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**Toward a Right of Control over the City Planning Process**

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Toward a Right of Control Over the City Planning Process

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Lawyers who have businessmen as clients often find that their employers are specialists in the laws regulating their occupations. To some degree, planners must also become specialists in laws affecting them. This essay is aimed at such aspiring planners and lawyers. Its purpose is to suggest an emerging jurisprudential approach to some laws relating to urban affairs. Illustrations of this approach are taken from many, seemingly diverse, types of planning laws. The reader is asked to drop his expertise, which will tend to emphasize the unique problems of each type, and look for essential similarities.

The goals set by Congress in the Omnibus Housing Act of 1968 were based more on need than on what could be accomplished. The act calls for six million low-cost units over the next 10 years, 300,000 for the current year.

Mr. Romney said that he would do everything he could to increase production but that it was obvious that the 300,000 goal for this year could not be met.

"We should stop making big promises we cannot meet and leading people to false illusions and violence," he said.

"It's easy to trot out great, big grandiose programs as has been done over the last several decades. This causes frustration when those who are to receive the benefits have their expectations raised and you are left worse off than you were when you started."

The National Commission on Urban Problems, headed by former Senator Paul H. Douglas, Democrat of Illinois, recently reported that the goals set by the Housing Act of 1949 had still not been met and that the Federal Government had demolished more housing since then than it had helped build.**

Laws are passed for many reasons. The foregoing excerpt from a New York Times article on George Romney's first news conference as the new Secretary of Housing and Urban Development shows quite clearly that some housing legislation promises the public more than the mere enactment of a law can deliver. Such laws may be passed for

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political or hortatory purposes; legislators know full well that their goals cannot be achieved. Other laws are passed for genuine social welfare purposes. In either case, the law is passed because some segment of the public recognizes a need for a law. Still other statutes are passed to bestow rights on citizens in order to help courts solve disputes over a public program which has produced or might produce litigation. After all, one's lawyer can predict that his client has some "right" in a program, but only by going to court can the client find out definitely. Indeed, this is the only way to determine the scope of any legal right. As Jerome Frank said so well:

What we are accustomed to describe as "legal rights", then, apparently grow out of specific lawsuits and are to be found in specific court-orders, judgments, or decrees. If no court-order has as yet been entered with respect to any of your legal rights or mine, then those rights are not yet known, but can only be guessed. Maybe you have some particular right, maybe you haven't. The only way you can find out definitely is to see what a court will do about it.

A well-drafted statute may have a political or a social welfare aim, but it should also aid courts in determining the outcome of future lawsuits. Seldom does redevelopment, housing code, and, to some extent, zoning legislation achieve this latter goal. This failing is indicative of the task of an attorney for private citizens concerned with matters relating to these laws. It is to make them easier to litigate: a first step is to render policy decisions, made under the authority of legislatures and the Congress, ascertainable and thereby reviewable by courts.

Public agency planners work under the authority of various statutes and ordinances. These laws give planners a certain amount of discretion in performing a governmental function recognized as the "city planning process," so the empowering legislation is generally enacted into law as an enumeration and description of the various

1. Some comprehensive plans are also hortatory: others are genuine attempts at policy definition.
4. There is herein no implication that there is agreement over what the "city planning process" is, but, in general, a city planner is one who works to improve the quality of urban life and government through one of his many roles. A planner may see himself either as an urban designer, idea broker for the government, politician, trend and issue spotter, efficiency expert or utopian visionary; however he may conceive of his role, he sees himself as an advocate of governmental actions which deal with urban problems in a "comprehensive way" i.e., considering side issues and spinoff problems.
official actions which planners can be expected by the public to take. The 1945 Pennsylvania Urban Redevelopment Law is typical. Section nine provides that a redevelopment authority shall exercise “all powers necessary or appropriate to carry out and effectuate the purposes and provisions of this act.” As far as the planning powers of an authority are concerned, that body may “make and assist in implementing” five types of plans: (1) voluntary rehabilitation and conservation programs, (2) code enforcement programs, (3) relocation plans, (4) redevelopment plans, and (5) feasibility studies for redevelopment projects. Whether and when such plans are to become the stated policy of the agency is left undecided. On the face of the statute, they need not be determinative of any future actions taken by the authority. Apparently, the agency is not even bound by the goals and provisions of its own plans, and the development of its policies can only be reviewed “in house”—a situation likely to anger lawyers and administrators concerned with the due process of law. At some point after publication, a plan should become agency policy if, for example, a complaining citizen can show some action taken under its authority, or if a certain percentage of the affected citizens do not file a petition stating their objections. (This last suggestion will certainly force the agency to “think through” its proposals.)

