THE FEDERAL GOVERNMENT AS "HOUSER OF LAST RESORT": A POLICY FOR DEMOCRATIC URBAN GROWTH

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> If efforts to reach the [national housing] goal through the full participation of private industry should fail, this committee of practical and experienced men [the Kaiser Committee] concluded "we would foresee the need for massive federal intervention, with the federal government becoming the nation's houser of last resort." I agreed and I continue to agree.[1]

With increasing frequency "national urban growth policy" has been used to describe various means by which the national government might affect the nature and pattern of human settlement in the United States.

The phrase appeared first in the Urban Growth and New Community Development Act of 1970,[2] which lays out a broad framework for a "national urban growth policy." The Act calls for the issuance of a biennial Presidential Report on Urban Growth and provides new incentives for the development of new communities and inner city areas.

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1. LYNDON BAINES JOHNSON, THE VANTAGE POINT 331-32 (1971).

2. Title VII of the Housing and Urban Development Act of 1970, Pub. L. 91-609, 84 Stat. 1770 (1971).

The 1970 statute, in listing the ingredients of a national growth policy, illustrates the fragmentary way in which quite separate but related federal policies are now developed and implemented. Congress specified that urban growth policy should:

(1) Encourage wise and balanced use of physical and human resources in metropolitan and urban regions;

(2) Foster economic growth to reverse trends of migration which reinforce disparities among such regions;

(3) Treat comprehensively the problems of poverty and unemployment associated with disorderly urbanization and rural decline;

(4) Encourage good housing for all without racial discrimination;

(5) Revitalize existing communities and encourage planned, large-scale urban new community development;

(6) Strengthen the capacity of general government institutions to contribute to balanced urban growth;

(7) Facilitate increased coordination in the administration of federal programs to encourage desirable patterns of urban growth; and

(8) Encourage the prudent use of natural resources and the protection of the physical environment.

After one year, the state and federal legislative and administrative initiatives which have addressed themselves to these ingredients comprise a veritable kaleidoscope whose mosaic may shift with each change in overall perspective. Such policies range from highway and mass transportation programs, increased authorization for TVA, and reform of landlord-tenant relations to housing and new community legislation. Even anti-crime legislation might be included in the mix, because insecurity has a marked impact on the economic decay of urban areas.

I. Development of National Governmental Policies

It may be useful to divide existing national government policies into two streams for purposes of analyzing their impact on the distribution of resources and, inevitably, the pattern of human settlement. First is the *functional* stream of policies, by which resources are distributed according to economic functions that do not respect

geographic boundaries within the national economy. For example, the President's controversial new economic programs comprise policies that profess neutrality in connection with the development of the inner city, the rural hinterland, or suburbia.

So it is with virtually every aspect of incomes policy, tax policy, monetary policy, and other functional programs. If the economy is to be stimulated by investment credits, such credits can be earned even by a plant expanding in an exclusionary suburb. The oil depletion allowance can be earned in Alaska as well as Texas. If social security benefits are increased, or veterans benefits augmented, the residence of the recipient is irrelevant. Indeed, the long-pending reform of the existing welfare program stems from a recognition that disparity in benefits because of residence is not an equitable or rational policy. There is a long agenda, exemplified by voting rights and criminal justice matters, where the different treatment of people resulting from their residence has become less and less tolerable even in a federal republic. The pathbreaking 1971 decision of the California Supreme Court also embraces as legally intolerable an intrastate system of school finance that penalizes children because they happen to reside in a jurisdiction with an inadequate real estate tax base.[3]

A quite separate stream might be called the *territorial or area development* policy stream. These policies distribute national resources by virtue of some territorial objective, usually involving cooperative action by other levels of government in the federal system. The policy goals in this stream are usually to enhance the economy of a given area or group of areas.

Generally, federal resources are transmitted in the second stream under an application system requiring affirmative action by another level of government requesting aid from the national agency that finances the eligible activity. Federal programs to improve the physical quality of urbanization operate principally in this manner.

The major urban growth problem facing the United States is the future of its metropolitan areas. By the year 2000 present trends will concentrate 70 per cent of our population in the twelve largest urban regions occupying one-tenth of our land area.[4] There are now 76 million Americans living in suburban areas, 64 million in central cities,

3. Serrano v. Priest, ——— Cal. 3d ———, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

4. REPORT OF THE NATIONAL GOALS RESEARCH STAFF, TOWARD BALANCED GROWTH: QUANTITY WITH QUALITY 186 (1970).

and only 63 million outside metropolitan areas. Metropolitan areas accounted for more than four-fifths of total national growth in the past ten years, and they have grown more rapidly than the national average since 1900. Even were migration into such areas to be reduced below current levels, experts believe that the proportion of our population now living there—about two-thirds—would increase to 70 per cent by the year 2000, largely through natural increase (internal births).

