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Supreme Court

OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

JOSEPH DORSEY, MONROE DOWLING and CALVIN HARPER, suing on behalf of themselves and all others similarly situated,
Plaintiffs,

against

STUYVESANT TOWN CORPORATION and METROPOLITAN LIFE INSURANCE COMPANY,
Defendants.

Before:
HON. FELIX C. BENVENGA,
Justice.

BRIEF OF PLAINTIFFS IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

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Statement *

The three plaintiffs are Negro war veterans. They sue to enjoin the two defendants from withholding or denying to them and others similarly situated any of the dwelling units in the Stuyvesant Town project solely because of their race or color. They allege that they have applied for apartments in Stuyvesant Town but that the defendants do not intend to rent to Negroes. Their applications, they say, therefore are doomed in advance. In view of the public features of the project, the public aid and powers

* This brief is also filed in behalf of the American Jewish Congress, the American Civil Liberties Union and the National Association for the Advancement of Colored People who indorse the views expressed herein.

that made it possible, and the fact that it is subject to public controls throughout the life of its tax exemption, they assert that an obligation rests upon the defendants to extend to them the equal protection of the laws.

The defendants do not dispute that their policy is to bar their accommodations to Negroes. They have, in fact, gone out of their way to admit it orally and in writing. Their current explanation is more in the nature of demurrer than denial. The record of their position on the question may be stated in three phases.

Phase I goes back to 1943 when the Chairman of the Board of Metropolitan Life Insurance Co. asserted that no Negroes would be allowed in the project. Replying to affidavits in a taxpayer's action citing his statements, he admitted his position, but said that defendants' directors had "thus far not adopted any renting policy and that they will have no occasion to do so until the project approaches completion" (position summarized in Opinion of Judge Shientag in *Pratt* v. *LaGuardia,* 182 Misc. 462 [1944], aff'd 268 A. D. 973, leave to appeal denied, 294 N. Y. 842). Because there was no final renting policy and the project was not yet under way, a suit to enjoin the discrimination was then held to be premature.

Phase II is concerned with the period of June, 1946, when in response to a letter from the American Civil Liberties Committee asking the following question: "Are there restrictions as to race, color, religion of prospective tenants?", George Gove, Vice-President of Stuyvesant Town Corporation, stated " * * * in conformity with public announcement made when the plans for Stuyvesant Town were first formulated in cooperation with the City, provision has not been made for occupancy by Negro families" (Letters of Foster and Gove annexed to moving papers).

Phase III is concerned with the period immediately preceding this action. Shad Polier, vice-president of the American Jewish Congress, spoke with George Gove on June 20, 1947. He read Mr. Gove the letter of a year before to the Civil Liberties Committee. He said that he had heard that a change in that policy was being contemplated and that Negro applicants were being interviewed. Mr. Gove stated that despite the interviews "there was no change in the Corporation's policy as publicly announced and as summarized in the letter to Mr. Foster" (Affidavit of Polier). Mr. Polier asked Mr. Gove what the Corporation would do, should Negroes meet "the requirements established by the Corporation with respect to character, stability, manner, appearance and similar criteria." Mr. Gove "stated that, nevertheless, unless there should be a change in policy—and none was being contemplated—there would simply be no renting to Negroes."

Mr. Gove's answering affidavit does not deny any of these assertions nor does it deny the policy as set forth in the letter of June 26, 1946 to the Civil Liberties Committee. The only reference to Mr. Polier's conversation and to the letter to the Civil Liberties Committee is an attempted justification of the discriminatory policy on the ground that the presence of objectionable persons might "endanger the economic success of the enterprise. This right of selection by the management cannot be impaired if due regard is to be had for the rights of the policyholders of Metropolitan Life Insurance Company and without violating the rights of Metropolitan Life Insurance Company and Stuyvesant Town Corporation under the Fifth and Fourteenth Amendments to the Constitution of the United States and under Article I, Section 6 of the Constitution of the State of New York."

Mr. Gove insists that there is no limitation either by contract or statute upon the defendants' absolute right to refuse accommodations to whomever they choose.

The issue of discrimination is thus clearly drawn and the question presented directly for the first time.

Have the defendants the right to refuse the plaintiffs, and others similarly situated, the accommodations in Stuyvesant Town solely because of the plaintiffs' race or color? This is the question to be decided.