Statutes like this one are also silent on the subject of overseeing the implementation of plans. Contracts for Urban Renewal projects, signed by HUD with a local planning agency (LPA), often require the completion and implementation of various planning studies. By statute, a relocation plan must be drawn up. However, federal statutes only require that HUD approve such plans. Plans often sound good on paper, but are seldom implemented exactly as approved by HUD. There is little continuing review of their implementation. In addition, legislation stating that the local agency “shall” formulate and assist in implementing a plan, does not say who shall decide whether the agency has carried out what was approved by HUD. Will HUD approval, once granted, legitimize the plan indefinitely, without anymore review? Further, if the legislation states that the agency “may” make certain plans, a threshold question again remains unanswered: What if the agency does in fact make a plan? Does this

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5. Standard Planning Enabling Act, par. 6, DEP’T OF COMMERCE (1928).
7. As note 1 stated, some plans are merely hortatory; they are “trial balloons” that test the values of those for whom the planning is done. This type of plan could not, immediately after publication become agency policy. The question becomes, when thereafter may it become binding upon the agency and how may that policy later be changed?
plan ever become a policy binding on the agency implementing it? Present legislation obscures these types of legal issues.

Empowering legislation like the Pennsylvania law thus puts the public on notice that city planners can be expected to use their powers in any of their enumerated areas of concern, though not necessarily in all, or in any particular one. In this light, consider the definitions of "blight" which govern the use of condemnation powers in urban renewal. Definitions include both "physical" and "environmental" factors; indeed, there are so many interchangeable aspects to the definition of "blight" that it becomes a very flexible term. Even vacant land can be "blighted", and this is a finding unexpected by many laymen. Any city planner can cite instances in which the definition has been manipulated at will. The up-shot is that the discretion of the planners really determines the geographic area of an urban renewal district. Such a determination may or may not fulfill the public's expectations about city planning. Whether or not it does is now left up to planners themselves.

This type of legislation has been inherited from an era when planners were seeking to define their role in society. However, after these laws are examined from the viewpoint of the planner's clients, they may come to have a very different function. They may not only be describing the powers of city planners, but may also be detailing these same official actions as their "duties" as well. In the event of such a turnabout, complete execution of these plans accordingly becomes a duty. In the recent past, for example, relocation has been the issue which has made planning agencies become more comprehensive in their planning. It has been the "swing issue" forcing planners to concede that physical and social planning must be performed simultaneously. Public outcry has virtually made provision of "adequate relocation" into a duty for planners.

The juridical basis for such changes has been established in the work of Harry Jones, Daniel Mandelker, Charles Reich and A. D. Smith. All of these men are law professors concerned that the rule of

9. See supra note 7.
11. This was the case in one urban renewal project in Baltimore, Maryland.
law survive the advent of our planned society. Planning and planning laws—using the term "planning" in its broadest sense, to include all legislation relating to the "urban crisis"—affect the lives and fortunes of countless citizens. The implementation of plans redistributes the wealth, or opportunities for wealth, offered in our cities. The right to redevelop an urban renewal area, the contract for government-sponsored rehabilitation, or a change in zoning permitting more intensive use of land, are some of the preconditions for urban-based wealth. Such opportunities are latter-day "property rights". In earlier ages, it was enough to own land; today one must also secure the right to use the land which one wishes to develop. This right to use is of great value in the hands of those who possess it—be those people developers, neighborhood groups, or private citizens. Things of such value should not be distributed without considering the position of all those who have a reasonable basis to expect to use the land being redeveloped or conserved. Thus both substantive and procedural rights to plan for their future arise to protect both present residents and redevelopers. A corresponding duty to allow such planning is incumbent on planners.

