety. In these areas questions of
health and safety are minimal, and as a result, the reasonableness of the
legislative act may not even be debatable. However, if the purpose of
the legislature is viewed as protection of the public welfare, then the
classification of a city into two or more housing code zones should not
be denied constitutional affirmation. Whenever slums are eliminated,
sound areas rehabilitated and the good areas conserved, the community
is benefited and the public welfare enhanced.\textsuperscript{134} A reasonable relationship

\textsuperscript{130} See S. \textit{Parratt}, \textit{supra} note 97, at 6, 132. \textit{See also} \textit{Ford, supra} note 94, at
633.

\textsuperscript{131} See Gribetz & Grad, \textit{supra} note 72, at 1281.


\textsuperscript{133} Lester v. City of St. Petersburg, 183 So. 2d 589 (Fla. App. 1966). In rare
instances a court will characterize a classification as totally arbitrary in light of its
purpose. \textit{See, e.g.,} Levy v. Louisiana, 391 U.S. 68 (1968). \textit{See also} note 114 and
accompanying text \textit{supra}.

\textsuperscript{134} This position is tenable because the public welfare is enhanced through the
enforcement of a housing code in all the areas of a community, even though the
objectives in each area might vary. For example, in the "good" districts of the
community, the objective of the code would be the preservation of property values
or slum prevention, whereas in the slums, the objective would be a stopgap holding
action prior to slum amelioration. In either event, the public welfare has benefited.
is thereby established between the housing code and the legislative purpose, the latter becoming even more acceptable when considered in connection with the expanded definition given to public welfare by the case law.

In Boden v. City of Milwaukee, the plaintiffs attacked a city ordinance on the ground that it was unreasonable and as such was a violation of the due process clause of the fourteenth amendment. The ordinance required that every dwelling meet certain standards relating to construction, state of repair, ventilation, and plumbing. The Boden court reasoned that the city police power extended to situations which affect not only the public health and safety, but also the public welfare which includes conditions that tend to depress adjoining property values. Subjecting the ordinance to the test of reasonableness under this expansive concept of the police power, and giving due weight to the legislative judgment, the court held that the ordinance was not unreasonable and, therefore, constituted a valid exercise of the police power. Many other courts have considered the constitutionality of similar housing ordinances, containing provisions equally as burdensome as those in Boden, and have reached a similar result. Additionally, in the area of zoning, there is a growing judicial recognition of the power of the city to impose restrictions solely on the basis of general welfare considerations. For example, in State ex rel. Saveland Park Holding Corp. v. Wieland, a zoning ordinance requiring, before issuance of a building permit, a finding by the village building board that the exterior architectural appeal and functional plan of the proposed structure would not be so at variance with those other structures in the immediate neighborhood as to cause substantial depreciation in property values, was held to be a valid exercise of the police power. The Supreme Court of Wisconsin noted that the police power is not limited to regulations designed to promote public health, public

135. 8 Wis. 2d 318, 99 N.W.2d 156 (1959).
136. The housing code under attack in Boden contained the following provisions:
 (1) Every habitable room shall have adequate ventilation provided by one window or skylight of a specified size which may be easily opened . . . .
 (2) At least one window in each habitable room shall be supplied with a wire mesh screen covering at least thirty-three percent of the window area . . . .
 (3) Every foundation, exterior wall and roof shall be reasonably weathertight, watertight, rodentproof and insectproof, and shall be kept in a reasonably good state of repair.
 (4) Every interior partition, wall, floor and ceiling shall be kept in a reasonably good state of repair and so maintained as to permit them to be kept in a clean and sanitary condition.
 (5) Every window, exterior door, and basement hatchway shall be reasonably weathertight and rodentproof, and shall be kept in reasonably good working condition and state of repair.
 (6) All exterior wood surfaces shall be reasonably protected from the elements and against decay by paint.
Id. at 320-21, 99 N.W.2d at 158. The plaintiff, attacking the constitutionality of the housing code, had violated all but the first provision.
137. Id. at 325, 99 N.W.2d at 160.
138. Id. at 325-26, 99 N.W.2d at 160. See notes 112-16 and accompanying text supra.
140. 269 Wis. 262, 69 N.W.2d 217 (1955).
morals or public safety, but extends to conditions which promote the public convenience or the general prosperity.\footnote{141}

The main reason for upholding such ordinances, where the relationship to the public health, safety and morals is not readily apparent, is an expansion of the concept of public welfare as a separate and distinct category under the police power.\footnote{142} Since the police power is based on public necessity, it is not limited to conditions as they exist at any one particular time,\footnote{143} but is capable of expanding or contracting to accord with increased or decreased needs on the part of the public in particular spheres of regulation. As the needs of the people have expanded, the welfare clause has expanded accordingly to meet these needs.\footnote{144} This is evidenced by the fact that the courts have construed the general welfare in a progressively broader sense over the past years to include public convenience,\footnote{145} comfort,\footnote{146} prosperity,\footnote{147} financial security of the people,\footnote{148} economic welfare,\footnote{149} and it has been held that the preservation of property values may be a proper consideration.\footnote{150} The Supreme Court in \textit{Berman v. Parker}\footnote{151} added weight to these considerations by stating:

