Accelerating Integration: Effective Remedies in Public Housing Discrimination Suits

Adam M. Shayne

University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Civil Rights and Discrimination Commons, Courts Commons, Housing Law Commons, and the State and Local Government Law Commons

Recommended Citation


Available at: https://repository.law.umich.edu/mjlr/vol23/iss2/5

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
ACCELERATING INTEGRATION: EFFECTIVE REMEDIES IN PUBLIC HOUSING DISCRIMINATION SUITS

Adam M. Shayne*

The current state of lower income housing in the United States is one of the most pressing concerns confronting our country. This nation’s future progress and prosperity hinge upon whether it will commit sufficient resources to supply adequate shelter for lower income individuals and families on a nondiscriminatory, low-density basis. Integrated public housing would make great strides toward resolving a number of serious domestic problems that arise from the current concentration of subsidized housing units in minority neighborhoods.

The increasingly visible rate of homelessness turns, to some extent, upon the lack of housing units available to those of little or no means. Between 1985 and 1987, the number of persons applying for emergency shelter increased at an average of twenty-two percent each year. Approximately 735,000 people across the nation are homeless on any given night, and this problem no longer afflicts only individuals. Entire families live without permanent shelter, including approximately 100,000 children. A strong commitment to affordable housing would allow many homeless persons to obtain adequate shelter for themselves and their families.

The nation’s drive towards integrated public schools could gain strength if integrated housing reduced the need for more problematic solutions such as busing. Courts have recognized

---


4. Id.

that "[i]t would be illogical indeed to maintain that neighborhood schools do not reflect the racial composition of the neighborhoods from which they draw their pupils."\(^{6}\) Residential segregation lies at the core of the inability of school boards to integrate public schools. Equalizing educational opportunities requires the integration of both public schools and public housing.

Finally, the problems of high-concentration public housing are graphically illustrated in larger cities by the prevalence of gangs that terrorize many of the housing projects. Drug use, crime, and vandalism are rampant.\(^{7}\) Children living in the projects are drawn or forced into gangs and illegal activities at young ages.\(^{8}\) Tenants of these projects are also much more likely to be the victims of crime than are other members of society.\(^{9}\) In a Philadelphia public housing discrimination suit, the Court of Appeals for the Third Circuit noted that concentrating lower income housing affected not only those buildings' tenants, but also "occupants of owner occupied dwellings, merchants, and institutions in the neighborhood."\(^{10}\) Such concentration, the court stated, "is thus prima facie at variance with the national housing policy."\(^{11}\)

Despite this array of problems, local housing authorities and the federal Department of Housing and Urban Development (HUD) continue to lag in constructing or rehabilitating public housing in scattered sites throughout nonminority neighborhoods. Plagued by recent scandals,\(^{12}\) HUD officials have cut agency programs in an apparent effort to increase accountabil-

---


11. Id. at 821.

12. See, e.g., N.Y. Times, June 17, 1989, at A22, col. 1 (editorial summarizing three major HUD scandals that came out of the administration of Samuel A. Pierce, who served as Secretary of HUD under President Reagan from 1981-88).
ity. Local city councils have also frustrated the progress of integrated public housing by refusing to approve proposed sites located in predominantly white neighborhoods. In many cities, the courts have played the most active role in insisting upon nondiscriminatory public housing. Although limited by their roles as members of the judiciary, judges have used a variety of remedies to coerce administrative and legislative bodies into augmenting the current supply of public housing in a manner that will lead to integrated residential neighborhoods.

This Note examines the different remedies employed by judges to integrate public housing and recommends a standard approach for courts to employ in the future. Part I describes the status of local and federal public housing policy in the United States. Part II examines litigation aimed at achieving the integration of public housing. This Part details short-term remedies employed by judges in several cities and long-term integration efforts by the courts in two cities: Chicago, Illinois, and Yonkers, New York. The Chicago and Yonkers suits exemplify the major obstacles that plaintiffs and judges face in developing appropriate measures to integrate housing. Next, Part III discusses the general problems inherent in housing remedies and suggests three principles to guide judges in devising their orders. Drawing upon these principles, it then analyzes the array of alternatives employed by the courts and measures the effectiveness of these remedies. Finally, Part IV concludes this Note by proposing a standard set of orders that should successfully implement scattered-site housing programs without extended periods of delay.

I. FEDERAL AND LOCAL HOUSING POLICY: SEGREGATION AND CONCENTRATION

Congress passed legislation marking the first major attempt to construct lower income public housing in 1937. Public housing in the United States has, since that time, faced two principal problems: segregation and concentration. In the past, local officials, with HUD funding, built public housing projects to ensure

14. See infra text accompanying notes 76-78.
15. See infra note 47 and accompanying text.
a complete segregation of whites and blacks. In addition, these units were generally located in large, high-rise apartments that contained exclusively lower income families. This concentration of lower income residents has led to serious problems within public housing complexes and the neighborhoods in which they are located. Unfortunately, both local and federal governments have been painfully slow in realizing the dramatic adverse social costs that accrue from concentrating public housing in lower income neighborhoods.

Since the 1970s, HUD regulations have insisted that new construction sites “avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.” In addition, a site is unacceptable if it is located in an area of minority race concentration; however, cost considerations are often a barrier to sites in other neighborhoods. HUD permits a waiver of its site requirements to meet “overriding housing needs” or if a sufficient number of units are available “outside areas of minority concentration.” The first exception, ironically, describes most large cities. The second exception, unfortunately, describes none. Thus, HUD has consistently approved construction of projects in minority neighborhoods because of the pressing need for housing and the lack of “feasible” alternative sites.