In sum, the finding of a duty in the law implies that there are some people toward whom that duty is owed. In the case of the planner, this means those persons affected by his planning: they have a "right" to expect full performance of his duty. If this performance is not forthcoming, those affected may also have the right to obtain a court order compelling it. Such a plea asks a court to perform a task for which there is ample precedent in our legal system. People's expectations have often dictated the outcome of lawsuits. For instance, contracts are often enforced according to the intentions or expectations of the parties to it; courts even imply clauses based on what they consider to be the reasonable expectations of the parties at the time of contracting. Likewise, in the area of torts, legal concepts involving the duties of property owners sometimes depend on the reasonable expectations of guests and licensees. These situations bear more than a crude analogy to the relationship arising between citizens and their government when a public program promises more than it delivers.

The type of expectations about which this paper is now concerned, the kind recognized at law, often controls substantive provisions of a

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14. See particularly, Reich, supra note 13; the view that government is omnipresent in our lives has been aptly summarized by MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING, (1969), at xiii: "Not long ago it could be agreed that politics was the business of who gets what, when, where, how. It is now more than that. It has become a process that also deliberately seeks to effect such outcomes as who thinks what, who acts when, who lives where, who feels how."

15. REICH, supra note 13, at 785-786; JONES, supra note 13, at 154.
contract. That is, where the words of the contract are silent on a particular subject, a court can make a finding as to what the intentions of the parties were. This decides what actions each will be required to perform under the contract. In the case of the government and its citizen beneficiaries, the former cannot argue that it passed a bill or signed a contract while crossing its fingers behind its back, saying all the while that it could not make good on all its promises. If done, that would be of no legal consequence: for it is the impression that each party has, not their respective inner intentions, that governs the rights and duties of the parties. Today, citizens are attempting to see that plans are adequate to their tasks by asserting that their groups are third-party beneficiaries to the HUD-LPA contracts and hence entitled to enforce their provisions. In this sense the objectives stated in the “whereas” or purpose clauses of many types of planning legislation and contracts can be said to express both the intentions of the local government toward its citizens and the expectations of those citizens about their housing.

So citizens’ rights can be defined in terms of the expectations of those for whom planning is intended as a benefit. Jesse Gray, a tenant group leader in New York City, illustrated this point when talking about a rent-strike dispute his group was having with slumlords. He said: “We are going to completely disassociate ourselves from the slumlords. We are going to pay rent to the city and expect them to make the repairs.” Gray was referring to the protest over housing code violations of some 600 to 1000 tenants on welfare. He alleged the withholding was legal under New York City’s Rent Strike Law. Clearly his expectations were that the city would intervene in, and was in some sense responsible for, this conflict between landlords and tenants.

Yet the public’s expectations, if unfulfilled, also have a way of forcing themselves on the planner either through amendments to the law or through new interpretations of existing legislation by courts. City planning, like other public programs, has promised much for our cities. Some of these promises have been redeemed; still others have proven self-fulfilling; many, however, have neither been redeemed, nor fulfilled.