\begin{quote}
\textbf{Id. at 267, 69 N.W.2d at 220. In \textit{Best v. Zoning Bd. of Adjustment}, 393 Pa. 106, 141 A.2d 606 (1958), the Supreme Court of Pennsylvania held that a zoning ordinance creating a single family district was not unconstitutional when applied to a house containing twenty-two rooms and seven baths, since the use of the property as a single family house would promote the general welfare by preserving attractive characteristics of the community and the property values therein. \textit{See also \textit{Pierro v. Baxendale}, 20 N.J. 17, 118 A.2d 401 (1955). For example, in \textit{Oregon City v. Hartke}, 240 Ore. 35, 400 P.2d 255 (1965), the Supreme Court of Oregon noted:}}

\textbf{[T]here is a growing judicial recognition of the power of a city to impose zoning restrictions which can be justified solely upon the ground that they will tend to prevent or minimize discordant and unsightly surroundings . . . This change may be ascribed more directly to the judicial expansion of the power of police to include within the concept of "general welfare" the enhancement of the citizen's cultural life.}}
\end{quote}

\textit{Id. at 46-47, 400 P.2d at 261.}

\footnote{142. \textit{For example, in \textit{Oregon City v. Hartke}, 240 Ore. 35, 400 P.2d 255 (1965), the Supreme Court of Oregon noted:}}

\begin{quote}
\textbf{[T]here is a growing judicial recognition of the power of a city to impose zoning restrictions which can be justified solely upon the ground that they will tend to prevent or minimize discordant and unsightly surroundings . . . This change may be ascribed more directly to the judicial expansion of the power of police to include within the concept of "general welfare" the enhancement of the citizen's cultural life.}}
\end{quote}

\textit{Id. at 46-47, 400 P.2d at 261.}

\footnote{144. \textit{Many commentators feel that aesthetic regulations are within the permissible scope of the police power under the public welfare clause. See \textit{DiCello, Aesthetics and the Police Power}, 18 CLEV.-MAR. L. REV. 384 (1969); \textit{Rodda, The Accomplishment of Aesthetic Purposes Under the Police Power}, 27 S. CAL. L. REV. 149 (1954). Higher minimum standards of housing quality may conceivably extend into the field of aesthetics. Aesthetic considerations, if recognized under the law, would come under the exercise of the police power for the general welfare. However, many courts would hold that aesthetics do not fall within the scope of the police power possibly because they think the terms "health," "safety" and "morals" comprise the whole possible scope of police regulation. Much of the confusion is traceable to this concept of the police power in terms of fixed categories rather than as something adjustable to meet the needs of a changing social nature. If this is the case, then higher minimum standard housing codes would never be acceptable since no relationship could be established between aesthetics and a health, safety and morals purpose as the bases of police regulations. See Note, \textit{Aesthetic Regulation under the Police Power}, 80 U. PA. L. REV. 428 (1931).}}

\footnote{145. \textit{McKay Jewelers, Inc. v. Bowron}, 19 Cal. 2d 595, 122 P.2d 543 (1942).}

\footnote{146. \textit{Porter v. City of Paris}, 184 Tenn. 555, 201 S.W.2d 688 (1947).}


\footnote{148. \textit{Gordon v. Indianapolis}, 204 Ind. 79, 183 N.E. 124 (1932).}

\footnote{149. \textit{McKay Jewelers, Inc. v. Bowron}, 19 Cal. 2d 595, 122 P.2d 543 (1942).}

\footnote{150. \textit{Town of Burlington v. Dunn}, 318 Mass. 218, 61 N.E.2d 243, \textit{cert. denied}, 326 U.S. 739 (1945). For a discussion of property values as a basis for upholding the zoned housing code concept, see \textit{p. 514 infra}.}

\footnote{151. \textit{348 U.S. 26 (1954).}}
The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.152

Thus, if the courts accept the use of this broader definition of purpose, to insure the public welfare through slum amelioration, rehabilitation and prevention, the validity of zoned housing codes will be sustained. This argument becomes more tenable when considered in conjunction with the fact that blighted housing, whether in an aesthetic or a health and safety sense, is a matter of public necessity today, and the ordinary housing code, devoid of graded standards, is substantially less effective than the zoned housing code in achieving the objectives of this broader definition of purpose.

The third requirement announced by Brennan demands that the classification not be based solely on existing circumstances.153 An argument might be made that, since the classifications in zoned housing codes must be based upon substantial distinctions between one class and another, it necessarily follows that in order to effectuate such a distinction, the criteria for delineation must be drawn from now existing empirical data. Osten- sibly, this might be so, but further inspection dispels the force of this argument. Initially, it should be noted that the “existing circumstances” requirement does not proscribe the use of such circumstances as raw material for classification, rather, it simply forbids classification based on these sources alone. It seems clear that the housing administrators and analysts, in delineating the extent of the areas to be zoned, will look not only to what the situation is now, but what it will be in the future. Drawing from objective population and density statistics, and from subjective criteria indicating the beginnings of blight, they will project what the situation will look like sometime from now, and will base their classifications considering all circumstances.