II. Discrimination in Federal Housing Policy

The thesis of this article is that federal housing policy discriminates against people because of residence, and income (and by extension, race); and the only way to correct this is to develop a "last resort" direct capability in the federal government to put housing in place.

If the rhetoric of urban growth policy is to have any meaning, surely it suggests that the national government must assess the impact of its functional policies on the nature of metropolitan growth and pursue a more conscious effort to design its area development policies with demographic trends in mind. It is fair to say that federal housing programs have generally been designed to stimulate the economy rather than to affect urban growth patterns.

Proportionally, blacks reside in metropolitan areas more than do whites (74% to 68%).[5] But the proportions of the races residing in central cities and suburbs is very disparate: 80 per cent of the metropolitan black population lives in central cities, compared to only 40 per cent of the whites. While there was an absolute increase of blacks in the suburbs, this remains a very small percentage in each metropolitan area. For cities over 500,000, the white population declined 1.9 million over the decade, while the black population increased by 2.2 million. Blacks as a proportion of central city population increased from 16 to 21 per cent during the 1960's.

The median income for white families residing in central cities and suburban rings has shown increasing economic disparity in the last decade.[6] In 1959 median white income in the suburban ring areas was somewhat higher than in the central cities: $8,486 to $7,881. Ten years later the gap widened: $11,155 to $9,797. Whereas Negro family

5. Statement of Dr. George H. Brown, Director, Bureau of the Census, before U.S. Comm. on Civil Rights, June 14, 1971.

6. *Id.*

median income in 1959 was higher in the central city than in the suburbs ($4,840 to $4,383), the economic ghettoization of the central city is now reflected in the figures for Negro families. Those in suburban rings had a median income in 1969 of $6,986, while Negro families in the central city had a median income of only $6,136. Thus, the central city is increasingly the primary haven of poor whites and blacks.

The transformation of our urban areas into black and poor central cities with largely white and affluent suburbs has serious implications for American society. It is bound to complicate efforts to desegregate public education, to overcome fiscal disparities in metropolitan areas, and to achieve necessary cooperation among different local jurisdictions and different levels of government.

Our metropolitan population will not only grow as a proportion of our total population, but its growth in absolute terms will be staggering under even conservative projections. It is estimated that to accommodate the anticipated urban population to the year 2000 would require building a city the size of Tulsa every month for the rest of the century.[7]

The level of anticipated growth will put a severe strain on the existing institutions that allocate our land, housing, and transportation resources, particularly in connection with growth regarded as fiscally burdensome, *i.e.*, most forms of residential development.

There is some evidence already that jurisdictions may be strengthening their existing land use controls and building regulations in an effort to thwart growth pressures that require municipal services such as new schools, sewers, and fire stations. The current concern with preserving or enhancing the ecological balance of the land may play into the hands of local preferences to avoid further development for fiscal rather than ecological reasons.

Environmental groups correctly allege that indiscriminate suburban sprawl has allowed land use and development that may degrade the environment. On the other hand, civil rights and development groups also correctly charge that suburban land use restrictions keep out lower income housing, maintain a "white noose" around the city, and hamper the achievement of national housing goals.

Potential conflicts have appeared in some instances. In one case involving local exclusion of nonprofit housing sponsored by a black

7. See note 4 *supra* at 56.

group, the countervailing claims asserted to obstruct the proposed development were the desire for open space and avoidance of sewer overload.[8] In other instances the maintenance of scenic open space has been asserted to justify large-lot zoning,[9] refusals to rezone for higher density housing, or other exclusionary techniques.

Studies and census bureau data as well as casual observations indicate that the geographic expansion of metropolitan areas and the shift of population to the suburbs have been accompanied by a growth of industrial and business activities outside central cities. Economic decentralization has progressed at different rates in different metropolitan areas, but it is a firmly established national trend.

In ten metropolitan areas cited in the President's 1971 Manpower report, almost 80 per cent of the employment growth in manufacturing in the 1960's took place in suburbs, as did 78 per cent of retail trade employment growth, and 68 per cent of wholesale trade employment growth.[10] The report also noted that there are records of journeys to work involving reverse commuting in which disadvantaged workers spent up to five hours a day traveling by bus, with six transfers, to go to and from jobs paying $2.00 or less an hour. The exclusion of lower-income housing from the suburbs, and the suburban favoritism of mass transit schedules and routing, contribute to disparities that undermine national manpower policies.

On the other hand, at least one recent study indicates that a respectable absolute rate of job growth has been maintained in the central cities, with sufficient growth in semi-skilled and low-skilled jobs to accommodate the unemployed if, in fact, they had access to those jobs.[11]

The Equal Employment Opportunity Commission is reportedly considering a standard that would make action in conflict with an egalitarian urban growth policy a predicate for a violation of the Equal Employment Opportunity Act.[12] Pressures have built up to

8. Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970).