16. “Where a city contracts for the benefit of its inhabitants, an individual citizen may enforce the contract as an intended beneficiary.” Simpson, Contracts 317 (1954). The author includes numerous citations to cases involving municipal contracts with various types of private utilities.
17. See Reich, supra note 13, at 778-785.
A word should be said about the underlying political context in which such expectations normally arise. All of these promises, whether honored or not, have been made in the context of our pluralist system of politics. Initially, these promises were arguments advanced in support of our existing urban programs. The more arguments amassed behind a program, the more "broadly based in society" and hence the more "politically feasible" the program appeared to legislators. In this way, there is a tendency to overburden our public programs with diverse rationales and justifications. Some are policy-oriented; some are constituent-oriented. Thus our Model Cities Program has something for the advocates of many (often conflicting) proposals on the reduction of poverty. Thus also our early attempts at urban renewal were justified as a benefit for rich and poor alike. Thus housing code enforcement is often thought of as "cheap urban renewal", improving the tax-base, providing better housing, etc.

The overburdening of a public program with divergent rationales tends to obscure its role subsequent to its authorization. Administrators have a hard time defining their mandate. Auditors have a harder time evaluating the effectiveness of the program. And, in the process, clients or beneficiaries of the program cannot tell what it is supposed to accomplish for them. Imprecisely defined policies thus mean that the beneficiary does not know what he is entitled to. He cannot predict his entitlements. His "right" to benefits which the program purports to initiate disappears as the administrator tries harder and harder to achieve a balance between the many objectives of his program. By reverse token, clarity of policy tends to establish definite "rights" for the beneficiary.

This short explanation of the legislative process and some of its administrative consequences should help the reader distinguish between the official confusion over programs and the public expectations which result from them. Those who feel that they have been promised benefits from a program may feel outrage and frustration while the government makes the difficult choices postponed during legislative deliberations. Social scientists may concern themselves with the conflicting goals of programs, but affected citizens feel that they cannot afford the same detachment.

19. Reich, supra note 13, at 785.
21. Other public sector activities are similarly burdened. Educators and social workers in our larger cities today perform functions for which they are untrained. The social worker spends much time investigating his clients. The educator has been expected to do more than teach: he is also supposed to counsel and acculturate new Black and Puerto Rican urbanites to the city. These aspects of the city school systems and the welfare system is probably a major reason why neither functions well today.
Unfortunately, the only point clear about many city planning programs is the expectations they engender. The creation of these expectations results from the overselling needed to enact city planning laws: thereafter, this becomes a problem of one's chickens coming home to roost. It is in this light that some courts are starting to decide that planners must perform certain of their obligations or else have these obligations performed on their behalf. Why? "Because," the judges say in effect, "the public has a right to expect performance. The laws under which planners work have created expectations which ought to be fulfilled."

In all of this, reference is not being made merely to a right of clients to participate in the city planning process. "Citizen participation" is now so well embedded in the law that planners cannot ignore it, or the problems it raises. The right of participation may not be effective, however, without changes in the priorities and processes which planning now utilizes. Thus, to any participatory rights which clients now have, must be added the right to expect that planning will fulfill the substantive expectations of its clients as to substantive policies.

**HOUSING CODES**

The remainder of this article deals primarily with housing codes. The discussion will consider the effect of statutes and ordinances upon planning. Constitutional issues and arguments necessarily enter into much that is said. When, for example, housing codes and zoning ordinances are selectively enforced, some rational classification process must underlie the selection. If none does, than those not benefited are said to have been denied, in the language of the Fourteenth Amendment, the "equal protection of the law." If the areas of non-enforcement are exclusively black or Puerto Rican, racial or income discrimination may be a factor in the selection process. So far as they are able, courts are obliged by our federal constitution to expunge such selectivity from the planning process. If the areas of non-enforcement are exclusively black or Puerto Rican, racial or income discrimination may be a factor in the selection process. So far as they are able, courts are obliged by our federal constitution to expunge such selectivity from the planning process.

Housing codes are only spottily enforced in our nation's slums.

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22. Other constitutional provisions may have been violated as well: e.g., the "due process" clause of the Fourteenth Amendment.