Even in those rare instances in which HUD does seek to encourage the construction of integrated public housing units, local housing officials usually manage to frustrate the federal agency's
efforts.\textsuperscript{26} The United States Housing Act "vest[s] in local public housing agencies the maximum amount of responsibility in the administration of their housing programs."\textsuperscript{27} In the past, inability to obtain proper zoning or approval from local officials triggered a waiver of HUD's site standards mandating integration.\textsuperscript{28} As three authors noted in their 1970 article on discriminatory site selection, "[c]ost, zoning, and local political review—the same factors that lie at the heart of the system of constraints facing all LHA's [local housing authorities]—are singled out by HUD regulation as satisfactory excuses for an LHA's failure to achieve nondiscriminatory site selection."\textsuperscript{29} Thus, municipal and federal officials together have managed to deny thousands of eligible tenants integrated public housing.

Nevertheless, there is a solution to the problems of public housing: scattered-site housing. Scattered-site housing programs limit the number of public housing units in any one area, and particularly in any one structure. The programs seek to integrate residential areas by restricting the amount of lower income housing placed in neighborhoods with a large percentage of residents who belong to minority groups.\textsuperscript{30} In several communities across the country, scattered-site programs, both mandatory and voluntary, are responsible for successfully providing safe, integrated housing to lower income tenants.\textsuperscript{31} Although HUD has provided neither the political will nor sufficient funding to institute these programs, plaintiffs and judges in public housing discrimination suits have begun to insist on their implementation in cities found responsible for intentional residential segregation.

II. THE DIFFICULTIES OF PUBLIC HOUSING DISCRIMINATION LITIGATION: SHORT-TERM AND LONG-TERM REMEDIES

Legal challenges to public housing discrimination in the 1940s resulted in a number of courts upholding the right of states to

\begin{itemize}
  \item \textsuperscript{26} Peel, Pickett & Buehl, supra note 22, at 362.
  \item \textsuperscript{27} 42 U.S.C.A. § 1437 (West Supp. 1989).
  \item \textsuperscript{28} Peel, Pickett & Buehl, supra note 22, at 362.
  \item \textsuperscript{29} Id.
  \item \textsuperscript{30} See Stevens, Scattered Low-Cost Housing Offers Renewed Hope to Poor and Minorities, N.Y. Times, Sept. 15, 1988, at A11, col. 1 (nat'l ed.).
  \item \textsuperscript{31} See Stevens, supra note 30 (describing a program in Montgomery County, Maryland, that "requires builders of housing developments to dedicate 12 percent of the dwellings for the use of families with low and moderate income").
\end{itemize}
operate housing on a separate-but-equal basis.\textsuperscript{32} In the next decade, however, some courts began to rule that intentional segregation by governmental bodies was constitutionally impermissible.\textsuperscript{33} The Supreme Court's ruling in Brown \textit{v. Board of Education},\textsuperscript{34} rejecting the separate-but-equal doctrine of \textit{Plessy v. Ferguson},\textsuperscript{35} clearly applied to public housing as well as to public schools.\textsuperscript{36} School desegregation has remained the more widely publicized issue, and through the 1970s some Supreme Court justices continued to insist that the government was not directly responsible for residential segregation.\textsuperscript{37} Despite the fundamental link between the two forms of segregation, some federal courts have excluded evidence concerning residential segregation when offered by plaintiffs as a means of proving intentional school segregation.\textsuperscript{38}

Although school desegregation and public housing discrimination cases contain many similarities, there is a fundamental difference in the availability of effective remedies. In school suits, courts have generally authorized or overseen busing programs that, once initiated, may indefinitely carry out the desired public policy.\textsuperscript{39} There is no parallel remedy in the field of public housing. Sites, particularly in scattered-site programs, must be chosen on a constant rather than a one-time basis. Scattered-site housing requires a continuing commitment to its implementation. This requirement creates considerable difficulties for members of the judiciary: judges cannot indefinitely oversee and con-

\textsuperscript{32} See Comment, The Public Housing Administration and Discrimination in Federally Assisted Low-Rent Housing, 64 Mich. L. Rev. 871, 875 n.30 (1966) (authored by Jordan D. Luttrell) (citing Favors \textit{v.} Randall, 40 F. Supp. 743 (E.D. Pa. 1941); Denard \textit{v.} Housing Auth., 203 Ark. 1050, 159 S.W.2d 764 (1942); Housing Auth. \textit{v.} Higginbotham, 143 S.W.2d 95 (Tex. Civ. App. 1940)).


\textsuperscript{34} 347 U.S. 483 (1954).

\textsuperscript{35} 163 U.S. 537 (1896).


\textsuperscript{38} Id. at 1743.

\textsuperscript{39} See P. Dimond, supra note 5, at 84-87, 160-64, 255-57, 332-34 (describing court-ordered busing plans in Detroit, Dayton, Columbus, and Wilmington).
trol the programs of local housing authorities. Eventually the
presiding judge must return full control to the appropriate au-
thorities and insist that they continue to develop public housing
projects in a nondiscriminatory manner.

In many public housing discrimination suits, the plaintiffs
have sought only a specific remedy to obtain short-term relief. In other cases, however, the judiciary has had to grapple with
the problem of ordering long-term remedies to address past de-
cades of purposeful segregation. Rarely, though, have the
courts ordered remedies that direct residential integration in
both the immediate and distant future.