9. National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

10. U.S. Dep't of Labor, Manpower Report of the President 89-90, 96 (1971).

11. C. Fremon, The Occupational Patterns in Urban Employment Change 1965-1967, August 1970 (a paper published by The Urban Institute, 2100 M Street N.W., Washington, D.C. 20037).

12. Memorandum, *Employment Discrimination by Re-location of Plant and Corporate Headquarters,* Equal Employment Opportunities Comm., July 7, 1971. *See also* Washington Post, August 27, 1971, at 1, col. 2.

use federal facility location as an affirmative tool for shaping metropolitan growth; new policies adopted by HUD and the General Services Administration are intended to respond to these pressures.[13]

The extent to which national growth policies encourage a stable supply of sites for low- and moderate-income housing will determine the extent to which the production of such housing can fuel economic growth for peacetime purposes. Sites are limited by a number of factors, among them economic and racial discrimination against subsidized projects. Such projects are by law and administrative regulation open to minorities. This is generally recognized by the public, particularly neighbors of the proposed development.

As a consequence of the increased federal involvement in subsidized housing developments, the concerns of civil rights forces, housing production interests, and urban growth analysts converge in the arena of national housing policy. Spurred by the courts, existing legislation, and public criticism, the federal government has proposed locational criteria for allocating its housing subsidies that for the first time purport to redress racial disparities in metropolitan areas.[14] This is being proposed, however, in the absence of comprehensive data on where housing subsidies are flowing within such areas, of the racial composition of housing managed by other than local public housing authorities, and of metropolitan housing plans. Few people, in or out of government, would now profess to know with precision the "formula" for dispersing housing opportunities in a metropolitan area.

What programs are included in the urban growth constellation vary with the observer, but certainly the federal housing programs must be considered a major element. What the goals of an urban growth policy might be is also a matter open to varying perspectives, but a major ingredient in any national goal must be the creation of metropolitan "open communities," and the avoidance of residential apartheid.

III. National and Local Housing Responsibilities

If one were to construct, *ab initio,* a national housing and land policy in a federal system, questions would immediately arise as to which level of government ought to perform what role in guiding

13. Memorandum of understanding between the Dep't of Housing and Urban Development and the General Services Administration concerning law and moderate income housing, June 11, 1971.

14. Project Selection Criteria (Notice of Proposed Rule Making), 36 Fed. Reg. 19316 (1971). These proposed criteria supplant those originally announced in 36 Fed. Reg. 12032 (1971).

private and public decisions toward appropriate goals. The provision of housing in the narrow sense—creating and maintaining shelter—is essentially a private sector decision although it is one of the most regulated of private industries. If we define housing in its broadest sense—the creation of a living environment—the decision becomes more mixed, and both public and private sectors play key roles. Public decisions on sewers, streets, or schools are the spine of community development.

Looking at housing in the narrow sense, quite separate resources of land, labor, and capital are put together by private mechanisms which must deal with the direct or indirect forms of public regulation. As we try to determine on what level public regulation should be organized, some questions and answers come more readily than others when we examine the present system.

A. Finance

The availability of construction financing and permanent financing is a result of monetary and fiscal decisions taken by national or central government instruments, such as the Federal Reserve Board, the Federal Home Loan Bank Board, or the Federal National Mortgage Association. The Treasury itself in selling bonds to finance the operations of the government profoundly affects the availability of long-term mortgage credit in the private pool into which it dips along with private corporations.

This home financing system is quite complicated, and these central banking mechanisms exert a pervasive and complex influence on it. In fiscal year 1970 the national government provided enough funds through this "system" to cover 58 per cent of all mortgage loans made in that period. One knowledgeable observer has predicted the eventual "federalization of the housing market."[15]

Current national housing goals call for a federal subsidy of about one quarter to one-third of housing starts (not including mobile homes). The direct cost to the U.S. taxpayer, based on subsidy payments already obligated by the federal government, is estimated at $30 billion over the next 30 to 40 years.[16] Assuming the completion

15. Wall Street Journal, January 5, 1971, at 1, col. 6. The prediction was attributed to Henry Kaufman, partner and economist in a New York investment house.

16. PRESIDENT'S THIRD ANNUAL REPORT ON NATIONAL HOUSING GOALS, H.R. Doc. No. 92-136, 92d Cong., 1st Sess. 22 (1971).

of six million subsidized units for low- and moderate-income families by 1978, present estimates suggest $7.5 billion annually will be paid by that year.[17]

Clearly, the flow of money into housing is a function of decisions made in a national context; state or local governments play little or no part. Indeed, the major impediments to more efficient flow of capital across state lines are the vagaries of state and local law as they affect mortgage instruments, building codes, and zoning.

Without passing judgment on the effectiveness of current national instruments, it is worth noting that no one is heard suggesting that other levels of government ought to, or can, perform the job of allocating capital for housing finance. We might sooner tolerate trade wars among the states.