Resolution of the issue entails crucial consequences beyond the project's boundaries. Urban redevelopment laws had been enacted in 20 states by the close of 1945 (*see* Senate Hearings on S. 1592, before the Committee on Banking and Currency, 79th Congress, pp. 485-524). With 39 percent of the dwellings in the United States substandard (*see* Statement of John B. Blandford, Jr., former National Housing Administrator, at Hearings before the Subcommittee on Housing and Urban Redevelopment of the Senate Special Committee on Postwar Economic Policy and Planning, 79th Congress, 1st session, part 6, January 9, 1945, pp. 1233-37) urban redevelopment has become a principal device for the replanning and rebuilding of our extensive slum areas throughout the country and for replacing them with new neighborhoods. In the process, it is inevitable that millions of people will be moved from their old neighborhoods and the racial and social patterns of our cities will be recast. In the new areas we shall face the choice either of isolating minority groups into segregated areas or creating new neighborhoods in which educational processes shall have a chance of functioning toward interracial harmony. The local ordinance barring discrimination in City projects applies neither to Stuyvesant Town nor to any other project outside of New York City (Admin. Code, Sec. J41-1.2).

If the new neighborhood patterns of New York State and the United States are to be based on the theory of segregation, segregation in neighborhood schools, in playgrounds, in shopping centers, in other public facilities will result. If the nation's neighborhoods are to be marked off into areas for the exclusive and the excluded, the involuntary ghetto will have become an unalterable American institution. For, once the racial composition of the

new neighborhoods is fixed, they cannot be easily changed, particularly if they are as rigidly controlled as Stuyvesant Town would be with all the freedom from public interference it asserts it has.

Public housing projects have made great headway in reestablishing the pattern of heterogeneous occupancy in newly-created neighborhoods and 325 of the 622 projects throughout the nation now have mixed occupancy (*see* 1944 Annual Conference of Racial Relations Advisers, "Experience in Public Housing Projects Jointly Occupied by Negro, White, and Other Tenants", p. 4). Every federal and state-aided project in New York City has mixed occupancy. The threats to the defendants' claimed property rights rest upon the mistaken notion that Negroes *per se* cause a white exodus, for they have mistakenly applied the theory of small scattered private ownerships to a large self-contained area that creates its own environment. The pattern of infiltration followed by inundation that takes place in the former has no application to a controlled project such as Stuyvesant Town. Every instance of mixed occupancy in the United States has substantiated this proposition, including defense projects built for higher rent tenancy (*ibid,* testimonials to successful mixed occupancy in projects in Chicago, Milwaukee, Philadelphia, Pittsburgh, Los Angeles, Seattle, etc., pp. 8-49). The fear of an invasion of defendants' property rights rests therefore upon an illusion.

The defendants simply choose to reverse the policy of heterogeneous tenancy in publicly-aided undertakings and claim their right to do so as "private" owners of a "private" project. The plaintiffs, however, assert that the project is endowed with certain public attributes which impose upon its sponsors the obligation to extend the equal protection of the laws to the citizens whose powers and funds have made the project possible. The character of the "private" undertaking therefore must be carefully analyzed.

The character of Stuyvesant Town

Stuyvesant Town is not merely a composite of buildings. In many respects it is more like a principality. It consists of 18 city blocks consisting of more than 2½ million square feet of land of which almost 750,000 square feet were originally public streets. These are now enclosed and included in the site (*see* Chart II appended to the contract between the City, Stuyvesant Town and Metropolitan Life Insurance Co.). Within the enclosure will live a population of 24,000, equal to the population of one-quarter of one of our smaller states. It will be larger in population than 61,000 communities in the whole country and smaller than only 400. It spans four avenues of narrow Manhattan Island, cutting off traffic on two avenues completely. It will have no public parks, no schools, libraries, fire, policing or sanitation facilities. Existing public schools, a limited dividend corporation and other public property were demolished and the land sold to the Stuyvesant Town Corporation. All the streets in the area will be marked "private". There will be signs on those streets at their intersections with public streets giving notice to the public that these streets are "private" (*see* Sec. 211 of contract between City, Stuyvesant Town and Metropolitan).

This strange, novel undertaking is presumably authorized under the Redevelopment Companies Law (McKinney, Unconsol. Laws, Secs. 3401-3426). The project, however, cannot exist without the provision of new schools for the children in the area, without policing and fire protection, without welfare facilities, without the aid of the vast network of municipal facilities which surround the area around the project and convert it into a community.