The final criterion of validity required by the Brennan court is that the law must apply equally to each member of the class involved. A fundamental equal protection requirement,154 this standard creates no more

152. Id. at 33.
153. See note 121 and accompanying text supra. In State ex rel. Ford Hopkins Co. v. Mayor & Common Council, 226 Wis. 215, 276 N.W. 311 (1937), the court suggested that unless a statute is curative or remedial and therefore temporary, provision must be made for future acquisition to the class as other subjects acquire the characteristics which form the basis of the classification. The principle becomes considerably important when distinctions are based on time. Where a procedure would discriminate unwarrantably in favor of existing establishments, things or persons, it has been held that the classification is a denial of equal protection. Id. at 219-20, 276 N.W. at 314-15. Accordingly, this requirement is of utmost significance when speaking of housing codes, since housing conditions are constantly changing.
154. A statute cannot intentionally be applied to produce discrimination. For example, in Yick Wo v. Hopkins, 118 U.S. 356 (1886), a statute provided that laundries in wooden buildings (as distinguished from brick or stone) could not be carried on without a license. The classification itself appeared impartial and reasonable, but in application the licensing authority consistently refused licenses to Chinese applicants. Such an application of the statute was held violative of the equal protection clause. Thus, where a zoned housing code is enacted, the housing
of a problem in the zoned housing code than it does in any statute requiring classification. It is a problem of enforcement of an otherwise properly classified law, and since the only differentiation, constitutionally, between the zoned code and the ordinary code is its classification, no special inhibitions to validity arise.

Several additional factors would seem to indicate a favorable judicial acceptance of zoned housing codes. Municipal ordinances, and legislation in general, enjoy a presumption of validity, and judicial deference has been extended to legislative determinations of reasonableness of the standards prescribed. Courts have also recognized that the preservation of property values is a valid legislative purpose. Unsightly conditions in a residential community not only depress the social values of the neighborhood, but also destroy economic values in terms of a fair return for the property owner and a sound tax base for the municipality. As a result, courts have recognized the power to zone to conserve property interests. Therefore, if the preservation of property values may constitute a legitimate objective of zoning, it would appear that the preservation of property values would also constitute a legitimate objective of housing code measures. An important additional consideration is that courts have accepted the establishment of analogous zoned districts under zoning ordinances. Under state enabling legislation a city is empowered to divide itself into districts, according to number, shape, size and area in order authority should treat all the buildings in each zone equally by enforcing the graded standard uniformly in the designated area.

155. For a discussion of equal protection problems which arise in the enforcement of a single-standard code, see p. 522 infra.

156. See notes 50 & 58 and accompanying text supra.

157. See note 133 and accompanying text supra.

158. In Fischer v. Bedminster Township, 11 N.J. 194, 93 A.2d 378 (1952), the Supreme Court of New Jersey upheld the validity of a zoning ordinance in a rural community restricting lot sizes to a minimum of five acres, finding justification for the ordinance in the preservation of the character of the community and the maintenance of the value of the property therein. For substantially the same reasons, the Supreme Court of Wisconsin upheld a zoning ordinance which required, before issuance of a building permit, a finding that the exterior architectural appeal and functional plan of a proposed structure would not be at variance with the structures in the immediate neighborhood. State ex rel. Saveland Park Holding Corp. v. Weiland, 269 Wis. 262, 69 N.W.2d 217 (1955). See also State ex rel. Beery v. Houghton, 164 Minn. 146, 204 N.W. 569 (1925), aff'd, 273 U.S. 671 (1926); Lionshead Lake, Inc. v. Wayne Township, 10 N.J. 165, 89 A.2d 693 (1952), appeal dismissed, 344 U.S. 919 (1953); Best v. Zoning Bd. of Adjustment, 393 Pa. 106, 141 A.2d 606 (1958).


160. See Kansas City v. Liebi, 298 Mo. 569, 252 S.W. 404 (1923) (use of eminent domain to achieve this same objective); note 158 supra. See also Comment, "Conservation" — A New Area for Urban Redevelopment, 21 U. Chi. L. Rev. 489 (1954).

161. For example, in Valley View Village, Inc. v. Proffett, 221 F.2d 412 (6th Cir. 1955), an ordinance which gave the city council power to "divide the municipality into districts" in order to promote the purpose of the statute, was interpreted to mean that a municipality may divide its area into more than one zone or district.

to carry out the purposes of the act, which very often are similar to the purposes of a housing code. For example, in Pennsylvania, the zoning regulations are designed, among other things:

[T]o secure safety from fire, panic and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the overcrowding of land, [and] to avoid undue concentration of population .... 163

If the city is empowered to divide itself into districts under its zoning laws to achieve these purposes, it is reasonable to conclude that a city should be allowed to achieve the very same purposes by the use of a zoned housing code.

In the final analysis, the legislature should be attempting to cope realistically with existing conditions by prescribing remedies according to the circumstances. 164 With this legislative initiative, it is submitted that the courts will give judicial recognition to the validity of a zoned housing code and permit it to operate as an innovative and effective instrument for blight elimination and prevention.