The national government, through the Internal Revenue Code, also provides enormous stimulus to middle class homeownership at great loss to the Treasury. In 1970, the allowable deduction of interest on mortgages of owner-occupied homes was $2.8 billion a year; the deductibility of property taxes by this same group of taxpayers resulted in an estimated loss of an additional $2.9 billion, or a total of $5.7 billion per year.[18] Here again, the national government merely facilitates the flow of money into a form of property tenure which profoundly if only indirectly affects the shape and character of our metropolitan areas. In this respect it might be said that the norm for national policy is simply middle-class homeownership. Although this subsidized tenure tends to encourage or underwrite wasteful sprawl by driving up housing costs and raising the loss to the Treasury, it is currently of no apparent concern.

The Tax Reform Act of 1969,[19] however, introduced a new form of indirect subsidy to housing. It changed the rules regarding depreciation to divert investment from commercial and industrial real estate to stimulate the development of new residential rental projects in general and certain federally assisted low- and moderate-income projects in particular. The loss to the Treasury will undoubtedly be quite small as compared to the homeownership figures previously cited. Here again, the effect on the character of the urban environment is

17. *Id.*

18. *Cf.* Schorr, *National Community and Housing Policy,* 39 SOCIAL SERVICE REV. 433 (1965); GRUEN, GRUEN, & ASSOCIATES, HOUSING POLICY AND CLASS INTEGRATION.

19. INT. REV. CODE of 1954 § 167.

significant, but the tax law is neutral as to whether the benefits accrue in the inner city or suburbia.

Aside from these macroeconomic policies, the federal government since 1969 has vastly increased is subsidization of housing for the non-poor in ways which work in tandem with essentially private mechanisms. FHA insurance and VA guarantees were the backbone of federal housing policy until 1969. In 1971 it is estimated that 250,000 units will be directly subsidized by the federal government in programs that were nonexistent until 1969, the FHA 236 and 235 programs. These units are sponsored by private entities. The home ownership assistance program, for example, subsidizes home buyers at $20 per month for up to five years on conventionally financed mortgages up to $25,000, as administered by the Federal Home Loan Bank and savings institutions. Under other programs, the federal government also tries to maintain the FHA-VA interest rate at 7 per cent on mortgages from $22,000 to $24,500, and in other circumstances, up to $33,000.[20]

The central point is that many housing subsidies flow through a *functional* stream that is totally unconcerned with the nature of urban patterns, and all these programs are intended to aid the non-poor. National government intervention in home finance for the non-poor is thus theoretically untrammeled by the "sovereignty" of other levels of government. In fact the national policy favoring low- and moderate-income housing, much of it multi-family, is colliding with local prejudices against such housing and its occupants even when the housing is developed by private sponsors.

B. Labor

Construction wages have risen more rapidly than manufacturing wages. The Nixon Administration claims that the continuation of recent construction wage settlements "probably would add $2,500 or more to the cost of constructing a new home" by 1973.[21]

Contruction wage settlements are the product of collective agreements arrived at locally in federally-assisted construction, including most federally assisted housing. The Davis-Bacon Act represents a national policy to pay "prevailing" wages (i.e., union wages) in the local area as determined by the U.S. Department of Labor.

20. See note 16 at 1, 13.
21. *Id.* at 18.

The President in February 1971[22] suspended the operation of the Davis-Bacon Act in a vain effort to stem rising construction wages. This was a highly centralized decision aimed at one sector of the economy. That centralized intervention, now pale in comparison to the wage-price freeze announced six months later, was frustrated in large part by the "little Davis-Bacon Acts" of various states. They represented an interesting example of federal initiative blunted by a "residual federalism."

A similar example is the failure of "hometown" plans to ensure equal employment opportunity in the construction industry. One observer has reported that the vast majority of the voluntary plans are in "various stages of neglect, disrepair, failure or, where new, promise." As of August 1971, the Labor Department had ordered 73 cities to draw up voluntary local hiring plans and had approved voluntary plans for 36 cities, including St. Louis which joined five other major cities setting a federally-imposed minority hiring plan.[23]

The housing industry is thus beginning to see a far greater intervention by the national government in labor-management relations, particularly in the unionized sector. This may omit much single-family home building.

C. Land

The availability of land for housing is only indirectly affected by federal government action insofar as real estate changing hands may expose enhanced values to income taxation. The National Commission on Urban Problems suggested that in 1967, approximately $72 billion worth of real estate changed hands, involving $24 billion in capital gains, perhaps $15 to $20 billion attributable to land. Such transfers yielded small tax receipts, around $1 billion, according to the Commission.[24] There is an effective exemption even under the lower capital gains tax for the sale of most owner-occupied homes. The total impact of these policies probably encourages the speculative retention of land holding.

The federally assisted urban renewal program and a fledgling new towns program are the only other federal government programs helping to make available land for housing. In the case of urban renewal,

22. *Id.*
23. URBAN RESEARCH CORP., URBAN READ-OUT (Chicago, August 25, 1971).
24. NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. 91-34, 91st Cong., 1st Sess. (1969).

critics have questioned whether its net effect has not been to remove needed housing from the national housing inventory. The federal highway program has also had a distinctly destructive effect on housing.