The very privacy and exclusiveness which the project's sponsors sought for it necessitated various controls. This was no secession from the community. These were no ordinary apartment houses differing from others only in mass and quantity. The new development was in effect a

satellite city over which the public exercised legislative and contractual controls. The wisdom of the undertaking and the adequacy of the controls are not in issue. What is in issue is that the whole legislative and contractual pattern clearly evidences an intention to confer an agency upon the Stuyvesant Town Corporation to carry out city and state duties—in slum clearance, in urban redevelopment, in replanning, in housing. To achieve these public purposes the City gave up much and the defendants submitted themselves, in return, to public regulation. The City condemned the property for the companies. It turned over streets equal to 19 per cent of the area. It supplied vast facilities. It gave tax exemption on the improvements. The residents of the area gave up much, too. In a period of intense shortage they were moved out to other slums where many of them were forced to overcrowd. The purpose, however, was public and private convenience had to yield to the larger public interest. That public interest, however, still acts as the check-rein to which the project is bridled.

The law is clear that the state itself or its subdivisions may not deny the use of public facilities to any individual solely because of his race, color or creed (*14th Amendment; People* v. *King,* 110 N. Y. 418; *Buchanan* v. *Warley,* 245 U. S. 60; *Harmon* v. *Tyler,* 273 U. S. 668; *In re Edward J. Jeffries Housing Project,* 306 Mich. 638). Schools, parks, public auditoriums, public hospitals and public housing, if provided, must be provided for all on an equal basis without distinction as to race or color.

The restraints that bind the state and its subdivisions also bind those agencies to whom the state's power has been delegated (*Nixon* v. *Condon,* 286 U. S. 73; *Smith* v. *Allwright,* 321 U. S. 649; *Kerr* v. *Enoch Pratt Free Library,* 149 F. 2d 212; *Steele* v. *Louisville R. Co.,* 323 U. S. 192). The question is not whether the corporation is public or private but whether it is operating as a representative of the City in discharge of the City's authority, whether the Board's managers are "representatives of the state

to such an extent and in such a sense that the great restraints of the constitution set limits to their action" (*Nixon* v. *Condon* and *Smith* v. *Allwright,* supra). The issue, therefore, as clearly framed by the Court, involves a consideration of (1) the constitutional provisions under which the project is authorized, (2) the enabling statute, (3) the contract between the City and the defendants.

The constitutional provisions

The constitutional questions have been resolved in part by *Murray* v. *LaGuardia* (291 N. Y. 320). The constitutional authorization derives from the clause providing:

> "Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing for persons of low income as defined by law, *or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto"* * (Article XVIII, Sec. 1).

It should be noted that the purposes are in the alternative, but that the second alternative consists of five inseparable components, i.e. clearance, replanning, reconstruction, rehabilitation, and recreational and other facilities incidental and appurtenant thereto. If the Constitutional Convention had intended clearance alone to be a public purpose, presumably it would not have coupled the other purposes with it. Manifestly, the legislature knew that clearance could be accommplished by an earthquake, a bombardment or a fire. It was the replanning of the area, its reconstruction and its rehabilitation into a completed work that was intended as the public use for which the vast benefits to redevelopment companies was authorized. As Judge Lewis

* All emphasis throughout this brief is supplied except where it is indicated that the emphasis appeared in the original quotation.

said, the other purpose was "to bring about the clearance *and* rehabilitation of substandard areas as a means to protect public health and morals." The rehabilitation, by the statute, has to be by supplying housing in place of the slums (Sec. 14). The incidents of the public purpose is the housing. The cost of that housing is contributed to by every taxpayer, white and black. The statute does not say that the housing shall be for whites only. As our Court of Appeals said in *People* v. *King,* supra,

> "It is not necessary, at this day, to enter into any argument to prove that the clause in the Bill of Rights that no person shall 'be deprived of life, liberty or property without due process of law' (Const., Art. 1, § 6), is to have a large and liberal interpretation, and that the fundamental principle of free government, expressed in these words, protects not only life, liberty and property, in a strict and technical sense, against unlawful invasion by the government, in the exertion of governmental power in any of its departments, *but also protects every essential incident to the enjoyment of those rights."*

The defendants seek to read into *Murray* v. *LaGuardia* the holding that once the clearance of the slum has been accomplished they are as free from any restraints upon their conduct as any private landlord. That is sustained neither by Judge Lewis' opinion nor by statute. The *Murray* case was brought by 18 owners within the Stuyvesant Town area to enjoin the defendants from proceeding with the project. The petition alleged, among other things, that the plaintiffs would be deprived of their property without due process of law and "allows the condemnation of private property for the benefit of a private corporation and not for public use" (Petition, Sec. 27). "Condemnation" said the petition, "would cause the plaintiffs irreparable injury." It was to this point that the Court of Appeals addressed itself saying that "If upon completion of the project the public good is enhanced, it does not matter that private interests may be benefited."