B. Uniform Versus Selective Enforcement

1. Introduction

The uniform enforcement of a single-standard housing code in a community in which neighborhoods differ in degree of decay, has proved unworkable as a method to retard the spread of blight. 165 The single-standard code must attempt to strike a balance between laxity and stringency; however, if it does not, then standards which are too low are worthless, and those too high are unenforceable. 166 Some commentators have suggested that unequal enforcement of a housing code is an undesirable vice, 167 and although such a policy presents obvious constitutional questions, 168 not everyone would agree that unequal enforcement is necessarily evil. 169 As a result it has been recommended and used in programs of selective neighborhood conservation and rehabilitation. 170

a city may regulate, among other things, the height, number of stories and size of buildings, the percentage of lot that may be occupied, the size of yards and the density of population. Pa. Stat. tit. 53, § 14752 (1957).


164. Guandolo, supra note 41, at 44. Additionally, reference should be made to early judicial treatment of the old New York tenement laws, where effect was given to the enforcement of the acts when the courts saw a need for reform. See notes 14-15 and accompanying text supra.

165. See notes 87-93 and accompanying text supra.

166. See Lehman, supra note 96, at 188-91.

167. Id.

168. See pp. 520-22 infra.

169. See, e.g., L. Friedman, supra note 10, at 54; W. Nash, supra note 66; Slayton, supra note 95, at 313, 319-22, 345-53.

170. See, e.g., Babcock & Bosselman, supra note 95, at 220-31. See note 171 infra.
2. Selective Enforcement as a Workable Solution

In order to implement a selective enforcement system a municipality is necessarily required to divide its corporate area into different enforcement districts. In Dade County, Florida, minimum housing standards are set up for the entire county. Dade County, Florida, Housing Code, ch. 17 (1968). Chapter 17 contains two parts — Articles 1 and 2. The standards established under Article 1 are the minimum standards applicable to all municipalities in the unincorporated area. However, this article does not prohibit municipalities from adopting higher standards. Id. § 17-4. Article 2 establishes minimum standards applicable to the City of Miami. Id. § 17-41. Only in this respect does Dade County have a zoned housing code, which is not of the type discussed previously in this Comment which reflected a variable enforcement on the basis of neighborhood.

However, the Dade County Department of Housing and Urban Development does authorize a selective enforcement system which establishes four categories of inspections applicable to areas of the city of Miami on the basis of the general condition of housing and on-going Urban Development Programs. See City of Miami Systematic Housing Code Program (1967). Three of the areas established coincide with the suggestions of The National Commission on Urban Problems. New Approaches, supra note 85, at 28-32. The fourth category set up for the City of Miami applies to those areas which have undergone redevelopment through urban renewal, and is intended to prevent overcrowded conditions and back-sliding. City of Miami Systematic Housing Code Program (1967). Memorandum received from Eugene F. Miles, Department of Housing and Urban Development, Neighborhood Rehabilitation Branch, dated Dec. 1, 1971, on file at the Villanova Law Review office.

171. In Dade County, Florida, minimum housing standards are set up for the entire county. Dade County, Florida, Housing Code, ch. 17 (1968). Chapter 17 contains two parts — Articles 1 and 2. The standards established under Article 1 are the minimum standards applicable to all municipalities in the unincorporated area. However, this article does not prohibit municipalities from adopting higher standards. Id. § 17-4. Article 2 establishes minimum standards applicable to the City of Miami. Id. § 17-41. Only in this respect does Dade County have a zoned housing code, which is not of the type discussed previously in this Comment which reflected a variable enforcement on the basis of neighborhood.

172. New Approaches, supra note 85, at 28. This designation generally corresponds to the prevention, rehabilitation, and demolition zones discussed above. See pp. 505-06 supra. Additionally, residential buildings may be similarly distinguished. See note 90 supra.

173. This designation generally corresponds to the prevention, rehabilitation, and demolition zones discussed above. See pp. 505-06 supra. Additionally, residential buildings may be similarly distinguished. See note 90 supra.

174. New Approaches, supra note 85, at 28. The following short term activities have been suggested:

1. Repair of serious deficiencies in public facilities . . . to the extent necessary to maintain reasonable conditions of livability until permanent action could be taken;
2. Improvement of private properties as necessary to eliminate immediate dangers to public health and safety;
3. Demolition of structures considered unsound or unfit for human habitation, or deemed a public nuisance and a serious health and safety hazard;
4. Establishment of temporary public playgrounds on vacant lots . . . .
5. Improvement of public services in the area such as rubbish collection and street cleaning.