A. Short-Term Remedies: Near-Sighted Solutions

Short-term remedies in public housing discrimination cases
have often succeeded. Such remedies have consisted of prevent-
ing the construction of specific projects in minority neighbor-
hoods or ensuring the building of a particular public housing
complex in a nonminority area. For example, in Bogalusa, Louisi-
siana, a federal court in 1969 issued a preliminary injunction
against the local housing authority and a construction company
to prevent construction of a public housing development in an
all-black neighborhood. The same year, property owners in the
only middle income black community in Tucson, Arizona, filed
suit to enjoin the placement of public housing in their neighbor-
hood. In both of these suits, the plaintiffs argued that the local
housing authority had chosen the disputed sites because of their
location in black neighborhoods. Regrettably, both suits re-
sulted in no new public housing units being built in either black
or white neighborhoods.

In other cases, judges have ordered local governing bodies to
issue building permits and to desist from otherwise interfering
with the construction of public housing projects in white neigh-
borhoods. In 1970, for instance, a federal judge ordered the city
of Lackawanna, New York, to take whatever steps necessary to

40. See infra Part II.A.
41. See infra Part II.B.
43. El Cortez Heights Residents & Property Owners Ass'n v. Tucson Hous. Auth., 10
44. Hick, 302 F. Supp at 620; El Cortez, 10 Ariz. App. at 133, 457 P.2d at 295.
allow construction to begin on a proposed public housing development in a primarily white neighborhood. It is rare, though, that such housing developments are proposed, and even more rare that they are actually constructed. Furthermore, despite modest successes in imposing short-term remedies, judges have been unable to achieve any long-term solutions to the obvious opposition to integrated housing.

B. Long-Term Remedies: Two Case Studies

Judges who have ordered local governments to set forth long-term public housing plans have faced stiff resistance. The conduct of officials in Chicago and Yonkers exemplifies this concerted opposition to integration. Federal judges found both cities guilty of intentional residential segregation; however, litigation continued for years as local officials frustrated the plaintiffs and judges' efforts to implement integration programs. The long and turbulent histories of these cases reveal the vast array of remedies available to judges and suggest which methods are most successful in implementing orders to integrate.

1. Chicago—Dorothy Gautreaux, along with more than 43,000 other black tenants in and applicants for public housing in Chicago, filed suit against the Chicago Housing Authority (CHA) and HUD in 1966. The plaintiffs alleged that both the federal and local government housing agencies had illegally discriminated against blacks by intentionally segregating them in the administration of lower income public housing projects. The plaintiffs offered evidence that the site-selection and tenant-selection procedures used in Chicago contained purposefully segregative features that placed public housing almost entirely in black neighborhoods and excluded black tenants from the few projects in white neighborhoods.


47. Other cities, such as Detroit, Boston, and Dallas are facing or have already faced similar public housing discrimination suits. Detroit Hous. Comm'n v. Lewis, 226 F.2d 180 (6th Cir. 1955); N.Y. Times, June 28, 1989, at A1, col. 4; Herbers, Breakup of Housing for Poor Is Backed in Integration Move, N.Y. Times, Apr. 28, 1987, at A1, col. 5.


50. See P. Dimond, supra note 5, at 205-08.
Federal District Judge Richard B. Austin ruled on February 10, 1969, that the plaintiffs had satisfied their burden of proof against CHA. Judge Austin urged the city to rectify the situation quickly: "[E]xisting patterns of racial separation must be reversed if there is to be a chance of averting the desperately intensifying division of Whites and Negroes in Chicago." The judge noted that the President's Commission on Civil Disorders had estimated that Chicago would be fifty percent black by 1984 and that "[b]y 1984 it may be too late to heal racial divisions."

Currently, more than five years after 1984, Chicago remains one of the most segregated cities in the nation despite ongoing litigation in the Gautreaux dispute. Since 1969, the Gautreaux plaintiffs have returned to court more than twenty times, not including separate attorneys' fees litigation. Federal district courts, courts of appeals, and the Supreme Court of the United States have adopted a large number of different remedies designed to begin the program of integration in Chicago's public housing projects; yet the effectiveness of these remedies has

52. Id: at 915.
53. Id.
been extremely limited. Only in the last few years has judicial action succeeded in increasing the availability of integrated public housing.

The Gautreaux litigation produced separate remedies against CHA and HUD, and the eventual success of these remedies reflected the defendants' gradual willingness to comply. In the suit against HUD, the plaintiffs charged the federal agency with violating the fifth amendment by supporting the discriminatory practices of CHA. The district court dismissed the complaint in 1970; however, the Seventh Circuit Court of Appeals reversed, holding that HUD had violated both the due process clause of the fifth amendment and section 601 of the Civil Rights Act of 1964 by funding CHA's segregative housing policies. Relying on the decision of the court of appeals, the district court enjoined the transfer of twenty-six million dollars from HUD to CHA as part of the Model Cities Program. Judge Austin, in issuing the injunction, blamed the city for the negative impact that the loss of funds would have upon the citizens of Chicago: "Four thousand would lose their jobs and many other thousands would be deprived of the benefits derived from the Model Cities Program. Only the City of Chicago, by failing to comply with its undertakings, and neither the plaintiffs nor this court, would be responsible for such a catastrophe." On appeal, the Seventh Circuit once again reversed the lower court. The appellate court ruled that although the city did fail to comply with the 1969 judgment order, an insufficient nexus existed between the CHA housing program and HUD's Model Cities Program to permit the enjoining of the transfer of Model Cities funds to Chicago.

The September 1973 final judgment order issued against HUD by the district court required the department to use its "best efforts" in cooperating with the local housing authority and in creating integrated public housing. The plaintiffs had sought to have the court issue an order that would require HUD to imple-

57. See infra text accompanying notes 85-86.
58. See infra text accompanying notes 90-91.
59. Gautreaux v. Romney, 448 F.2d 731, 740 (7th Cir. 1971).
63. Id. at 126-28.
ment integrated housing in the Chicago suburbs as well as in the city. However, Judge Austin ruled that a federal court could not order this type of metropolitan-wide relief when the plaintiffs had proven constitutional violations only within the city limits. The court of appeals reversed this part of the lower court’s decision, and the U.S. Supreme Court affirmed in Hills v. Gautreaux, holding that the district court had the authority to order HUD to institute remedies beyond the city’s boundaries because the agency had violated the Constitution and federal laws.