In any event, federal policies have had an indirectly neutral to negative effect on land development for residential use, especially for lower income people who have not had the advantage of the home-ownership income tax deductions for mortgage interest payments and local real estate taxes. As the President observed, "[T]he one major element in housing costs that federal policy has not addressed effectively to date is the cost of land."[25]

By contrast, state and local levels of government have exercised massive controls over the use of land and its taxation. Zoning, subdivision controls, bedroom-count limitations, and ad valorem real estate taxes are all critical factors affecting the availability of land for social purposes over which the central government exercises little or no control. We do not have a national land use policy, and without it we cannot have a national urban growth policy.

The cost of land for socially necessary and desirable uses is rising at an alarming rate. The price per square foot of land used as sites for new houses purchased with FHA-insured mortgages has increased at an annual rate of almost 12 per cent from 1965 to 1970.[26] The only feasible way to deal with this problem is some form of land ranking financed or operated in part by the federal government.[27] In the absence of a national policy it is likely that local and state governments will be unwilling or unable to act.

The absence of creative local action is not as damaging as local action which frustrates already established national policy. The impact of national housing goals on local policies of excluding minority groups, lower-income groups, or multi-family housing has been the source of concern to those interested in developing more efficient means of producing housing in the face of rising costs. Thus, the President observed in his 1969 housing goals report:

> The fact remains that it is difficult, if not impossible in many communities, to find sites for low- and moderate-income housing because the occupants will be poor, or will be members of a racial

25. See note 16 at 19.

26. *Id.*

27. *See* Franklin, *Federal Power and Subsidized Housing*, 3 THE URBAN LAWYER 61 (1971).

> minority, or both. The consequence is that either no low or moderate income housing is built or that it is built only in the inner city, thus heightening the tendency for racial polarity in our society.[28]

This comment, which appeared under the "land" section of the second report, appeared nowhere in the third report.

The gap may be explained by contemporaneous work on a singular Presidential statement on June 11, 1971, on "Federal Policies Relative to Equal Housing Opportunity."[29] An incipient effort in 1970 by the Department of Housing and Urban Development to overcome local exclusionary land use controls by new central government authority, premised on a concern with the frustration of its efforts to promote industrialized housing,[30] was effectively quashed by the President in 1971.

The President's formal statement followed a series of blunt although somewhat unclear pronouncements opposing "forced integration of the suburbs."[31] His ultimate formal statement[32] explicitly denied any intention of increasing federal influence on local land policies and was at pains to explain the limited role of the national government in housing. A few excerpts will give this flavor of the statement:

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> My purpose is not to announce new policies, but to define and explain the policies we have. . . . The federal government operates in important but limited ways and under limited authorities.

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> In terms of site selection for a housing development, the federal role is one of agreeing or not agreeing to provide subsidies for projects proposed by local authorities or other developers.

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28. PRESIDENT'S SECOND ANNUAL REPORT ON NATIONAL HOUSING GOALS, H.R. Doc. No. 292, 91st Cong., 2d Sess. 42 (1970).

29. Weekly Compilation of Presidential Documents, June 14, 1971, at 892.

30. In 1970 George Romney, Secretary of Housing and Urban Development proposed enactment of a federal law that would bar local governments from using zoning, building codes, and other powers to prevent construction of low-income housing in areas undergoing development. In testimony supporting the proposal, the Secretary stated, "Adoption of this provision is a necessary first step in ending the ominous trend toward stratification of our society by race and by income." N.Y. Times, June 3, 1970, at 1, col. 5.

31. Weekly Compilation of Presidential Documents, December 14, 1970, at 1653; *id.*, January 11, 1971, at 36; *id.*, February 22, 1971, at 239-240; *id.*, March 29, 1971, at 533. The biting edge of the President's personal attitude was honed down somewhat by his formal statement.

32. See note 29 *supra.*

A municipality that does not want federally assisted housing should not have it imposed from Washington by bureaucratic fiat; this is not a proper federal role.

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The federal program role—as the governing statutes make clear—is essentially one of responding to local or private initiatives rather than one of imposing its programs on state and local governments.

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In none of HUD's grant programs does the Department act directly. The Department builds no housing, develops no landuse plans, clears no slums and constructs no sewers . . . .

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This Administration will not attempt to impose federally assisted housing upon any community.

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[T]he kinds of land use questions involved in housing site selection are essentially local in nature—they represent the kind of basic choices about the future shape of a community, or of a metropolitan area, that should be chiefly for the people of that community or that area to determine. The challenge of how to provide fair, open and adequate housing is one that they must meet, and they must live with their success or failure.

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We are dealing here in a realm in which federal authority, while substantial in terms of enforcement, is very limited in terms of the choices that must be made in each community.