Id. at 29.
nature which may be detrimental to the health, safety and welfare of the occupants. This type of inspection system would give residents the protection and assurance of minimum standards of safe and sanitary housing by identifying and securing correction of conditions requiring immediate attention. It has also been suggested that if urban renewal treatment is in the distant future, possibly full code enforcement followed by repair or demolition accompanied by a relocation program could be used as an alternative where feasible. Similarly, in the “gray” areas, or residential areas that are basically sound but declining in quality; i.e., those areas earmarked for Section 117 federal aid, neighborhood improvement programs with systematic block-by-block code inspection and enforcement should be the major tool in preventing further deterioration and in restoring housing to compliance with code standards within a specified period. The major objective of this surveillance program is to maintain the general good housing conditions in these areas. Conversely, in “good” areas, inspection on a three-year cycle should be used in conjunction with code enforcement to prevent deterioration and to maintain existing high-level environmental and housing conditions. It has also been suggested that regularly scheduled external surveillance of housing conditions, and interior inspections undertaken on a complaint basis, be implemented in order to supplement the three-year cycle inspection.

The Housing and Urban Development Act of 1965 has provided an additional impetus for municipal governments to divide their community into different enforcement areas. Under this Act, federal funds are made available for a new type of urban renewal project consisting entirely of a program of intensive code enforcement which would be

175. See, e.g., City of Miami Systematic Housing Code Program (1967).
176. Building the American City, supra note 4, at 284.
177. See note 31 supra; notes 183–97 and accompanying text infra.
179. The “good” areas would be those areas not located in an urban renewal area, or within a Section 117 concentrated housing code program.
180. New Approaches, supra note 85, at 32–33.
181. Id. at 35.
183. The presence of the Section 117 programs in a number of cities has actually made more apparent the absence of effective code enforcement in other areas of the city. Indeed, most cities are not able to bring an effective code enforcement to bear on a city-wide basis because of seriously strained local financial resources. R. Hale & A. Fritschler, supra note 70, at 18.
184. If it can be demonstrated that the code enforcement activities will be adequate to assure that the urban renewal area will remain stable and viable and will not need clearance, rehabilitation or renewal activities in the foreseeable future, federal aid would be forthcoming under the Section 117 program. H.R. Rep. No. 1703, 88th Cong., 2d Sess. 12 (1964). In order to be eligible for this assistance, a community must agree to increase its total expenditures for code enforcement by an amount equal to its share of the project. Id. This insures that federal funds are not used merely to replace local funds in providing code enforcement activities.
used to eliminate the first stages of blight in basically sound areas\textsuperscript{186} and prevent the need for subsequent clearance or rehabilitation. In order to qualify for these funds, a municipality is not required per se to divide the community into different enforcement areas; however, it is posited that when a renewal area is set aside for this federal program, the local government has, in effect, established varied enforcement areas.\textsuperscript{187} This would necessarily follow since such an intensive code enforcement in these basically sound areas would be impractical in the slums,\textsuperscript{188} particularly when no comparable federal program is available in these areas. Furthermore, the level of code enforcement in the Section 117 areas would be inadequate to cope with the higher standard of maintenance required to conserve the “good” areas of the community.\textsuperscript{189} A selective enforcement system, therefore, is the logical and practical result of the federal plan and should be given primary consideration when urban planners investigate the possibility of adopting a selective enforcement code.

In fact, many Section 117 Concentrated Code Enforcement programs have been approved by HUD in recent years, constituting a major step forward in the fight against blight.\textsuperscript{190} Federal aid, under the normal $2/3$ formula, was given to communities for use in “deteriorated” or “deteriorating” areas in which such enforcement, together with those public improvements to be provided by the locality, would be expected to arrest

\begin{itemize}
\item [186.] These areas have begun to show signs of deterioration principally because of noncompliance with the housing code and related codes of the community. If allowed to continue to deteriorate, such areas would ultimately require more extensive renewal treatment, either in the form of clearance or intensive rehabilitative activities.
\item [187.] See notes 171-79 and accompanying text supra.
\item [188.] See note 88 and accompanying text supra.
\item [189.] See note 87 and accompanying text supra.
\item [190.] See R. HALE & A. FRITSCHLER, supra note 70, at 346. In order to qualify for aid under the program, twenty per cent of the houses must have violations; twenty per cent must have one or more “building deficiencies,” and the area must contain at least two “environmental deficiencies.” The United States Department of Housing and Urban Development, in its Urban Renewal Handbook, defines “building deficiencies” as follows:
\begin{enumerate}
\item Defects to a point warranting clearance;
\item Deteriorating conditions because of a defect not correctable by normal maintenance;
\item Extensive minor defects which, taken collectively, are causing the building to have a deteriorating effect on the surrounding area;
\item Inadequate original construction or alterations;
\item Inadequate or unsafe plumbing, heating, or electrical facilities;
\item Other equally significant building deficiencies.
\end{enumerate}
“Environmental deficiencies” are defined as follows:
\begin{enumerate}
\item Overcrowding or improper location of structures on land;
\item Excessive dwelling unit density;
\item Conversions to incompatible types of uses, such as rooming houses among family dwellings;
\item Obsolete building types, such as large residences which through lack of use or maintenance have a blighting influence;
\item Detrimental land uses or conditions, such as incompatible uses, structures in mixed use, or adverse influences from noise, smoke, or fumes;
\item Unsafe, congested, poorly designed or otherwise deficient streets;
\item Inadequate public utilities or community facilities contributing to unsatisfactory living conditions or economic decline;
\item Other equally significant environmental deficiencies.
\end{enumerate}
the decline of the area. While Section 117 has been promising, it has not always proceeded without pitfalls. Where these have resulted, it has not been so much from anything inherent in the program as from indirect difficulties such as sustaining community efforts through the duration of the project and establishing and sustaining the increased level of inter-departmental co-ordination which the program requires. In addition to these problems, the full benefit of additional Section 117 programs has not been achieved because of the lack of adequate funds for the programs and the failure of HUD to mention Section 117 as one of its available projects. Nevertheless, since the inception of the Section 117 Concentrated Code Enforcement program, findings demonstrate that it has functioned successfully, and has satisfied the need for community improvement that other programs have not effectively reached. Several reasons have been advanced for this result: namely, (1) better administrative organizations; (2) the quality of housing and the level of incomes are generally higher in the code areas; and (3) the excellent cooperation local officials have experienced with HUD officials responsible for administering the program.

