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## PUBLIC HOUSING AND DISCRIMINATION IN SITE SELECTION

Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.<sup>1</sup>

The recent decision of *Gautreaux v. Chicago Housing Authority*<sup>2</sup> held that it must be clear to all, with clear perception, that the pattern of de facto housing segregation in public housing has chiefly resulted because of the uniform practice of the dominant white majority in discriminating generally against blacks in the sale and rental of housing. In *Valtierra v. Housing Authority of City of San Jose*,<sup>3</sup> the Supreme Court overturned a state constitutional provision, which made referenda mandatory to determine the acceptability of low income public housing sites, as being a totally benign, technical economic classification. The courts stated that "referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."<sup>4</sup>

This comment analyzes the existing methods of determining site selection for low income public housing as disclosed by *Gautreaux* and *Valtierra* and discusses the claim that these methods violate the Constitution as a denial of equal protection.

### DISCRIMINATION IN SITE SELECTION

In *Gautreaux v. Chicago Housing Authority*,<sup>5</sup> black tenants and applicants for public housing in Chicago brought suit against the Chicago Housing Authority (CHA) contending that the defendants had deprived them of rights guaranteed by the fourteenth amendment. The first count of the complaint alleged that the defendants had intentionally selected sites and assigned tenants to public housing units in a manner that maintained "existing patterns of urban residential segregation by race" in Chicago, thus violating plaintiffs' right to the equal protection of the laws. Count three was identical to the first count except that it omitted any allegation of intent on the part of CHA.<sup>6</sup> The plaintiffs sought declaratory and injunctive relief. The second and fourth counts repeated the allegations of counts one and three, and demanded relief pursuant to section 601, title VI of the Civil Rights Act of 1964.<sup>7</sup>

<sup>1</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

<sup>2</sup> 296 F. Supp. 907 (N.D. Ill. 1969).

<sup>3</sup> 39 U.S.L.W. 4488 (U.S. Apr. 27, 1971).

<sup>4</sup> *Id.* at 4489.

<sup>5</sup> 296 F. Supp. 907 (N.D. Ill. 1969).

<sup>6</sup> *Gautreaux v. Chicago Housing Authority*, 265 F.Supp. 582, 583 (N.D. Ill. 1967).

<sup>7</sup> 42 U.S.C. § 2000d (1964).

CHA moved to dismiss the complaint for three reasons: 1) that plaintiffs failed to state a claim upon which relief could be granted, 2) that the plaintiffs lacked standing, and 3) that the class action was improper.<sup>8</sup> The court denied defendant's motion to dismiss counts one and two but did dismiss counts three and four because the plaintiffs' failed to allege intent.<sup>9</sup>

Evidence was heard on counts one and two and both parties moved for summary judgment. Plaintiffs' motion was granted on the first count of the complaint<sup>10</sup> but denied on the second count.<sup>11</sup> The second count sought an injunction against the use of federal funds by CHA. Although the court had stated that a cause of action was presented, practically, relief could not be granted because it would impede the construction of any public housing which would put the plaintiffs in an even worse position.<sup>12</sup>

Relief was postponed by the court to allow the parties an opportunity to formulate a plan which would prohibit the future exclusive location of public housing in predominately non-white areas. Several months later, the court entered an order on the summary judgment.<sup>13</sup> The order prohibited CHA from constructing any dwelling units in Cook County within a census tract having 30% or more non-white population<sup>14</sup> until it had commenced construction of seven hundred dwelling units in the rest of Cook County.<sup>15</sup> The court further ordered that once these conditions were satisfied, the CHA must build three units in areas not having thirty percent or more non-white population to every one unit built within such an area.<sup>16</sup> The same three-to-one ratio was applied to those units which the CHA leases, rather than builds.<sup>17</sup>

The court was influenced by the fact that continuance of past site selection patterns by the CHA would lead to the creation of new black public housing ghettos to the exclusion of whites from public housing. To prevent the creation of black ghettos within white areas, it ordered that each public housing structure be planned for occupancy by not more than 120 persons<sup>18</sup> and that the number of CHA low income, non-elderly units be restricted to fifteen percent of all dwelling units within a given census tract.<sup>19</sup> The court was confronted with the following facts: (1) ninety percent of the people on the waiting list for public housing were blacks,<sup>20</sup> (2) in Chicago there are twice as many whites eligible

<sup>8</sup> 265 F. Supp. 582, 583 (N.D. Ill. 1967).