The Court said, referring to the exercise of eminent domain and the tax exemption provisions "it is thus made clear that such tax exemption, which as we have seen, is limited to the value of *improvements* made within the area, cannot occur until the project itself—the work of redevelopment and rehabilitation within the substandard area has been completed and the public purpose for which the project was designed has been accomplished."

Judge Lewis used the term "public purpose" in the eminent domain sense. It is clear that he did not mean that thereafter there were no other public purposes to be performed, for the statute and the certificate of incorporation and the contract and the whole formula from beginning to end are replete with public purposes that weave in and through the whole transaction. These include not only sound neighborhood replanning and sound redevelopment of the area but provision and maintenance of adequate safe and sanitary housing accommodations. Completion of the *project* by the statute itself means completion of "a specific work or improvement to effectuate all or any part of a plan including lands, buildings and improvements acquired, owned, constructed, managed or operated in an area by a redevelopment company providing dwelling accommodations pursuant to this act and such business, commercial, cultural or recreational facilities appurtenant thereto as may be approved pursuant to section fifteen of this act." *

The public use as clearly held by Judge Lewis included not only reconstruction of the area but the continued operation of the project in the public welfare. When the reconstruction was accomplished, new rights and obligations were set up which in 1943 the Court of Appeals was not called upon to decide. What is involved today is whether the product of the "cooperation between municipal government and private capital to the end that substandard, insanitary areas in our urban communities may be rehabilitated" (*Murray* v. *LaGuardia,* p. 332) is now completely divested of public interest.* This would be a preposterous interpretation. As the court pointed out in the sentence following its allusion to public purpose, "It should be added that during the period of tax exemption the statute (Sec. 16) makes it unlawful for the redevelopment company 'to change or modify any feature of a project' without the approval of the municipal planning commission, except by a three-quarters vote of the local legislative body."

* *Completion of the project* is defined differently in the contract from the statute. Completion of the project under the contract means the date of actual completion or three years and sixty days after certification by the Comptroller that materials and labor are available.

During the period of such tax exemption the redevelopment company "shall not have power to sell any project without the consent of the local legislative body" (Sec. 23). However, whether the housing be a distinct public function under the statute or be only an incident of the slum clearance that has already been "accomplished" the plaintiffs are entitled to benefit equally with other citizens (*People* v. *King,* supra).

That there was a continuity rather than a cessation of the public purpose is further suggested by the Court's statement that

> "The People by the adoption of article XVIII of the State Constitution, and the Legislature, by the enactment of the Redevelopment Companies Law, have recognized that the sinister effect of substandard, insanitary areas, wherever slums exist, exerts a malign influence upon the community at large *and thus justifies public control and corrective measures.* The corrective statute with which this proceeding is concerned

* The Courts are liberal in upholding the use of eminent domain. It has been conferred even upon private companies such as irrigation and drainage companies, railroads, other public utilities and cemetery corporations. The more rigid definition of public use, i.e., use by the public, has now been abandoned and even public benefit today authorizes the condemnation power. But "public use" from the standpoint of eminent domain is a far cry from discrimination in the undertaking of a "public use". The situation might be compared to a utility company which exercises the eminent domain power or may have it exercised on its behalf. What determines its actions in regard to discrimination is not the considerations underlying the use of the eminent domain power but the public nature of its activities and the statutory authority from which they derive.

is an effort by the Legislature to promote co-operation between municipal government and private capital to the end that substandard, insanitary areas in our urban communities may be rehabilitated."

The reference to *control;* cooperation between municipal government and private capital; and to the word *rehabilitated* (not cleared) indicate that there was a public purpose in the continued operation of the project as well as in the clearance of the slum and the construction of the buildings.