191. R. HALE & A. FRITSCHLER, supra note 70, at 339.
192. Id. at 16–17. The Section 117 Concentrated Code Enforcement Program has been used in heavily blighted areas because it accomplished rehabilitation more rapidly than the related urban renewal rehabilitation and conservation program, and unit-for-unit costs under Section 117 were less than under other projects. Id.
193. Id. at 348. One of the main reasons for inadequate funding is the Vietnam War. Id. As a consequence of inadequate funding, applications cannot be processed as quickly as they had been in the early stages of the program.
194. See R. HALE & A. FRITSCHLER, supra note 70, at 349. It has been suggested that the tensions which exist between the proponents of urban renewal (or "slum clearance" as it was called in 1950) and code enforcement are responsible for this lack of publication. Id. at 349-50.
195. Byran, supra note 31, at 300. See also Cavanaugh, Section 117 Concentrated Code Enforcement, 24 J. HOUSING 629 (1967). For excellent statistical data on the program, see R. HALE & A. FRITSCHLER, supra, note 70, Appendix, Table A-D. Even though there is good administrative organization, there is still a need for more personnel. R. HALE & A. FRITSCHLER, supra note 70, at 351.
197. Id. at 351–52. A significant by-product of the projects has been the amount of public works improvements that the individual projects have generated in effected areas beyond the improvements that are included and paid for in the federally aided project budget. As a result, community organization has become an integral part of the undertaking. Byran, supra note 31, at 302.

The Section 117 Concentrated Code Enforcement Program has received a further impetus from other government programs such as the Section 312 Rehabilitation Loan Program, 42 U.S.C. § 1452(b) (1970); the Section 115 Rehabilitation Program, 42 U.S.C. § 1466 (1970); and the Relocation Assistance Program, 42 U.S.C. § 1465 (1970). Under section 312, an applicant in a concentrated code enforcement program may secure funds up to $3,000 if he has been unable to secure them from other sources upon comparable terms and conditions. However, under section 115, actual grants, distinguished from loans, can be made to low income owners for basic repairs to a maximum amount of $3,000. While these grants are normally limited to persons with incomes under $3,000, they can also be used by other persons of limited means to supplement a loan under the section 312 program. Finally, since relocation of existing occupants is one of the most difficult programs confronting any slum improvement program, relocation assistance grants are available for individuals, families and businesses displaced as a result of activities carried out within assisted concentrated code enforcement areas. See A DECENT HOME, supra note 64, at 106-07. The municipality must assure that all individuals and families displaced as a result of the project are offered decent, safe and sanitary housing within their means.
It has been demonstrated that either a zoned housing code program or a selective enforcement system would alleviate many of the drawbacks of a single-standard code. Yet on a relative scale of flexibility, it would seem that a change in enforcement policy would be better adaptable to a change in community needs. The establishment of a zoned housing code would require more formal action on the part of the municipality in the form of city council action. If a change in any of the zones is later required, an amendment to the housing code would have to be passed by council just as any other city ordinance. On the other hand, where a system of selective enforcement is in operation, the municipal department in charge of housing would simply change its enforcement practice to reflect the change in community improvement. Under this latter method, valuable time and effort would be saved, and possible back-sliding, which may occur in housing conditions while a change in housing policy is being implemented, would be avoided. Even though a selective enforcement system would be better adaptable to community needs, the problem arises as to whether it will withstand a constitutional challenge.

3. A Problem of Constitutional Validity

Section 117 clearly evidences a congressional intent encouraging local municipalities to implement a program of selective code enforcement in the blighted areas of its community. This is demonstrated by the overall purpose of the section to grant federal monies to those localities carrying on concentrated code enforcement programs in deteriorating areas, and thus putting economic pressure on cities to institute such an improvement plan. The effective result of such a program is to apply the code requirements of the housing laws differently to one sector of the community than to another. It is clear, however, that whenever legislation operates to create different requirements for similar groups, it is subject to equal protection objections. Nevertheless, it is submitted that the

198. See note 31 supra.

199. This is, of course, one of the reasons housing code enforcement is a far more significant element of a community’s overall development activity. However, this creates a federal policy dilemma since federal housing assistance is limited to those areas in which code enforcement will be sufficient “to arrest” the decline of the area. It is submitted that an individual living in another area of the community, who needs assistance to correct the blighted conditions of his dwelling, should not be denied federal aid merely because he does not live in the renewal area. To this extent he may be denied equal protection under the laws. In fact, it has been noted that section 117 has created problems in city neighborhoods which have been unwilling to agree to systematic code enforcement in their neighborhoods unless such aids were made available to them as well. See R. Hale & A. Fritschler, supra note 70, at 17. This is not to suggest that the theory of selective enforcement is invalid, but rather that the manner in which federal aid is used to implement that enforcement procedure is not appropriate.