23. Yick Ho v. Hopkins, 118 U.S. 356 (1888), in which a San Francisco ordinance was struck down by the U.S. Supreme Court because of its affect (though not its words) was to make it applicable only to the Chinese in the city. Under the ordinance, laundersies were excluded from wooden buildings, and evidence showed that only Chinese laundersies were in wooden buildings.

their enforcement is more likely (and more likely to be encouraged by planners) in neighborhoods where the population is changing—racially, ethnically, or otherwise. In other words, planners have long been accustomed to the selective enforcement of housing and sanitary codes. This selectivity has been possible because of a combination of factors. First, the right to enforce the codes is given explicitly only to public officials. Second, those who would benefit by enforcement are often without knowledge of the codes' prescriptions. The increasing sophistication, however, of the occupants of poor housing has led to an increasing number of requests and demands that officials enforce the code standards.

When these requests were denied or unheeded, some people resorted to the courts. Recent and pending litigation presents three common situations: 1) a complaint is filed or an affirmative defense raised asking that the landlord be required to bring dwellings up to code standards; 2) rents withheld pending repairs; 3) the court asked by the private citizen to order housing officials to enforce the codes against named individuals. Most of the relevant cases to date combine these categories in their pleadings. The following paragraphs summarize, in law-text form, the plaintiff's legal arguments in each type of case.

Civil Suits To Enforce Code Standards

The private citizen's civil suit seeking the landlord's compliance with code standards has strong legal support. If the codes were not meant to protect the inhabitants of the dwellings covered, it is difficult to see whom they were meant to protect. Moreover, to say that the class of people protected by the codes cannot insist on the enforcement of the code's provisions is to violate well-established legal rules governing the permissible sources of judicially-made contract and tort law. It is in our courts that the broad coverage provided in the codes must be made fully enforceable.

These cases ask, in effect, that the courts adopt the following three rules: a landlord who initially leases or thereafter collects rent, without having a certificate of compliance, has abrogated his right to


26. Id.

27. On the total aspects of code violation cases, see PROSSER, TORTS 191-205 (3d ed. 1964); and see generally, Sax and Hiestand, Slumlordism as a Tort, 65 MICH. L. REV. 869 (1967); Mendozo v. Gonzalez, Cal. Super. Ct., Santa Clara County, No. 21761, (complaint filed Jan. 31, 1969), alleging extreme psychological stress on slum tenant and malicious conduct in maintaining apartment on the part of landlord. The quasi-contract cases in notes 28-31 are reported in Clearinghouse Review, (now published by the Northwestern Univ. Law School).
that rent;\textsuperscript{28} a landlord who leases non-complying premises has negotiated a contract void for reasons of public policy which override the lease;\textsuperscript{29} finally, a landlord who allows rented premises to deteriorate into non-compliance has voided his lease.\textsuperscript{30}

**Implied Warranty of Habitability**

Where a tenant withholds rent in a situation not covered by a rent-withholding law, the landlord can argue that he has been deprived of a "property right"—that of collecting rent.\textsuperscript{31} To counter this, the tenant may say the lease contained an implied warranty that the premises are habitable, which warranty has been violated when things like water, heat, or personal security are not provided by the landlord. (If the lease makes express warranties, so much the better, but this is rarely the case.)

If rent-withholding is permitted by statute or ordinance, the tenant can further argue that the state has made the landlord’s right to collect rent conditional upon the latter’s making the premises “habitable”—or whatever broad legal standard is used. Often the housing code provides such a standard. Here the state has not withdrawn or denied the landlord his right; it has only granted it conditionally upon compliance. In support of this, it should be noted that rent-withholding legislation often requires the rent to be put in escrow or deposited with a court official.