<sup>9</sup> *Id.* at 584.

<sup>10</sup> 296 F. Supp. 907, 914 (N.D. Ill. 1969).

<sup>11</sup> *Id.* at 914-15.

<sup>12</sup> *Id.* at 915.

<sup>13</sup> *Gautreaux v. Chicago Housing Authority*, Civil No. 66 C 1459 (N.D. Ill. July 1, 1969).

<sup>14</sup> "Dwelling Unit" is defined as an apartment or single family residence occupied by a low-income, non-elderly family and furnished by or through CHA. *Id.* at 2.

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at 4.

<sup>17</sup> *Id.* at 4-5. The order refers to these units as "Leased Dwelling Units." A Leased Dwelling Unit is defined as "a Dwelling Unit in a structure leased or partially leased by CHA from any person, firm, or corporation." *Id.* at 2.

<sup>18</sup> *Id.* at 5-6.

<sup>19</sup> *Id.* at 6.

<sup>20</sup> 296 F. Supp. 907, 915 (N.D. Ill. 1969).

for low cost, non-elderly public housing as non-whites,<sup>21</sup> and (3) the small number of whites currently in public housing is a result of the undesirable location of most of the present public housing units (in primarily non-white areas).<sup>22</sup>

In *Valtierra v. Housing Authority of City of San Jose*,<sup>23</sup> suits were brought by predominately black citizens of San Jose, California, and San Mateo County, against the Housing Authority of the City of San Jose (HAC SJ), the City Council of San Jose (CCSJ), the Department of Housing and Urban Development (HUD), and the Housing Authority of San Mateo County (HASM C). (Members in their official capacities of the HAC SJ and CCSJ, as well as Secretary George Romney of HUD, were joined as defendants.) The cases were consolidated for consideration.<sup>24</sup> Both cases involved "persons of low income" who had been determined eligible for public housing and who had been placed on the appropriate waiting lists. San Jose, California, and San Mateo County were localities where housing authorities could not apply for federal funds because low cost housing proposals had been defeated in referenda.

The plaintiffs sought a declaration that Article XXXIV of the California State Constitution<sup>25</sup> was unconstitutional because it violated: (1) the supremacy clause of the United States Constitution, (2) the privileges and immunities clause, and (3) the equal protection clause. They further sought to enjoin the defendants from relying upon that Article as a reason for not requesting federal assistance with which to finance low income housing.<sup>26</sup>

HUD and its Secretary moved for their dismissal because the complaint did not seek any relief against them. Their motion was granted. The other de-

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 313 F. Supp. 1 (N.D. Cal. 1970).

<sup>24</sup> *Id.* at 3.

<sup>25</sup> Article XXXIV—Public Housing Project Law

§ 1. Approval of electors; definitions.

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town, or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this article the term "low rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article, only there shall be excluded from the term "low rent housing project" any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

<sup>26</sup> *Valtierra v. Housing Authority of City of San Jose*, 313 F. Supp. 1, 2 (N.D. Cal. 1970).

defendants raised the following pleas in abatement:<sup>27</sup> (1) because California could choose not to participate in the housing program,<sup>28</sup> it could participate by stipulating any conditions it chose; (2) referenda are not subject to constitutional scrutiny; (3) defendants could not be compelled to seek federal funding. The court ruled that these pleas did not preclude it from reaching the merits of the plaintiffs' constitutional claims. The court pointed out that the bases of the pleas were not true and that the plaintiffs were not seeking to compel the defendants to seek federal funding but merely seeking to forbid them from relying on Article XXXIV as a reason for not requesting such funds.<sup>29</sup>