To an extent, the Housing Act of 1968 offers a partial solution to this problem by giving interim assistance in other rehabilitation areas directed at removing the most serious hazards to health and safety in the poorest sections of the cities; however, restrictions contained in this program limit its effectiveness. Pub. L. No. 90-448, § 514, 82 Stat. 525, as amended, 42 U.S.C. § 1468(a) (1970).

200. See pp. 499-500 supra.
result of selective enforcement of a single standard housing code is identical to that of one which is zoned — the only difference being one of denomination. Both proposals, the one procedural and the other substantive, are classifying the community into areas of relative decay; i.e., “good,” “gray” and “worst” areas, and then implementing their respective programs in a manner geared to obtaining the same result. Assuming this position is accepted, then it should follow that if the rules provided by *Brennan v. City of Milwaukee* are followed, the division of the city into districts for selective enforcement of the housing code will withstand a constitutional challenge on equal protection grounds. If the classification is based upon substantial distinctions which make one class really different from another, the classification is germane to the purpose of the law and not based on existing circumstances only, the first three requirements of *Brennan* are fulfilled. If a valid legislative purpose requires a particular classification for its adequate fulfillment, such necessity may provide not only a basis for the classification, but also provide in itself a reasonable relationship between the classification and the legislative purpose. Thus, if the purpose for enacting Section 117 is to keep the “gray” areas free of blight and make them desirable places in which to live, it is submitted that this is a valid legislative purpose, necessitating the division of a city into the “good,” “gray” and “worst” areas in order to achieve that purpose. Because of this necessity, a reasonable relationship is thereby established between the classifications and the legislative purpose. Finally, if the code is applied equally to each member of the class, then the entire selective enforcement scheme is constitutional. There should be no problem in meeting this final requirement so long as the community is careful to enforce the housing code uniformly in each of the areas designated by the community. This conclusion is acceptable once it is realized that those groups under the intensive enforcement campaign are part of the proper classification which initially allows differing requirements to be ordered.

That the courts will uphold the validity of selective enforcement programs is further supportable by other factors indicative of judicial acceptance. Many of those factors posited in support of zoned housing

201. See p. 520 *supra.*
202. 265 Wis. 52, 60 N.W.2d 704 (1953). See notes 117-55 and accompanying text *supra.*
203. The National Commission on Urban Problems recommended that housing codes be directed specifically at establishing decent homes for all. The purpose would be to promote the specific portion of the general welfare which depends upon achieving this stated national goal. See *Building the American City,* *supra* note 4, at 306. For a discussion of the general welfare clause, see notes 135-52 and accompanying text *supra.*
204. See notes 134-36 and accompanying text *supra.* In *Argentine Citizens Comm. v. Urban Renewal Agency,* 194 Kan. 468, 399 P.2d 553 (1965), the Supreme Court of Kansas concluded that an urban renewal plan may contain standards and controls for rehabilitation of properties in urban renewal projects more demanding than minimum housing standards promulgated for the city as a whole, thereby indicating a possible favorable judicial response to selective enforcement.
205. *Brennan v. City of Milwaukee,* 265 Wis. 52, 60 N.W.2d 704 (1953). See notes 154-55 and accompanying text *supra.*
codes are applicable here, but additional support may be found in elements inherent in the nature of the selective enforcement program itself. Often administrative personnel, cognizant of the futility of code enforcement, will not insist upon uniform compliance. To an extent, then, the purposes of selective code enforcement are achieved on an informal basis. However, without legislative and judicial checks, standards essential to health and safety may not be met and, consequently, a threat to the community will ensue. Additionally, housing officials might be prone to neglect of their duties, graft and discriminatory practices in all enforcement areas. Under a concentrated code enforcement program, all the advantages achieved on the informal level can now be maintained on the formal level with the additional advantage of judicial scrutiny over the program’s implementation.

It is fruitless to attempt to prevent blight through uniform enforcement of a single-standard code. This merely precipitates block-by-block enforcement campaigns concentrating “first” on conservation areas, while at most only partially enforcing the code in the slums. The result is neglect of the slum amelioration function of the housing code — results antithetical to the purposes of equal protection. The selective enforcement program, on the other hand, specifically provides for different degrees of enforcement, including a stopgap holding action in the slums as an integral part of an overall valid legislative purpose. The courts should not overlook the fact that a sound objective — slum amelioration and slum prevention — is being sought through the development of such a program, and that this objective is being obtained. When these factors are taken into consideration, the selective enforcement program should and will receive a judicial stamp of approval.