Mr. Robert Moses confirms this for he states in an affidavit which Metropolitan relied upon and filed in the *Pratt* case, as follows:

"I was a delegate to the Constitutional Convention of 1938 and took a lively interest in the housing article proposed by that Convention. After its adoption I was appointed a member of the Mayor's Committee to work on legislation to make the article effective. It soon became apparent that all present and prospective federal, state and municipal loans and grants for public housing, including funds in hand and those which might be expected over a period of several years after the war, could not possibly accomplish more than 10 percent of the problem of rehabilitation in this City. It also became apparent that, apart from the difficulty of obtaining huge direct subsidies for public housing, it would be wholly undesirable to have a large proportion of the entire city population living in superior subsidized quarters at rentals one-half to one-third of those charged by private enterprise, at the expense of hundreds of thousands of people enjoying slightly higher incomes but living in altogether inferior apartments.

For these reasons the Redevelopment Companies Law was framed as an effort to enlist private capital for slum clearance and neighborhood rehabilitation." (See Record on Appeal, *Pratt* v. *LaGuardia,* p. 87.)

It was thus conceded that the new housing was for the benefit of the thousands of people enjoying slightly higher incomes than those eligible for public housing. It was the

housing as well as the clearance that constituted the public purpose.

Finally, in passing upon whether the issue of discrimination (the third ground) was considered in the *Murray* case, Judge Shientag said:

"The third ground of objection was not presented in any form to the Court of Appeals; it was not referred to in any of the briefs. * * * The opinion was concerned almost entirely with the question of the constitutionality of the Redevelopment Companies Law and the legality of the project sought to be undertaken pursuant to that statute. * * * As the defendants forcefully point out in their briefs, Stuyvesant will have to perform its contract with the City in obedience to the fundamental law of the State and of the United States. If it adopts an illegal renting policy any person thereby aggrieved will have his remedy in the courts." (*Pratt* v. *LaGuardia,* supra.)

The statute and contract

If there is any doubt as to the public nature of the completed operation, that doubt should be resolved by a reading of the enabling statute. Section II of the statute declares:

"that there is not in such areas a sufficient supply of adequate, safe and sanitary dwelling accommodations properly planned and relating to public facilities;

* * * * * *

that modern standards of urban life require that *housing* be related to adequate and convenient public facilities;

* * * * * *

that the public interest requires the clearance, replanning, *reconstruction and neighborhood rehabilitation* of such substandard and insanitary areas together with adequate provision for recreational and other facilities;

* * * * * *

that in order to protect the sources of public revenues, it is necessary to *modernize the physical plan and conditions of urban life;*

* * * * * *

that these conditions cannot be remedied by the *ordinary* operations of private enterprise;

* * * * * *

that provision must be made to encourage the investment of funds in corporations engaged in providing redevelopment facilities to be constructed according to the requirements of city planning and in effectuation of official city plans and *regulated by law as to profits, dividends and disposition of their property or franchises;*

* * * * * *

that provision must also be made for the acquisition for such corporations at fair prices of real property required for such purposes in substandard areas and *for public assistance of such corporations by the granting of partial tax exemption;*

* * * * * *

that the cooperation of the state and its subdivisions is necessary to accomplish such purposes;

* * * * * *

that the clearance, replanning and reconstruction rehabilitation and modernization of substandard, and insanitary areas and the *provisions of adequate, safe, sanitary and properly planned housing accommodations in effectuation of official city plans by such corporations in these areas are public uses and purposes for which private property may be acquired for such corporations and partial tax exemption granted;*

* * * * * *

that these conditions require the creation of the agencies, instrumentalities and corporations hereinafter prescribed for the purpose of attaining the ends herein recited;

* * * * * *

the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination."

The statute then defines the nature of a redevelopment company by requiring in the Certificate of Incorporation "a declaration that the redevelopment company has been organized to serve a public purpose and *that it shall be and remain subject to the supervision and control of the supervising agency* except as provided in this act, so long as this act remains applicable to any project of the redevelopment company; that all real and personal property acquired by it *and all structures erected by it shall be deemed to be acquired or created for the promotion of the purposes of this act*" (Sec. 4). Would it not be preposterous to assume that a corporation that binds itself to remain subject to the supervision and control of the supervising agency and whose structures erected by it are created to promote the numerous public purposes above stated, can escape its public obligations to extend the equal protection of the laws—and do it with the acquiescence or consent of the municipal agency that controls it?

If the defendants' contention is correct, i.e., that following clearance there is no longer any public purpose and no longer any public obligation in connection with the ownership and operation of the project, the certificate of incorporation becomes meaningless. The continuing control also becomes meaningless.