In 1950, the California Supreme Court held that local authorities' decisions regarding seeking federal aid for public housing projects were "executive" and "administrative," not "legislative," and therefore the state constitution's referenda provisions did not apply to these decisions.<sup>30</sup> Within six months of that decision, the California voters adopted Article XXXIV of the state constitution to apply the state's referenda policy to public housing decisions.<sup>31</sup> The plaintiffs demonstrated that Article XXXIV impeded the financing of new housing since only fifty-two percent of the referenda submitted to the voters had been approved.<sup>32</sup> In Santa Clara County, referenda seeking permission to obtain housing funds were defeated in 1968; and in San Mateo County, two similar referenda were defeated in 1966.<sup>33</sup> The Housing Director in San Mateo County felt other attempts to secure passage of a referendum would be fruitless at present.<sup>34</sup>

The three judge court found the plaintiffs' supremacy clause argument unpersuasive and did not reach the privileges and immunities argument, but it ruled in favor of the plaintiffs on equal protection grounds.<sup>35</sup>

The U.S. Supreme Court reversed<sup>36</sup> holding that the record did not support any claim that a law *seemingly*<sup>37</sup> neutral on its face was in fact aimed at a racial minority.<sup>38</sup> It added that provisions for referenda demonstrate devotion to democracy, not to bias, discrimination, or prejudice.<sup>39</sup>

<sup>27</sup> *Id.* at 3.

<sup>28</sup> United States Housing Act of 1937, 42 U.S.C. § 1401 *et seq.*

<sup>29</sup> *Valtierra v. Housing Authority of City of San Jose*, 313 F. Supp. 1, 3 (N.D. Cal 1970).

<sup>30</sup> *Housing Authority v. Superior Court*, 35 Cal. 2d 550, 557-58 (1950).

<sup>31</sup> *Valtierra v. Housing Authority of City of San Jose*, 39 U.S.L.W. 4488 (U.S. Apr. 27, 1971).

<sup>32</sup> *Valtierra v. Housing Authority of City of San Jose*, 313 F. Supp. 1, 3 (N.D. Cal 1970).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (There was an affidavit supporting the plaintiffs' position that but for the existence of Article XXXIV local housing authorities would choose to apply for federal funds.)

<sup>35</sup> *Id.* at 4.

<sup>36</sup> *Valtierra v. Housing Authority of City of San Jose*, 39 U.S.L.W. 4488 (U.S. Apr. 27, 1971).

<sup>37</sup> Emphasis added.

<sup>38</sup> *Valtierra v. Housing Authority of City of San Jose*, 39 U.S.L.W. 4488, 4489, (U.S. Apr. 27, 1971).

<sup>39</sup> *Id.*

## EQUAL PROTECTION

Courts have held that governmental action is presumptively valid and does not violate equal protection unless intent to discriminate can be demonstrated<sup>40</sup> or that such action bears no rational relationship to the accomplishment of a permissible public purpose.<sup>41</sup> In cases where state action is particularly suspect because a group has been singled out on the basis of race or some other "suspect trait,"<sup>42</sup> an "overriding justification" standard has been used.

The court in *Gautreaux* struck down the plaintiffs' prayers for relief to two counts when they did not allege that the CHA intentionally selected most of their sites within the areas heavily populated by non-whites. Since intent is difficult to prove in most cases, the rule places a severe limitation on the availability of the equal protection clause in fields such as public housing. The operation of this government program in the context of pre-existing social conditions produces a result which is unequal in fact, leaving identifiable disadvantaged groups worse off than the rest of society. This result can be shown regardless of intent. The problem regarding public housing is that the state action which produces inequality is often incontestably "rational," within the traditional context of the equal protection clause. The programs are usually good faith, reasonable attempts to cure social problems.

In *Gautreaux*, the plaintiffs alleged that the administration of the Illinois public housing statute was "maintaining existing patterns of urban residential segregated by race . . ." <sup>43</sup> The problem had become so severe that "99½% of CHA family units are located in areas which are or soon will be substantially all Negro."<sup>44</sup> This type of adverse effect upon a disadvantaged group is a violation of equal protection whether or not it was the purpose of CHA to achieve it.