After HUD lost the case before the Supreme Court, the Department agreed to a demonstration program that provided two to three hundred units each year to Gautreaux families. HUD decided to use a housing assistance payment program to provide relief to members of the Gautreaux class. From 1976 to mid-1986, nearly 3,000 families (approximately 10,000 persons) benefited from new housing opportunities due to the consent decree. Thus, HUD eventually accepted its duty to integrate public housing and succeeded in implementing a program that increased the number of available integrated housing units.

The Chicago City Council and CHA proved less willing to comply with the courts’ orders. A few months after he found CHA guilty of intentional discrimination, Judge Austin issued a supplemental judgment order that allowed the housing authority to complete the “proposed projects in black areas that had triggered the lawsuit, but ordered that three-fourths of future family units would have to be built in white areas.” The judge also required that the next 700 units be built in “white areas” to mirror those already approved for minority neighborhoods. Furthermore, the judgment order prohibited CHA from constructing any projects with more than 120 dwelling units, taller than three stories, or in areas already containing more than fifteen

65. Id.
70. P. DIMOND, supra note 5, at 208.
71. Id. at 209.
percent CHA residents.\textsuperscript{72} Finally, the court directed CHA to "use its best efforts to increase the supply of dwelling units as rapidly as possible" in conformity with the 'scatter,' low-rise, low-density objectives of the decree.\textsuperscript{73}

For a year after the court’s order, CHA did not propose any new public housing sites to the city council.\textsuperscript{74} After a number of conferences, the plaintiffs obtained from Judge Austin an order that required CHA to submit proposed sites to the council according to a specific timetable. Yet CHA stalled for another year by appealing the order to the court of appeals and to the Supreme Court.\textsuperscript{75}

CHA finally submitted proposed sites for at least 1500 units to the Chicago City Council and the Chicago Plan Commission, a city agency, on March 5, 1971.\textsuperscript{76} By July 1, the council and the planning commission had approved the acquisition of enough sites to provide fewer than 200 dwelling units that conformed with the court’s 1969 judgment order.\textsuperscript{77} No other sites were approved by February 2, 1972, when plaintiffs once again brought the case to court. The district court held that the city’s failure to approve at least 200 sites violated plaintiffs’ rights under the equal protection clause of the fourteenth amendment.\textsuperscript{78} Hence, the district court held that the law requiring city council approval of public housing sites would no longer apply to CHA’s actions.\textsuperscript{79} Furthermore, Judge Austin set forth a strict timetable for CHA that required the agency to begin construction as soon as possible, including construction on sites not formally approved by the city council.\textsuperscript{80}

In an effort to force implementation of intra-city relief, the plaintiffs filed suit again in 1974, seeking to have a commissioner appointed to take control of public housing programs in Chicago.\textsuperscript{81} Judge Austin rejected such an approach. Instead, he appointed a federal magistrate to serve as a master in order to review patterns of racial segregation in public housing as well as

\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{77} Id. at 829.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 830.
\textsuperscript{80} Id. at 830-31.
CHA's efforts to comply with court orders. In both 1980 and 1984, the plaintiff class attempted to have a receiver appointed over the CHA, but the district court denied this relief.

After several more years of little progress in public housing integration, the district court finally agreed to place CHA's scattered-site program into receivership on May 14, 1987. Federal District Judge Marvin Aspen noted the court's frustration with CHA's failure to abide by the many orders issued since 1969:

Enough is enough. It is fundamentally clear that in light of CHA's track record, not only in CHA's present form but also in its multitude of previous incarnations, this case is well beyond the point where bureaucratic squabbles between local and federal agencies will be tolerated as an excuse for noncompliance with the important remedies sought by the plaintiffs, agreed to by the parties and ordered by the Court.

Thus, in the first five years after the court's initial remedy order, CHA built no new housing in a city of three million people. The ensuing five years produced only 117 new units. After 1979, CHA added a few hundred additional units. On three separate occasions, the plaintiffs sought to have the scattered-site program placed into receivership so that interested parties could administer it, but not until May 1987 did a federal judge finally agree that the CHA should no longer retain control over the program.

After being placed into receivership, Chicago's scattered-site program made some limited progress toward integrating the city's public housing units. Within one year, 15 buildings with 96 apartments had been renovated, were under construction, or were awaiting HUD approval. By September 30, 1989, the receiver reported that rehabilitation was complete for 14 buildings

---

82. Id. at 37-38.
83. In such a case, a receiver would take over management of CHA, or of a particular program normally administered by CHA officials.
84. Speech by Alexander Polikoff, supra note 69.
86. Id.
with 72 apartments and that an additional 23 buildings with 147 units were under rehabilitation.\textsuperscript{91}

Although the HUD remedies placed several hundred tenants into subsidized housing in the late 1970s, the CHA remedies did not achieve any sort of compliance until the late 1980s. Even after the court removed the obstacle of city council approval of site proposals, CHA managed to delay development and construction of public housing sites throughout the city. In addition, there was little coordination between HUD and CHA's activities to comply with the courts' orders. Both agencies demonstrated a desire to use appeals and bureaucratic devices to contest any attempt by the federal courts to insist upon a non-discriminatory policy for site and tenant selection.