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There are some who assume that the federal government has the power to do anything it wants—or that they want. But we have maintained our freedom for nearly two centuries by insisting that the federal government's exercise of power not exceed its authority.

I believe in that principle, and because the authority of the federal agencies is limited—quite properly I believe—with respect to the essentially local and individual choices involved in local community planning, their power will be used in only limited ways.

The quoted excerpts from the President's statement reflect a traditional resistance to any articulated national role in shaping metropolitan America. Returning to the earlier distinction between *functional* and *territorial* policies, the former have profound but usually unarticulated effects on patterns of urban growth whereas the controversy surrounding the latter policies will reflect articulations of con-

flicting or competing goals. Thus, it is common for national policy-makers to eschew making choices in this difficult area, for when the federal writ on the patterns of metropolitan growth is made explicit, it is challenged as violating the "federal system."

Some observers believe that these contradictions could be avoided by converting our current housing construction subsidy programs, which stimulate supply, into a "housing allowance" system which "subsidizes people" who would then seek their shelter on the same basis as anyone else. Such an approach would supposedly absolve the national government of the responsibility to make any choice regarding metropolitan patterns of settlement, more or less as revenue sharing is supposed to do in other contexts.

This is not the place to analyze housing allowances other than to say that local land use and building controls that inflate housing costs and otherwise frustrate the provision of an adequate supply will continue to exert the same negative influence with any likely housing allowance system.

IV. A New Federal Role

The foregoing discussion has sketched the pervasive national influence over what might be described as the economic aspects of urban growth and its professed neutrality on the quality and character of urban growth. In the latter regard, the national government has been a facilitator of decisions made without reference to even a generalized notion of how we might better organize our urban environment. Perhaps only the urban renewal program might be a significant exception, since it was initially based on the political conviction that the vitality of the central city must be maintained. In this connection, it should be noted that the increasing concern with the program's destruction of low-income housing led to pressures on the national government to make low- and moderate-income housing a favored reuse of urban renewal land. This change, however slow and limited, would have taken far longer and been far less effective had local officials been the only pressure points for change.

Clearly the time has come to examine whether this professed neutrality or refusal to articulate refined goals of national policy helps us to think clearly and to act beneficially on urban growth issues.

Did the President correctly describe the *real* role of the federal government in housing? His statement may have been so "lawyerly" as to mislead us as to what actually happens in the day to day inter-

action between federal officialdom and local officialdom and private citizens.

For example, the local HUD area office, which the President would describe as "essentially . . . responding to local or private initiatives . . . ." actually exercises influence over the location and design of housing sites, which sponsors will be favored, and which projects will suffer vexatious delay. Under policies announced by HUD in June 1971,[33] a proposed housing project, including public housing and FHA housing, would be rated "superior" if it is outside an area of minority concentration. If a project does not rate at least "adequate" on the nondiscriminatory location criteria, it would be disapproved. These criteria, although vague, and striving to make objective a process of judgment which remains subjective, nevertheless demonstrate the influence on sites which has always been exerted by officials who receive their pay on U.S. Treasury checks.

A U.S. Appeals Court, in *Gautreaux v. Romney*,[34] pointed out that the federal role in correcting the past discriminatory policy of the Chicago Housing Authority was as "equally important" as CHA's own role.

> Within the structure of the housing programs as funded, HUD retained a large amount of discretion to approve or reject both site selection and tenant assignment procedures of the local housing authority. HUD's 'annual contributions contract' contained detailed provisions concerning program operations and was accompanied by eight pages of regulations on the subject of site selection alone.[35]

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33. See note 14 *supra.*

34. 448 F.2d 731 (7th Cir. 1971).

35. *Id.* at 739. On September 16, 1971, Senators Brooke and Mondale announced amendments to existing and proposed housing legislation which would express the intent of Congress that the Secretary of Housing and Urban Development should act as houser of last resort in those areas of the country where a "housing emergency" exists. A "housing emergency" would be defined as a substantial number of low and moderate families residing or employed in an area where there are no sponsors (public or private) willing to provide housing to meet their needs. This section would further provide that the Secretary of HUD, by contract with private or public agencies or other entities may act as sponsor in such areas beginning two years after the enactment of this act. Further, Secretary of HUD would submit to Congress within one year his plans for implementing this section including his proposed criteria to identify such "emergency" housing areas. This concept is included in the 1970 Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4601.

The court's holding was based on its conclusion that HUD's past actions were racially discriminatory "in their own right" and not just on the theory of joint participation with the local agency.

In reality, and as recognized by courts if not by statutes, the federal government does play a direct and significant role in the financing and the location of subsidized housing in every locality where projects are located under the existing system. It is the locality where projects should be developed, but are not because of local inaction or obstructionism, that federal power has yet to reach. To deal with this situation the national government will need to become the "houser of last resort."