\textsuperscript{28} Goodloe v. Goodman Bros. Co., (now in Cir. Ct., Wayne County, Mich.).
\textsuperscript{29} Brown v. Southhall Realty Co., 237 A.2d 834 (D.C. Ct. App. 1968), held "where an owner of dwelling property, knowing housing code violations exist on the property which render it unsafe and unsanitary, executes a lease for the property, such lease is void and cannot be enforced." \textit{Id.} at 837-38. The code violations involved were an obstructed commode, a broken railing, and insufficient ceiling height in the basement. \textit{Cf.} Saunders v. First National Realty Corporation, 245 A.2d 836 (D.C. Ct. App. 1968). Some of the problems in making the rule of Brown operational are now coming before the courts: Stone v. Isom, No. 4899 (D.C. Cir. Ct., April, 1969) (trial court held that tenant who successfully invoked the defense of "illegal contract" could have his tenancy terminated only by being given the statutory notice to quit; Diamond Housing Corp. v. Robinson, No. LT 62391-68 (D.C. Ct. Gen. Sess., 1968) (held, that a landlord need not be cited by authorities for code violations before he can be precluded from obtaining a judgment of possession if he knew of the violations when the lease was signed.)
\textsuperscript{30} Perez v. Russo, No. 206772, Super. Ct., Cal., (filed May 17, 1968; prelim. injunction issued for plaintiffs). The \textit{Brown} case was cited with approval in \textit{Edwards} v. Habib, 397 F.2d 687 (D.C. Cir. 1968) at 702; \textit{Edwards} is a retaliatory eviction case, and the opinion stated that, upon deterioration into non-compliance, not only is the lease voided, but the tenant may also ask that the landlord’s certificate of code compliance be revoked, or, at least, not renewed; on this last point, see \textit{Tenants Win Policy Ruling, 3 Law in Action, No. 6 at 9 (Dec., 1968)}, in which it is reported that the Dist. of Colum. Dept. of Licenses and Inspections will not renew the licenses of non-complying premises.
Writs of Mandamus to Housing Officials

A final series of cases involves a private citizen asking, in a proceeding for a writ of mandamus, that housing officials be compelled to enforce the code provisions against named individuals. This is to say, in effect, that if public officials will not voluntarily perform their duties, then they should be compelled to do so. In more general terms, the plaintiff is asking that the city redeem the "promise" it made when it passed the code.\

He is asking that the housing experts, no matter what their professional judgment tells them, enforce the code more widely.

These legal arguments and rules, which courts today are being asked to adopt, put teeth into the codes. They render them more easily enforceable through litigation. They also suggest the kinds of provisions which future codes should include. What is really being sought by the plaintiffs in these cases is predictable governmental intervention in private real estate transactions, be they leases or sales. So future provisions might make such transactions legally invalid or rescindable if the subject of the agreement does not meet code standards. For instance, a building code violation should become an "encumbrance" on the title and be so recorded on the plat-index. A statute or ordinance to this effect would facilitate private compliance with housing codes by precluding sales and new leases; such laws would protect buyers as well as tenants.

Of course, most slum-tenant problems never reach the courts. Claims may be made individually, and mass protests are sometimes attempted first. Lack of heat, inadequate emergency repair service, poor plumbing, and rent increases have provided the issues for such protests and rent strikes. It is argued by some planners that code and ancillary public receivership programs do not work in a slum—whence sprang most of the litigation on which the foregoing discussion is based. Indeed, the underlying issue may be whether planners want a receivership program to work at all. Full code enforcement, some argue, would drive many slumlords out of business; the government would then have to assume their function, and supply the housing now provided by private landlords. The governmental burden thus shouldered would be large indeed. (If the

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32. See, e.g., Greenwood v. City of Detroit (pending now in Cir. Ct., Wayne County, Michigan). A pertinent problem of code enforcement is that of retroactivity: are a code's provisions retroactive, covering structures built prior to the enactment of the code?


housing were "public" in some sense, e.g., in public receivership or owned by a public authority, the question of whether housing codes are applicable to such dwellings raises new legal problems not discussed here.) Currently, New York City has title to about 30,000 tracts, only 2,000 of which are commercial. It has seized most of these through liens. The city's Commissioner of Real Estate predicts a 10% rise in the number of tracts in the city's hands during 1969. Most of these tracts are and will be in slum areas. Thus the city will be, at the end of this year, the unwilling landlord of more than 77,000 tenants.\textsuperscript{35}

For the present, however, it should be noted that no code exempts the slum areas of our cities from coverage. Their applicability is always city-wide,\textsuperscript{36} and city planners are now being called upon to fulfill the expectations created by the codes under which they work.