The whole formula contained in the act is shaped to protect the public interest in the continued operation of the undertaking:

(1) the project cannot be sold except as permitted by law (Sec. 23).

(2) profits are limited to 6 percent for interest and amortization (Sec. 8).

(3) a supervising agency is set up which must consent to the method of incorporation, to the method of financing, to the use of the project (Secs. 5 and 15).

(4) the City's approval must be obtained to any modification of the project (Sec. 15).

(5) the project must be designed and used primarily for housing purposes (Sec. 14).

(6) upon dissolution, any cash surplus belongs to the City (Sec. 24).

(7) the rents must be regulated and any increases must have the approval of the City (Sec. 15 and Sec. 307 of contract).

(8) rigid controls are imposed over the financing of the corporation (Secs. 9, 10, 11 and 12).

(9) preliminary approval of a plan or a project is provided for (Sec. 15).

(10) the state, municipalities and all public bodies and public officials are authorized to sell, lease or transfer property to a redevelopment company and hold its stock, income debentures or other securities, *secured or unsecured* (Sec. 17).

(11) the planning commission and the supervising agency are empowered to make rules and regulations to carry out their powers and duties pursuant to the act and to effectuate the purposes thereof (Sec. 15).

If this urban redevelopment company, this chameleonlike creature that freely alters its shape from a public to private instrumentality is at this moment private, its continued tax exemption and other benefits would be in violation of Article 8, Section 1, of the Constitution. It is more logical to assume that its functions are still public, with all the restraints applicable to the exercise of such public functions.

It would be idle to assume that these regulations had no purpose. If clearance were the only "public purpose" there would have been no reason for the statute requiring the construction of housing. If clearance and the construction of housing were the purpose with nothing more, there would have been no reason for the continued regulation

of profits, limitation upon rents, restrictions on sale, financial supervision, visitation by the Controller and the numerous other regulations that weave through the statute. Finally, if the intention were not "cooperation between municipal government and private capital" in the rehabilitation of the area and its continued operation in the general interest, there would have been no purpose to the payment of the cash surplus to the City upon dissolution of the corporation.

That its obligations are public is clear from the conditions under which tax exemption is given and the circumstances under which public regulation ends. Section 26 of the statute provides that the redevelopment company receiving tax exemption may elect to pay the municipality the total of all accrued taxes with interest. Thereupon the tax exemption ceases and Section 24 dealing with dissolution applies. It is only after the payment of the arrears of taxes that the company is free of regulation. By the contract (Sec. 601), however, the City and the defendants agreed that the taxes could not be paid up for a period of at least five years from the completion of the project. By Section 702 all supervision and restrictions cease after payment of the accrued taxes, except the covenants against change in the plan of the project. It was thus the intention of the law, as well as of the contract, that the grant of tax exemption be linked to the continued control by the City of the project and the continuity of the public obligations to the citizenry. If that obligation ceases at any time, one thing is clear: it does not cease during the period when the City is granting the corporation $2,000,000 annually in the form of a tax subvention.

POINT I

The extraordinary usages to which public powers were put affirm the public character of Stuyvesant Town.

Not one, but all three of the trinity of public powers were or are being utilized in this project in a unique and unprecedented manner.

1. The Tax Power.

The cost of the project is conceded to be 90 million dollars (Gove affidavit, paragraph 20). The cost of the land was about 17 million dollars (see application of Stuyvesant Town Corporation to New York Board of Estimate for an increase in rent, dated April 24, 1947). The total tax exemption over a 25-year period granted to Stuyvesant Town Corporation is thus about 3 percent on the improvement cost (90-17 millions) or well over 50 million dollars, which is about three times the cost of the land. There is no limitation upon the income group that may occupy the project in the statute or in the contract though the intention as set forth by Mr. Moses is to house a low-income group. Two conclusions are suggested by the calculation: (1) Here was a benefit resulting from a vast tax exemption which the City desired its citizens to have. Largely as the result of the exemption, housing, precious housing, was being made available at considerably less than market value. All citizens, not a select few, were entitled to reap that benefit. The defendants, however, would say that they want only the Caucasians in our city to have it and they and they alone have the right to determine who shall be the beneficiaries. This, the plaintiffs argue, deprives the plaintiffs of the law's equal protection. (2) If it was the intention of the statute or the contract to clear the slum, and nothing more, after which the project was to revert to its private status, the City could have been 33 million