\textbf{2. Yonkers—} The United States Department of Justice filed a suit in 1980 against the city of Yonkers, New York, and its board of education, alleging segregation in both its public schools and public housing.\textsuperscript{92} Litigation in the case extended into 1985, when the district court found the city liable for intentional housing and school segregation.\textsuperscript{93} Federal District Judge Leonard B. Sand criticized Yonkers for engaging in "a thirty-year practice of consistently rejecting the integrative alternative in favor of the segregative."\textsuperscript{94} Following a six-day hearing to debate appropriate remedies, Judge Sand issued a housing remedy order on May 28, 1986.\textsuperscript{95}

The order began by enjoining the city, its officials, and employees from impeding the integration of public housing.\textsuperscript{96} In the most far-reaching section of the opinion, the district court ordered the city to submit site proposals for 140 units of family public housing within thirty days and site proposals for an additional 60 units within ninety days.\textsuperscript{97} The order also required the

\textsuperscript{91} CHA Scattered Site Housing Program Status Report #11 at 2, Gautreaux v. Pierce, Nos. 66-C-1459, 66-C-1460 (N.D. Ill. Oct. 20 1989) (covering the period July 1, 1989 thru September 30, 1989). The receiver had also prepared sites for the construction of several hundred new apartments; however, stringent HUD regulations limiting the total development cost of subsidized units prevented any progress on new construction. \textit{Id.} at 1-3. Thus, once again, the federal agency frustrated implementation of the court's orders.

\textsuperscript{92} Days, \textit{supra} note 37, at 1764-65.


\textsuperscript{94} \textit{Id.} at 1368.


\textsuperscript{96} \textit{Id.}

\textsuperscript{97} United States v. Yonkers Bd. of Educ., 635 F. Supp. at 1580-81.
city to submit development proposals\textsuperscript{98} for the first 140 units within ninety days of HUD’s approval of the sites.\textsuperscript{99} Furthermore, the court insisted that within fifteen days Yonkers “execute a grant agreement with HUD for the 1984-85 program year, with the condition that receipt of the grant depends on submission of acceptable sites for 140 units of family public housing.”\textsuperscript{100} Each of these provisions of the housing remedy order also contained a “devolution” clause allowing the plaintiff (Justice Department) and the plaintiff-intervenor (NAACP) to submit sites, proposals, or a grant agreement to the court for approval any time that the city failed to carry out its assigned task within the allotted time period.\textsuperscript{101}

The housing remedy order also required the city of Yonkers to set up an “Affordable Housing Trust Fund,” using at least twenty-five percent of certain funds it received from HUD.\textsuperscript{102} The district court ordered the city to use its “best efforts” to secure additional funding for the trust, which would assist in financing development of lower and moderate income housing by private developers.\textsuperscript{103} Finally, Judge Sand gave city officials six months to submit a plan for the development of additional public housing units in the predominantly white residential areas of northwest or east Yonkers.\textsuperscript{104}

In 1987, the Court of Appeals for the Second Circuit affirmed the housing remedy order along with the original liability ruling.\textsuperscript{105} The city, however, had already defaulted. Yonkers failed to submit the proposed sites for 200 units before the thirty and ninety-day deadlines. In addition, the city council did not agree upon a plan for additional public housing units within the six-month time period. Judge Sand set out to ensure that the city complied with his housing remedy order. He appointed an “outside housing advisor” in early 1987.\textsuperscript{106} He also ordered the

\textsuperscript{98.} Pursuant to 24 C.F.R. § 941.404 (1989). Development proposals contain a description of the project, information about the site, and estimated construction costs. \textit{Id.}

\textsuperscript{99.} United States v. Yonkers Bd. of Educ., 635 F. Supp. at 1581. The court ordered HUD to advise the city of HUD’s approval or rejection of the site proposals within fifteen days of their submission. \textit{Id.} at 1580-81.

\textsuperscript{100.} \textit{Id.} at 1580.

\textsuperscript{101.} \textit{Id.} at 1580-81.

\textsuperscript{102.} \textit{Id.} at 1581-82.

\textsuperscript{103.} \textit{Id.} at 1582.

\textsuperscript{104.} \textit{Id.}


Yonkers Board of Education to return to the city certain vacant portions of land so that the city could use the land for public housing.\textsuperscript{107} In addition, the judge enjoined city officials from taking any further action in implementing private development projects until it proceeded with its obligations to public housing.\textsuperscript{108}

The district court began 1988 by entering a consent judgment to which both parties had agreed.\textsuperscript{109} The consent judgment committed the city to build 200 units of public housing on seven specific sites and “to implement a long-term plan to achieve the goal of 800 units of subsidized housing that had been recommended by the plaintiffs.”\textsuperscript{110} Yet Yonkers attempted to disavow the consent judgment and even “offered to return approximately $30 million of federal funds in the event the Supreme Court should set aside the public housing provisions of the Housing Remedy Order.”\textsuperscript{111} In June, the district court entered a new long-term order which the city council subsequently rejected.\textsuperscript{112}

Finally, at the end of July 1988, Judge Sand demanded that the city council either enact a specified legislative package detailing the city’s long-term housing plan or face contempt charges and stiff fines. The fines against the city began at $100 per day and doubled in amount each day of continued noncompliance. Furthermore, each council member voting against the legislation would be fined $500 per day and imprisoned after ten days of noncompliance.\textsuperscript{113} Judge Sand excoriated the city council for its refusal to comply with the lower court’s order:

“[T]here does have to come a moment of truth, a moment of reckoning, a moment when the City of Yonkers seeks not to become the national symbol of defiance to civil rights and to heap shame upon shame upon itself, but to recognize its obligation to conform to the laws of the land and not step by step, order by order, but in the way in which any responsible community concerned about the welfare of its citizens functions. That is not go-