This idea, in some minds, may mean the revival of federal eminent domain and sponsorship powers which the federal government exercised under the National Industrial Recovery Act until a federal district court ruled such activity unconstitutional in *United States v. Certain Lands in Louisville.*[36]

The National Commission on Urban Problems (The Douglas Commission), in recommending the idea in 1968, stated:

> If both a locality within a state, and the state itself, fail in their responsibilities to help meet the present crisis in the supply of housing for low-income Americans, the Commission believes that the Congress should authorize an emergency low-income housing program under which the Department of HUD would, as a direct federal operation equipped with the powers of eminent domain, build and have ready for occupancy such portion of 500,000 low-income units a year remains unmet by local and state action.[37]

A variant of this basic idea proposed by the President's Committee on Urban Housing[38] recommended direct federal acquisition of land, leases for the development of subsidized housing, and federal preemption of building and land use regulations on such sites as well as others which would not be federally acquired but on which housing was to be federally subsidized.

It is interesting to note that the *Louisville* decision recognized the implicit grant under the fifth amendment of eminent domain powers to the United States for "public use" of the property acquired. The court, however, declined to extend the "public use" concept to the

36. 9 F. Supp. 137 (W.D. Ky.), *aff'd,* 78 F.2d 684 (6th Cir. 1935), *cert. denied,* 294 U.S. 735 (1936).

37. See note 24 *supra* at 192.

38. PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME 25-26 (1968).

public construction and operation of low-income housing. It rejected as untenable a conception of "public use" as meaning "public benefit, public advantage, [or] general welfare."[39] This is, of course, an old debate which has lost much of its vitality.

Charles Abrams has reminded us that only the legalisms of the *Louisville* decision destroyed the new political federalism implicit in the NIRA low-income housing program. The United States had set up TVA and a "greenbelt" new towns program as direct federal planning and development activities with the power of eminent domain, along with the NIRA housing program. None of these three federal ventures into formerly sanctified state prerogatives met significant political opposition even on the local scene. By 1936, under the umbrella of the general welfare clause, "a formula had been carved out of the necessities of the era under which the federal government had assumed the initiative and responsibility for rebuilding urban and suburban America,"[40] only to be destroyed by judicial support of a stubborn landowner in Louisville.

This case, by frustrating the NIRA housing effort, led directly to the system established under the U.S. Housing Act of 1937,[41] under which the eminent domain power for low-income public housing is exercised by state agencies funded by the federal government. It is ironic that the eminent domain authority of such state agencies, actually local housing authorities, and later urban renewal agencies, was challenged under legal theories identical to those asserted against the United States in the *Louisville* case, except that the fourteenth amendment and the state constitutions were the basis of attack. All these attacks were unsuccessful. Thus, whatever claim to authority could have been asserted for the *Louisville* rationale has long since been eroded in the state courts.

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39. 9 F. Supp. at 138.

40. Abrams, *The Legal Basis for Reorganizing Metropolitan Areas in a Free Society,* 106 PROCEEDINGS OF AM. PHIL. SOC. 177 (1962). Governors and mayors welcomed PWA projects into their jurisdictions and many states and local authorities (who managed the projects after the federal agency developed them) filed Supreme Court *amicus* briefs in support of the federal program in the *Louisville* case. The "greenbelt" new towns program fared no better in the lower federal courts. After the decentralization of the program became a legislative fact, the Supreme Court upheld federally *aided* housing as a valid public purpose. City of Cleveland v. United States, 323 U.S. 329 (1945).

41. Act of Sept. 1, 1937, ch. 896, § 1, 50 Stat. 888.

The system we have inherited can be described as institutionalized discrimination against the poor. The transmission belt for federal housing assistance operates principally through an underwriting of the home finance system. The poor, however, are legatees of the *Louisville* rationale, and must depend on local affirmative public action to obtain federal housing assistance. Thus in the absence of strong national policy, localities can confine the poor and minority groups to the central city or refuse to aid those who are residents.

This can be illustrated by supposing oneself to be a suburban mayor who wishes to deny federal housing subsidies to poor, often black, residents, or potential residents, of his jurisdiction.

1. The first non-action would be to fail to create a local housing authority. Although such authorities are state agencies, they must be activated by local governing body action. The failure to create an authority, or to consent to the operation of a neighboring authority, effectively precludes the introduction of low-rent public housing into the jurisdiction. There is no federal authority to sponsor such housing directly.

2. If pressure to create an authority is too intense, or one has previously been created, a second defense would be appointing members of the authority who will see that it takes no action on local or regional housing problems. Two of the five members usually suffice to see that nothing happens, even in the unusual case where the authority staff wishes to act imaginatively and constructively.

3. Where, against all odds, the authority is willing and capable of moving affirmatively, the mayor and council can frustrate it by declining to approve a "cooperation agreement," which is a condition to federal financing. Such an agreement pledges the extension of municipal services to the completed project, and other actions necessary to permit completion.