In *Norwalk CORE v. Norwalk Redevelopment Agency*,<sup>45</sup> the plaintiffs argued, *inter alia*, that the Norwalk Redevelopment Agency's administration of the relocation program was effectively driving non-whites from the city of Norwalk.<sup>46</sup> No "suspect trait" was inherent in the statute or in its administration. Proving that the agency intended the adverse effects which non-white displacees were experiencing was difficult. The lower court held that the detrimental effects resulted from an extremely tight and highly discriminatory housing market which was in no way the fault of the authority.<sup>47</sup> The Second Circuit held, however, that even though this detrimental effect was "accidental," rather than

<sup>40</sup> See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>41</sup> See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (This test has primarily been used when the governmental classification is essentially "economic.").

<sup>42</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (race).

<sup>43</sup> 265 F. Supp. 582, 583 (N.D. Ill. 1967).

<sup>44</sup> 296 F. Supp. 910 (N.D. Ill. 1969).

<sup>45</sup> 395 F.2d 920 (2d Cir. 1968); see Comment "Relocation, Accidental Inequities and the Equal Protection Doctrine," 117 U. Pa. L. Rev. 579 (1969).

<sup>46</sup> 395 F.2d 920, 924 (2d Cir. 1968).

<sup>47</sup> *Id.* at 930.

intentional, the planners should have foreseen such harsh effects.<sup>48</sup> Therefore, the authority had an affirmative duty to insure that adequate housing was available to non-white displacees.<sup>49</sup>

Since the facts in *Gautreaux* were exceptional, the proof of intent was not a barrier to the cause of action. Actual discrimination was shown. The Illinois statute requires that the Chicago City Council approve sites selected by CHA.<sup>50</sup> CHA had developed the practice of informally submitting sites for family housing to the City Council alderman in whose ward the site was located. Sites in white areas were almost invariably vetoed by the respective alderman and therefore not submitted for City Council approval because the waiting lists for public housing were ninety percent black.<sup>51</sup> CHA admitted that deliberate segregation by race was an inherent and undisguised component of its system of selecting public housing sites.

In *Hicks v. Weaver*,<sup>52</sup> facts similar to *Gautreaux* were presented to the court concerning the site selections for public housing in Bogalusa, Louisiana; the court found intent, followed *Gautreaux*, and cited from Housing and Urban Development (HUD) pronouncement that:

[A]ny proposal to locate housing only in areas of racial concentration will be *prima facie* unacceptable and will be returned to the Local Authority for further consideration.<sup>53</sup>

In *Valtierra* the gravamen of plaintiffs' equal protection claim is that the express discrimination in Article XXXIV, as it applies only to "low income persons," brings it squarely within the ban of a long line of U.S. Supreme Court decisions forbidding the imposition of unequal burdens upon groups that are not rationally differentiable in the light of any legitimate state legislative objective.<sup>54</sup> Courts have held that to contain or exclude persons simply because they are poor is no longer a permissible legislative objective.<sup>55</sup>

Although equal protection focuses on differences in treatment, the latitude allowed the legislature in framing distinctions or permitting them to exist seems to depend on a judicial judgment about the importance of the underlying privileges. If the interest of the poor to equality in residential access is acknowledged as of great importance and hence of high constitutional priority, and if the absence of spokesmen for the poor in the corridors of municipal power is also noted, a mandate exists for curing the land use decisional process.

<sup>48</sup> *Id.* at 930-31. (The court clearly rejected any requirement of proof of a desire or purpose to produce adversely unequal results.)

<sup>49</sup> *Id.* at 931-32.

<sup>50</sup> Ill. Ann. Stat., ch. 67½, § 9 (Smith-Hurd Supp. 1969).

<sup>51</sup> 296 F. Supp. 907, 912-13 (N.D. Ill. 1969).

<sup>52</sup> 302 F. Supp. 619 (1969).