\textsuperscript{108} Id. at 1415.
\textsuperscript{109} United States v. City of Yonkers, 856 F.2d 444, 448 (2d Cir. 1988).
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 449.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 450 (describing district court’s unpublished order).
When the city council failed to pass the legislative package on August 1, the district court imposed the sanctions.\textsuperscript{116} The court of appeals affirmed the order, although it set a ceiling for the fines against the city at $1,000,000 per day.\textsuperscript{116}

Refusing to reconsider the sanctions against the city, the United States Supreme Court agreed to stay the fines against the individual council members in order to rule on the permissibility of such an action.\textsuperscript{117} After thirteen days of fines against the city, totalling $819,100, two council members changed their votes and the housing resolution passed the city council.\textsuperscript{118} By this time, the City of Yonkers had been forced to lay off more than 400 employees, to limit sanitation services, and to close all public libraries and parks.\textsuperscript{119}

When the Supreme Court finally addressed the issue of sanctions against the individual council members in \textit{Spallone v. United States},\textsuperscript{120} the five to four majority did not decide that the fines were inevitably beyond the scope of a district judge’s authority. Instead, the Court’s majority held that the district court judge should have waited to determine if the fines against the city would be sufficient to achieve compliance before levying additional fines against the opposing council members.\textsuperscript{121} In dissent, Justice Brennan argued that the Court should defer to the district court’s more knowledgeable vantage point.\textsuperscript{122} He also noted that the added fines against the council members might “secure compliance more promptly, minimizing the overall disruptive effect of the city sanctions on city services generally and long-term compliance with the Consent Decree in particular.”\textsuperscript{123} Finally, Justice Brennan commented, “I hope such a message [from the majority] will not daunt the courage of district courts who, if ever again faced with such protracted defiance, must

\textsuperscript{114} Id. at 451 (quoting the lower court’s statement at the August 2, 1988 contempt hearing).
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 460.
\textsuperscript{119} Spallone, 110 S. Ct. at 633.
\textsuperscript{120} Id. at 633-35.
\textsuperscript{121} Id. at 634-35.
\textsuperscript{122} Id. at 635 (Brennan, J., dissenting).
\textsuperscript{123} Id. at 641 (Brennan, J., dissenting).
carefully yet firmly secure compliance with their remedial orders."

As litigation concerning the opposing council members' sanctions persisted, Yonkers made little progress towards achieving the goals required by the district court. Not one new unit of public housing has been built. In addition, Henry Spallone, one of the leading council members opposed to integration, was elected mayor of Yonkers in November 1989. Spallone's political ascendancy and his claim of a public mandate has left Yonkers even further from reaching some sort of agreement with the district court over its public housing policy.

III. GUIDING PRINCIPLES AND THE EFFECTIVENESS OF REMEDIES IN HOUSING DISCRIMINATION SUITS

The political reality of cases such as Yonkers and Gautreaux is plain: no one wants public housing in his or her neighborhood. Residents fear the three major concerns commonly associated with public housing: crime, decreasing property values, and integration. Scattered-site public housing seeks to reduce these fears, but white residents, who traditionally have controlled political mechanisms, still successfully avoid placing public housing in their own neighborhoods. The few projects placed in white areas purposefully admit only elderly or white tenants.

In public housing discrimination litigation, a judge possesses considerable flexibility in fashioning an equitable remedy when she exercises her authority to correct a constitutional violation. The judge's "task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." Furthermore, as the Supreme Court insisted in a voting rights case, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate

---

124. Id. at 648 (Brennan, J., dissenting).
126. Id.
127. Id. (noting that Mayor Spallone has expressed interest in disputing the 1988 consent decree approved by Judge Sand).
128. Cf. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (holding that after a school board fails to offer suitable remedies, the district court has broad power to design a remedy to implement integration).
129. Id. at 16.
the discriminatory effects of the past as well as bar like discrimi-
nation in the future.\textsuperscript{130}

Despite its broad authority to implement remedies, the judici-
ary in these cases has struggled with the conflict between the
plaintiffs' right to integrated public housing and the defendant
local governments' right to limited interference with their legis-
lnative and administrative duties. Unfortunately, the remedies
created by the courts have been astoundingly unsuccessful in se-
curing plaintiffs' rights. These remedies have permitted defend-
ant city governments and HUD to retain enough authority to
frustrate any real progress toward residential integration.

Some public housing discrimination suits such as Gautreaux
ironically have resulted in the complete cessation of subsidized
housing construction in any neighborhood. This result hits hard-
est those who are most in need of any kind of shelter; it is there-
fore the result that judges should most carefully attempt to
avoid. When attempting to fashion remedies that achieve tangi-
ble results in public housing discrimination suits, courts should
follow several key principles. First, and most importantly, reme-
dies must immediately initiate some form of site selection and
construction or rehabilitation. The courts must prevent any de-
lays in the availability of new public housing units. Judges must
exercise great care to ensure that remedies do not result in a
decrease in the opening or availability of housing. Second, the
remedies must also implement long-range plans that establish
appropriate goals for the distribution of housing sites through-
out different neighborhoods, thereby effectuating residential
integration.

Finally, both the long-term and short-term plans should allow
local housing authorities as much input and control over scat-
tered-site programs as they are willing to provide. If the local
authorities propose reasonable sites according to a strict timeta-
bale established by the court, the judge should permit implemen-
tation of the plans. Any failure to meet set deadlines, however,
should result in an immediate transfer of authority back to the
courts or court-appointed officials. The judiciary cannot allow
local authorities, whose discriminatory policies first caused the
litigation, to continue to obstruct efforts to initiate scattered-site
housing programs and residential integration. Nevertheless, it is
important that local administrative bodies have the opportunity
to leave behind past wrongs by embarking on a new path. The
machinery of government will function more efficiently if the ju-

\textsuperscript{130} Louisiana v. United States, 380 U.S. 145, 154 (1965).
The judiciary can rely on local officials to administer their own public housing programs.