\section*{A Look At The Future}

This paper has suggested that some of the procedures which planners use to deal with redevelopment, sub-standard housing, and land development are selective, discretionary, and not helpful in deciding citizens' lawsuits against public officials. City planners and planning-related functions are coming under increasing judicial scrutiny. Planners may next be told that they must fulfill more of the expectations they have created. Recent interpretations of state and federal constitutions may permit more litigation over city planning projects. The case law is gradually establishing the right of citizens to contest and have courts review the policies of planning agencies.\textsuperscript{37} The

\textsuperscript{35} The implications of this idea that no city can afford to take title to deteriorating properties are developed in Cloward and Piven, Dissensus Politics, \textit{The New Republic} (April 20, 1968). (These authors reason that city officials and landlords are in collusion to block code enforcement in the slums.) \textit{See} Bennett, \textit{City Properties Continue to Grow}, \textit{N.Y. Times}, Dec. 14, 1968).

\textsuperscript{36} \textit{E.g.}: \textit{New Haven Housing Code}, \textsection 300, begins: "No person shall occupy as owner-occupant or let to another any dwelling or dwelling unit . . ." Subsequent sub-paragraphs begin: "Every dwelling . . ." (Quoted from Mandelker, \textit{Managing Our Urban Environment} 657.

\textsuperscript{37} Neither have social planners fulfilled the expectations of either their clients or the courts. That is why, today, courts are in the process of reviewing \textit{de facto} segregation in urban education. See \textit{e.g.}, Hobson v. Hansen, 265 F. Supp. 902 (1967), \textit{noted in} \textit{16 Amer. U. L. Rev.} 426 (1967); 81 \textit{Harv. L. Rev.} 702 (1967); courts are also reviewing the conditions which social workers impose on public assistance payments. The literature on the "welfare rights" movement is, by now, extensive. See Cloward and Elamn, \textit{Poverty, Injustice, and the Welfare System}, \textit{Part I. The Nation} (Feb. 28, 1966); \textit{Part II. The Nation} (Mar. 7, 1966); subsequent articles on welfare and housing appeared in \textit{The New Republic} and \textit{The Nation} through November, 1968. \textit{See also}: Reich, \textit{Individual Rights and Social Welfare: the Emerging Legal Issues}, 74 \textit{Yale L.J.} 1245 (1965).
most successful of these cases, from the private plaintiff's point of view, in the field of Urban Renewal, are *Powelton Village Home Owners Association v. H.U.D.*38 and *Norwalk Congress of Racial Equality v. Norwalk Redevelopment Authority.*39 In both cases, the plaintiffs, citizens seeking to dispute the policy determinations of state and federal renewal and housing authorities, were allowed to challenge location decisions for public housing projects and urban renewal districts in open court. The *Norwalk* court found the claims of racial discrimination made therein to be without merit, but the important holding of each case is that the court admitted that the plaintiffs had standing to sue. A 1968 decision of the United States Supreme Court makes this result an unshakeable part of our constitutional law. *Flast v. Cohen*40 held that a citizen, acting as a taxpayer and without suffering any further financial injury than the payment of his taxes would entail, is entitled to contest the legality of a governmental policy. This case will undoubtedly make taxpayer's suits more common in the future, and will eventually provide authority for contesting the application of and administration housing and zoning policies to unwilling citizens. Furthermore, the rule of *Flast* can be used to great advantage in class actions brought by citizens seeking broad code enforcement.