---

206. See notes 156–63 and accompanying text supra.
207. See Note, supra note 88, at 1122.
208. See pp. 516–17 supra.
209. Effective enforcement of housing codes has been given an additional boost with the enactment of rent withholding or receivership statutes in many states. See, e.g., Conn. Gen. Stat. Ann. tit. 19, § 19–347b (1969); Ill. Ann. Stat. ch. 24, § 11–31–2 (Smith-Hurd Supp. 1971); Pa. Stat. tit. 35, § 1700–1 (Supp. 1971). Under normal circumstances, the slum dweller is faced with a shortage of available housing which makes the housing market a seller’s market in which the slum landlord does little in the form of upkeep to attract tenants. As a result, the tenant is coerced by signing a form lease, virtually an adhesion contract, into surrendering most of his rights and remedies and into living in uninhabitable conditions. Under the common law, a tenant who withholds his rent from a landlord maintaining uninhabitable premises would be subject to summary eviction. However, notwithstanding the inadequacy of common law remedies, rent withholding may provide the tenant with a meaningful solution to the problem of substandard housing. If the house is certified as unfit for human habitation, the landlord’s right to collect rent is suspended. During the period when the rent is suspended, the tenant continues to occupy the dwelling, the rent is deposited in an escrow account and paid to the landlord when the dwelling is certified as fit, any time within six months from the date on which the dwelling was certified as unfit. If after the six month period such dwelling has not been certified as fit for human habitation, any monies deposited in the escrow account are payable to the depositor. In addition, a tenant is not to be evicted for any reason while the rent is in escrow. Pa. Stat. tit. 35, § 1700–1 (Supp. 1971). See Clough, Pennsylvania’s Rent Withholding Law, 73 Dick. L. Rev. 583 (1969); Comment, Rent Withholding — A Proposal for Legislation in Ohio, 18 W. Res. L. Rev. 1705 (1967). A problem remains, however, if the landlord abandons the premises because
A housing code is not designed to handle the problem of blight completely; however, it can be utilized as an integral part of an all-comprehensive strategy in making marginal improvements in the overall quality of the city's housing supply. Even though its effects on a city's total housing supply may be slight, as a limited tool it can generate substantial improvements in the physical housing conditions in a given area of a city. Because it is a micro-solution rather than a macro-solution to the problem of blight, it must be carefully used on a neighborhood-block-by-block, house-by-house basis. Nevertheless, within these limitations a housing code merits support for several reasons. First, it represents one of the few housing programs that can be organized and effectuated on a local level. Second, it represents an established method to discipline irresponsible landlords and owners. Finally, in certain areas, where specific conditions prevail, a housing code may be just the kind of program to quickly and cheaply transform the area. The latter reason would be particularly true in smaller cities, with reasonably low densities and far newer and less deteriorated housing.

Additionally, the zoned housing code and the selective code enforcement programs offer increased flexibility over a uniform enforcement policy and appear to be sound in a practical and constitutional sense. Assuming a federal commitment to decent housing, either methodology could be used in conjunction with other national and regional housing strategies to make striking advances in the effort to cope with blight.

V. Conclusion

Stephen J. Polaha

he feels it would not be economically wise to repair. In order to circumvent this difficulty, the law should be used to encourage and promote rehabilitation before the point of diminishing returns is reached.

A second remedy a tenant may use to correct uninhabitable conditions is the use of a receivership. When housing code violations are discovered, a petition for a mandatory injunction would be filed with the court. Upon a finding that the housing code had been violated, an order would be issued enjoining the defendant-landlord from maintaining the premises in this manner. If the defendant fails to comply with the order, a motion would be filed to appoint a receiver to manage the property. A hearing is held to determine the necessity of a receiver, and if the court so finds, a receiver is appointed who is entitled, according to specific statutory authority, to take control of the property and temporarily manage it according to the orders of the court. The receiver, either a private party, a social service agency or a municipality, collects the rents and uses the available funds to make the appropriate repairs. ILL. ANN. STAT. ch. 24, § 11-31-2 (Smith-Hurd Supp. 1971). See Marco & Mancino, Housing Code Enforcement — A New Approach, 18 Clev.-Mar. L. REV. 368 (1969); Rosen, Receivership: A Useful Tool for Helping to Meet the Housing Needs of Low Income People, 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 311 (1968). Again, this technique may only be useful for economically sound buildings that an owner is unwilling, unable or reluctant to repair and can be rehabilitated by the court appointed receiver and returned to the community as a housing resource.

A third possible approach made available to tenants by statute is the repair and deduct method which permits tenants to repair the premises and deduct the costs from his rent. CAL. CIV. CODE §§ 1941 & 1942 (West 1954). Funds withheld are payable to the landlord if he repairs, or to the person authorized to make the repairs, if the landlord fails to repair. By statute the tenant can make the repairs and deduct the cost only if he has the sanction of a court order. MICH. COMP. LAWS ANN. § 125.534(5) (Supp. 1971).