As the various court orders in public housing discrimination cases demonstrate, judges have failed to focus adequately on these three key principles necessary to appropriate relief for the plaintiffs. As a result, courts have not instituted short-term and long-term plans for public housing integration that adequately benefit the plaintiff classes.

A. Deadlines for Site Proposals and Construction

One remedy, common to both the Gautreaux and Yonkers suits, required the local authorities to propose and develop a specified number of sites for public housing according to a timetable. This “deadline” remedy permitted the local authorities to select the particular sites, provided that a given percentage of those sites were located in predominantly white areas. The advantage of this type of order is that it sets both short-term and long-term goals for the city, and it avoids more punitive measures.

The problem with the “deadline” remedy is that it has proven unsuccessful. Both in Chicago and Yonkers, for instance, the cities defaulted on proposing the required number of sites by the courts’ deadlines. The remedy has failed because the courts allowed local officials to retain too much authority for too long. Most cities involved in public housing discrimination suits already have a long history of opposition to integrated housing; it should not take an additional year, or several years, to realize that city officials will not comply with already missed deadlines. In all likelihood, local officials will not quickly change their behavior and abide by court-ordered deadlines if courts do not impose additional sanctions.

A timetable establishing deadlines for site proposals and construction is essential to court-ordered, scattered-site programs. However, the judiciary must insist on adherence to the timetable, and a judge must strengthen a deadline order with sanctions or alternative implementation plans that take effect immediately if the city fails to abide by the original schedule. Thus, the important issue is what type of reinforcement for deadlines will ensure the progress of scattered-site programs.
B. Bypassing the City Council

The judges in *Gautreaux* and *Yonkers* took vastly different approaches in their dealings with recalcitrant city councils. In *Gautreaux*, the district court judge eventually bypassed the Chicago City Council and approved public housing sites himself, despite a state law requiring council approval of the sites. This decision facilitated the process of constructing public housing units in white residential areas. Of course, Judge Austin did not decide to use this remedy until the city's aldermen had given him ample proof of their refusal to approve public housing sites in nonminority areas. The bypass ruling came in 1972, three years after the judge issued the first remedy in the *Gautreaux* litigation. Appeals of the ruling delayed its implementation for another two years.

Thus, beginning in 1974, CHA no longer needed approval from the Chicago City Council for public housing sites. However, CHA had a history of opposition to integrated housing similar to that of the city council. The court failed to recognize that it had surmounted only one of the two major obstacles to residential integration. The local housing authority retained sufficient power to frustrate efforts by the plaintiffs to obtain relief until 1987, when Judge Aspen ordered CHA's scattered-site program into receivership. It was only at that point, eighteen years after the original finding of discrimination in the case, that the court relieved the culpable parties of control over public housing sites and placed the scattered-site housing program into the hands of private organizations.

Thus, bypassing the city council generally helps to achieve short-term goals but is not particularly useful in long-term planning. It only removes authority from local legislators, allowing housing officials to continue to frustrate integration programs if they so choose. As such, this remedy cannot be expected to achieve the desired compliance without more direct measures.

C. Fines

In *Yonkers*, the district court judge sought to force the city council to accept publicly a plan for integrated public housing.

133. See *supra* note 85 and accompanying text.
He declined to bypass the city council, insisting that "this Court will stay its hand until it is conclusively established that no voluntary compliance will be forthcoming."134 After Yonkers had defaulted on three of the important deadlines established by the housing remedy order, Judge Sand continued to resist contempt sanctions and attempted to encourage voluntary compliance by the city council.135 The city council proved quite stubborn and agreed to the legislation only after the court imposed drastic fines on the city.

Even after the Yonkers City Council finally passed the resolution accepting a plan for housing integration, the local authorities had not yet proposed or accepted any sites or initiated construction on any public housing units. Thus, the New York judge's approach delayed even further the commencement of construction while he battled with the city council over passage of a resolution. This tactic aspired to promote long-term remedies, but sacrificed the possibility of any short-term improvements in the availability of public housing units.

Imposing substantial fines upon a city, as evident in Yonkers, is a severe measure used to spark local authorities to act. Particularly when the city faces the necessity of laying off public employees, city council members realize that their votes are responsible for the loss of patronage and support.136 Yonkers faced bankruptcy within a matter of weeks.137 Nevertheless, the possibility remains that the fines will fail to move city officials or public sentiment.138

Furthermore, those who suffer the most from fines against the city are without fault. These punitive measures adversely affect those who rely the most upon city services and jobs. Lower income citizens, including the plaintiffs in the litigation, are most likely to feel the impact of a curtailment of city services and job lay-offs. These people should not suffer for the recalcitrance of city officials. Fining the city also reduces the resources available

136. Feron, supra note 118.
137. Id.
138. In Yonkers, a bumper sticker stating "Bankruptcy is better" became popular during the city's financial crisis, which was brought about by the court's sanctions. Fodevaro, Yonkers Race Is Viewed As Vote on Housing Plan, N.Y. Times, Nov. 3, 1989, at B8, col. 2.
to comply with the court’s orders. Furthermore, although fines may result in immediate action, they often cause bitter resentment as well, and thus jeopardize long-range interests of returning full control to the local authorities. The courts need to consider constructive, rather than punitive, measures to encourage city officials to support scattered-site housing programs.