But the judicial opinion having the greatest impact on the city planning process—which, as is implicit in much of this discussion, is too often the captive of local politics—was handed down in Chicago in July of this year. Aldermen in that city have long enjoyed the power to veto the erection of public housing in their wards. Now, however, the Chicago Housing Authority is under an order, issued by Federal District Court Judge Richard Austin, to build 75% of all its future housing at least one mile from present Chicago ghettos and in areas that are 70% white. This case represents more than a guideline for planners working with the Authority; it is a constraint on their decision-making, solving, as it were, the planners' policy dilemma between "ghetto enrichment" and integration in favor of the latter.41

The following federal statute might be also become part of this same trend toward increased judicial scrutiny of the planning process:

Every person, who under color of any statute, ordinance,
regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, shall be liable to the party injured in an action of law, suit in equity or other proper, proceeding for redress.\textsuperscript{1}

This statute has been broadly interpreted by courts. It has been used to protect civil rights advocates and workers in the south from police harassment and mobs. It has been used to enforce integration of a restaurant on land rented from a city. There is thus ample precedent for its reaching public employees of various types, including planners whose inaction on housing codes is surely a "deprivation" of a right to expect governmental action to enforce the codes.\textsuperscript{2}

This statute, or others like it, may also take some pressure off the center-city housing market by providing legal support for integrating suburbs and enforcing central city housing codes. For example, fear of future development is one of the mainstays of the present system of zoning. Today, zoning districts operate to exclude large portions of the population, classified by income or race, from ever larger sectors of our housing market. Land accessible to jobs and cultural centers around our cities is becoming an increasingly scarce resource; evidence of this is the rapid rise in the land-component factor of recent new construction—from 10-12\% of total cost in 1960 to over 20\% recently.\textsuperscript{3} Density requirements, like one to four acre minimum zoning, now operate to deny some sectors of the housing market an equal opportunity to use the most essential precondition of modern, efficient housing—land on which to put it.

**Conclusion**

Statutes and ordinances concerned with redevelopment, minimum housing standards, and auxiliary programs (like receivership and prior lien laws) give the public the impression that they are applicable to all dwellings within the jurisdiction. In fact, they are not. Housing codes are enforced under standards not found in any legislation. In theory, their applicability is city-wide. In fact, the discretion of the planners,

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\textsuperscript{1} 42. Gautreux v. Chicago Housing Authority, No. 66 C 1459 (N.D. Ill. 1969; opinion dated Feb. 10, 1969) at 17: "It is also undenied that sites for the projects which have been constructed were chosen primarily to further the praiseworthy and urgent goals of low cost housing and urban renewal. Nevertheless, a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued." The court's order was issued July 1, 1969.


\textsuperscript{3} 44. For a more detailed review of this statute, see Friedman, supra note 20.
the economic feasibility of rehabilitation, and the relationship between landlords and the city determine the extent of actual enforcement. Under housing code receivership laws, the legislative standard for enforcement is the habitability of the building; the real standard is the economic feasibility of rehabilitation.

In each case, the real standard is more selective than the legislative or theoretical one. It is the first job of the planners to harmonize the two. In the alternative, he should urge that all of the planning legislation involved be redrafted using either the real standard or the standard which the public has been led to expect. It is more likely, however, that litigation between citizens and a planning agency will increase, and courts will accordingly develop expertise in identifying more precisely the public policies for which officials and planners have a statutory mandate. Rules of court may be required, in the end to, make our planning laws fully subject to litigation.

Much of what has been written here is directed at both lawyers and planners. Our legal system has too long regarded "public law" as something distinct from the legal rules governing events and transactions between private citizens. In an age when the government is exerting more and more control over the private sector, the two sectors of our law should be fused. This paper has attempted to suggest a jurisprudential basis for doing this in the field of urban affairs. But it is no longer enough to say that public law and private law should be combined. The question is, under what theory should the fusion take place? The expectations theory suggested here may prove appropriate for this task.

45. See Lefcoe, Savings Associations as Land Developers, 75 Yale L.J. 1271 (1966).