<sup>53</sup> HUD's Low Rent Housing Manual § 205.1 Par. 4(g) (February 1967 Revision).

<sup>54</sup> *Valtierra v. Housing Authority of City of San Jose*, 313 F. Supp. 1, 4 (N.D. Cal. 1970).

<sup>55</sup> *Edwards v. California*, 314 U.S. 160 (1941); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *cf. Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1962); *Harper v. Virginia Board of Elections*, 393 U.S. 663 (1966).

In *Valtierra* the lower court relied heavily on the United States Supreme Court decision in *Hunter v. Erickson*.<sup>56</sup> In that case the Supreme Court invalidated an amendment to the city charter of Akron, Ohio, which required a referendum before anti-discrimination legislation could be enacted. The court noted that the requirement of a referendum before taking action drew no distinction among racial or religious groups. Blacks and whites, Jews and Catholics were all subject to the same requirements. But the requirement of the referendum nevertheless hindered those who would benefit from laws barring racial discrimination as against those who would otherwise regulate the real estate market in their favor.<sup>57</sup> The court further noted that the impact of the law falls on minorities, resulting in an impermissible burden which constitutes a substantial and invidious denial of equal protection.<sup>58</sup>

Article XXXIV of the California constitution defines low income persons as:

persons or families who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe, and sanitary dwellings without overcrowding.

The article explicitly singles out low income persons to bear the burden of the referenda. In California, state agencies may seek federal financial aid, without first submitting the proposal to a referendum, for all projects except low income houses.<sup>59</sup> Some common examples, *inter alia*, are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities.<sup>60</sup> Mr. Justice Harlan dissented in *Douglas v. California*<sup>61</sup> where the majority held equal protection was denied when states refused to provide appellate counsel for indigent criminal defendants whenever a first appeal is granted as of right. He stated, "The states, of course, are prohibited by the Equal Protection clause from discriminating between 'rich' and 'poor' as such in the formulation and application of their laws."<sup>62</sup>

#### CONCLUSION

Although the decision in *Gautreux* favored the plaintiffs, it works a hardship on future plaintiffs who cannot prove intent to discriminate. *Valtierra* stands as a conscious misuse of the referendum. Asking a majority to weigh its feelings against the needs of a minority is merely to guarantee that those needs will not be met. Public housing is an important problem and requires leadership with foresight and imagination; a weighted scale may provide the desired answer. In both *Gautreux* and *Valtierra*, the court failed to follow the decisions in a recent line of cases holding that even though a state is without

<sup>56</sup> 393 U.S. 385 (1968).

<sup>57</sup> *Id.* at 391.

<sup>58</sup> *Id.*

<sup>59</sup> *Valtierra v. Housing Authority of City of San Jose*, 313 F. Supp. 1, 5 (N.D. Cal. 1970).

<sup>60</sup> *Id.*

<sup>61</sup> 372 U.S. 353 (1962).

<sup>62</sup> *Id.* at 361.

fault and the detrimental effect is "accidental" rather than intentional, the planners should have foreseen the harsh effects which are an impermissible burden constituting a substantial and invidious denial of equal protection.

The reluctance of whites to enter public housing would be substantially reduced if such housing became available in more desirable locations. Since the housing market is becoming increasingly tight, whites who are eligible for public housing in the future may no longer have the option of finding low rent private housing and will seek desirable public housing units.

Does the Supreme Court's holding in *Valtierra* that the California referendum law was not racially motivated mean it would also uphold a rash of new state laws setting up similar referendum provisions? At present, only eight other states have such a law.<sup>63</sup> To those who say that the referenda represents the will of the people, one can only reply:

Wherever the real power in a Government lies, there is the danger of oppression. In our Government the real power lies in the majority of the community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents. This is a truth of great importance, but not yet sufficiently attended to . . .<sup>64</sup>

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<sup>63</sup> Chicago Daily News April 27, 1971. (Colorado, Iowa, Minnesota, Mississippi, Montana, Oklahoma, Texas, and Virginia.)

<sup>64</sup> Writings of James Madison, 272 (Hunt ed. 1904).