Sanctions against individual city officials who are directly responsible for the lack of compliance with a court’s order impose punishment on those who are at fault and do not place any direct costs on the city. However, such fines may well make city officials martyrs in the eyes of their constituents, and these sanctions still do not ensure compliance with the court’s orders. Individual contempt citations may also instill resentment in the punished officials towards the policies supported by the court. Rather than wage a war against the recalcitrance of a small group of city officials, the courts must first seek to grant the plaintiffs the relief that they desire.

D. Masters and Outside Housing Advisors

The appointment of a master or outside housing advisor may facilitate the proposal or approval of scattered-site public housing, but such an appointment is a means to an end rather than a real solution to the problems facing the court. Appointments may frustrate efforts to seek immediate relief because the appointed persons add another level of bureaucracy to the housing process. Masters or advisors may take more time to produce reports than expected or desired. The court may find an advisor extremely useful in pondering the specifics of any housing plan; however, the implementation process remains in the court’s power.


140. The Supreme Court’s narrow decision in Spallone did not rule out the permissibility of such fines. Rather, the Court held that such fines could not be imposed concurrently with the fines against the city. 110 S. Ct. at 634-35.

E. Receivership

Placing a city's scattered-site housing program into receivership may be a final effort by a court to relieve an obstinate local body of its responsibilities. Such a measure is quite drastic, and the court should consider it only if numerous other remedies have failed. However, the judiciary need not wait twenty years to decide that a local housing authority cannot be permitted to carry on its efforts to frustrate court-ordered integration. One disadvantage to a receiver is that the time it takes the receiver to familiarize himself with the city's land holdings is much greater than if the local housing authority retains its authority.

Of course, receivership cannot permanently replace the local housing authority. At some point, the court will have to return a city's housing program to the appropriate administrative agency, preferably before the agency becomes too accustomed to functioning without it.

F. Devolution Clause

Another possible form of relief in public housing discrimination suits allows the plaintiffs to submit their own proposals if the city housing authority fails to meet the court's deadline. The housing remedy order in Yonkers included provisions that required the plaintiffs to submit to the court a grant agreement, site proposals, and development plans only after the city missed the court-ordered deadline. The court also added a more sweeping devolution clause, reserving the authority to appoint a third party to prepare any materials required by the order.

Although Yonkers defaulted on the deadlines, Judge Sand refrained from effectuating the alternative provisions, choosing instead to force the city council to abide by the original plan.

Devolution clauses permit a court to set both short-term and long-term housing goals. Furthermore, this remedy accords the local authorities significant control over public housing if they choose to accept it and meet minimum requirements. Finally, the devolution provisions assure that the plaintiffs will obtain relief because they can make their own proposals as soon as the city fails to meet its obligations. If the plaintiffs are incapable of

143. Id. at 1581.
preparing the proper documents and proposals, the court may appoint a neutral third party, an expert in the field, to do the work and receive compensation from the defendants.\textsuperscript{144}

IV. Conclusion: A Proposed Order for Implementation

When selecting remedies to eliminate illegal segregation in public housing, the courts must seek to implement public policy by promoting residential integration. Scattered-site housing programs can and do work. These programs are the key to eliminating discrimination in public housing. In addition, they help to reduce the serious problems brought about by the concentration of lower income housing. Therefore, the judiciary must be more firm in requiring local housing authorities to initiate such programs rapidly. A commitment to scattered-site housing requires remedies that focus upon both short-term plans and long-term goals. Although judges must permit local authorities to rectify past injustices in site selection, the judiciary cannot allow these authorities to continue to deny the rights of citizens who seek equal opportunities in obtaining subsidized public housing.

The structure for a model judicial order in public housing discrimination suits emerges from the synthesis of those remedies that closely adhere to the key principles discussed above. Clearly, any standard order must have a deadline for site proposals and the development of a specified number of subsidized units within non-minority neighborhoods. This timetable must insist upon both short-term plans and long-term goals for implementing the court’s order, and the judge must demand strict compliance with the deadlines.

The standard order should also include a devolution clause that permits the plaintiffs or a third party appointed by the court to submit to the judge any required proposals or plans that the defendants have failed to complete within the allotted time period. Such clauses avoid time-consuming bickering and bargaining between the court and the defendants, and they permit the plaintiffs to take an active part in effectuating their own desired relief. In addition, the standard order should propose placing the scattered-site program into receivership if the plaintiffs can demonstrate at a later date (one year, not twenty years) that the defendants have continually refused to agree upon acceptable long-term housing plans.

\textsuperscript{144} Id.
An additional incentive for short-term compliance with the court's order would be an injunction prohibiting the payment of salaries to those officials directly responsible for the city's failure to meet its obligations. For instance, if the local housing authority officials refused to comply with a judge's request for a certain number of proposed sites within thirty days, the judge would enjoin the payment of salary to those officials for that thirty-day period. Theoretically, this remedy is easier to accept than the imposition of fines, although both remedies have a similar effect. A salary injunction rests on the premise that if officials do not abide by their obligation to uphold the Constitution and faithfully execute their duties, they should not receive compensation. More practically, the city itself does not lose money; rather, it retains part of its coffers because of the officials' irresponsibility. In this manner, those who depend upon city services do not suffer for the actions of public servants.

Through the use of these measures, courts may allow city officials to decide whether they will assume—or abdicate—their constitutional responsibilities. Local authorities need to realize that the integration of scattered-site public housing must and will occur with or without their help. As the success of scattered-site housing continues across the country, more local housing authorities may begin to implement voluntarily these programs aimed at achieving effective nondiscriminatory housing. However, judges must stand ready to insist upon compliance with their orders in the face of resistance to constitutionally mandated integration.

145. A distinction might be drawn between fining city officials and temporarily withholding their salaries until they fulfill their legal obligations. The latter type of sanctions do not appear to conflict with the Supreme Court's decision in Spallone. See supra note 140 and accompanying text.