4. Quite apart from actions by a local housing authority, local refusal to approve leased housing transactions or rent supplement contracts can stymie other public or private efforts to transmit federal housing subsidies to the poor.

5. When all else fails, or added potential for inaction is needed, put the provision of low-income housing to a referendum.

Under the existing system, an added bias against the poor results from the fact that, generally, low-income public housing is not subject to local real estate taxes. Such projects make payments in lieu of taxes which usually fall far short of what local government would expect

from a privately-owned development of similar cost and design. By contrast, when the non-poor receive federal benefits to improve their housing, localities do not make a contribution to this benefit in the form of foregone tax recipts. All FHA subsidized housing is on the tax rolls (except in some high cost localities where a form of tax abatement is necessary for project feasibility). Thus, political difficulties for subsidizing housing generally are compounded in the cases of low-income public housing.

Were such projects to lose their tax-exempt status or were federal resources to defray the cost of full local real estate taxes, what would remain of the rationale of requiring a locality to approve public housing?[42] Such local governing body approval is required only for public housing and rent supplements in private housing, the only two federally-aided housing programs for the poor but financed in two different ways.[43]

This perverse symmetry illustrates the extent to which Congress has seen fit to fetter the basic functional financing mechanisms of FHA with a local public veto power only in the case where the poor might have something to gain from those functional policies. Consequently, the removal of this local public veto for rent supplement housing and public housing once it goes onto the tax rolls can be regarded as the first step to "freeing up" a functional approach to housing subsidies. It does fall far short, however, of placing national housing policy into the context of urban growth policy.

Shall we rely only on local initiatives to create local housing authorities, or to activate them? Shall we rely on this financing mechanism in any event? Should we depend on the private strategies or accidental opportunities of private (profit and nonprofit) groups to

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42. The decision of the U.S. Supreme Court in James v. Valtierra, 402 U.S. 137 (1971), does not preclude the federal government from eliminating the local approval requirements for subsidized housing. Indeed, footnote 4 of the Court's opinion suggests that the rationale for the current requirement is the fact that public housing may not pay full real estate taxes. In rejecting the supremacy clause argument in the case, Justice Black observed for the 5 to 3 majority, "By the Housing Act of 1937 the Federal Government has offered aid to state and local governments for the creation of low-rent public housing. However, the federal legislation does not purport to require that local governments accept this or to outlaw local referendums on whether the aid should be accepted." *Id.* at 140.

43. For an analysis of litigation strategies to require local affirmative action on public housing *see* Roisman, *The Right to Public Housing*, 39 GEO. WASH. L. REV. 691 (1971).

determine where and when subsidized housing will be located?

The Congress has just begun to ask some of these questions in evaluating Title V of the proposed Housing and Urban Development Act of 1971.[44] This title would encourage the creation of metropolitan housing agencies to program, but not develop, subsidized housing in metropolitan areas. The title is very complex; generally it would provide incentives to metropolitan housing plans and deny community development subsidies to localities that did not participate in the planning process. It is not clear if the title will do more than provide a metropolitan layer of consent to subsidized housing without adequately increasing the pressures on localities to give their consent to individual projects.

But it does move in the essential direction of stimulating a metropolitan planning process. It is interesting, and perhaps ironic, to note that although the Democratic Party tends to see the importance of national planning, Title V introduced under Democratic auspices places the responsibilities for metropolitan planning in a non-federal agency. By ironic contrast, the Republican Administration, despite a rhetoric of decentralization, has announced federal housing site location policies that suggest the focus of metropolitan planning responsibilities might be more appropriately placed, ultimately, in federal hands. So long as there is power in a national agency to approve and carry out such a plan, who draws it up is a subsidiary question.

Accordingly, the second major ingredient of a "last resort" mechanism must be some kind of metropolitan planning process to rationalize any national policy of directly placing housing in a recalcitrant community. If such a planning process does not exist, regardless whether it is done under federal or non-federal auspices, the national government exercising "last resort" powers may be open to the charge of acting arbitrarily or simply aiding private opportunities to develop land in metropolitan areas.

If a metropolitan housing plan is drawn up, the national government ought to have the power to finance housing sponsored by others, carry out the plan, acquire land for this purpose, lease it to other sponsors, or develop the housing itself. All of these powers should be untrammeled by local land use and building regulations.

In summary, our current housing policies do not serve the most pressing urban growth objective of overcoming economic and racial

44. H.R. 9688, 92d Cong., 1st. Sess. (1971).

disparities in metropolitan areas. They serve the non-poor through functional policies and the poor through area development policies that are not related to any urban growth policy. The major missing ingredients are the elimination of local veto over subsidized housing within a context of metropolitan planning and a strong national power to implement those plans when other levels of government or the private sector will not or cannot do so.

Undoubtedly the power of Congress to deal with the nation's racial problems in metropolitan areas is the rationale for federal power in the 1970's to confront directly what other levels of government choose to evade.