dollars better off by taking the land and presenting it as a gift to the Metropolitan Life Insurance Company on the condition only that it build a project. It should be remembered that Metropolitan has built Parkchester on the extremities of the City on land for which it paid. In fact, simultaneously with the building of Stuyvesant Town, it is building Cooper Village, on land for which it paid, and which is not tax-exempt. In other words, it is reasonable to assume that if the City wanted only the slum cleared and was not interested in housing for its citizens, it could have written down the land cost or even written it off completely and turned it over to Metropolitan. That the City has contributed more than half of the cost in tax exemption is proof of the cooperative and public nature of the undertaking and of the additional public benefits it expected from the undertaking. The public dividend was in the form of lower rental apartments, not necessarily "low-rent housing" as used in the Constitution. This must be made available not merely to Metropolitan's selected clientele. If, for example, Metropolitan had announced that the project's facilities would be for Metropolitan's executives only, the people would never have granted the tax exemption, the streets and the condemnation benefits nor would the court have sanctioned the grant. The presumption was that there was to be good housing for the people. Many citizens have eagerly looked forward to the opportunity of getting one of these low-priced apartments. Metropolitan may not therefore act arbitrarily in the selection of tenants as it contends, for its conduct must be reasonably related to the duties which it has assumed when it accepted the benefits of the public powers and aid. That duty carries with it an undertaking not to discriminate arbitrarily because of race or color. If it wishes to win release from the contract's and the law's restraints, it might do so perhaps by paying off the equivalent of the tax exemption five years from the completion date. But until then, and so long as it receives benefits, it must assume all the corresponding obligations attaching to those benefits.

2. Eminent Domain.

The grant of eminent domain is also unique. The City is permitted to acquire the property for Metropolitan Life Insurance Company, a privilege not shared by other corporations engaged in performing public purposes. Real property in the area needed or even *convenient* may be acquired. Property devoted to a public use may be acquired, too, notwithstanding that such property may previously have been acquired by condemnation or may be owned by a public utility corporation. Public property may be sold to Metropolitan without any requirement of public bidding. Increase in value due to assembly or reconstruction is not to be considered in making the award. Moreover, the use for which property is acquired for redevelopment companies becomes a *"superior public use"*. Presumably, therefore, should the City ever wish to condemn Stuyvesant Town for another public use, a serious question would arise as to whether the State might not have to declare the future use to be a "superior, superior public use". There is even a question as to whether it could reacquire the land at all for ordinary public uses. In any event, so public is the use, i.e., the clearance, redevelopment and reconstruction of the project, that schools, parks, streets and other simple public uses may be taken for this extraordinary and superior public undertaking. *In fact, a limited dividend corporation in the area for families of low income* was *actually condemned* (*Stuyvesant Housing Corporation* v. *Stuyvesant Town Corporation,* 183 Misc. 662, 51 N. Y. S. 2d 19). Thus the Legislature and the City conferred the benefits of a condemnation power greater in some respects than those granted to its own housing authority, a city agency also engaged in slum clearance. The use was considered more public than public hospitals, courts, water supply. Yet defendants now contend that the use has reverted not only to a private use, but to a "superior private" use, more immune from public obligations than even a wholly-owned company town.

3. The Police Power.

Streets equalling 19 percent of the area have been turned over to Stuyvesant Town Corporation and the police power normally possessed by the municipality over these streets is now under the corporation's control. Responsibility for accidents is assumed by the redevelopment company. The disposition of public property is not what normally takes place in the ordinary private large scale development. There, streets are dedicated to the City; here, the streets are dedicated by the City to the corporation. If the defendants are correct in their contention, no one has a right to enter those streets except the Comptroller (Sec. 506 of contract). *If Negroes have no equal rights to receive accommodations, they have no rights to walk upon the streets either.* This could not have been the intent of the Legislature. The only inferences which can be drawn from this unusual arrangement is that the streets, though owned by the company, are operated under a public trust for a public use. It need not be for the use of the whole public any more than a public housing project (*New York City Housing Authority* v. *Muller,* 270 N. Y. 333), or a poorhouse, but it cannot be employed for a special class or for a corporation that discriminates as to race (*Connecticut College* v. *Calvert,* 87 Conn. 421, 88 Atl. 633 [1913]; *University of Southern California* v. *Robbins,* 37 Pac. 2nd 163 [Cal. App. 1934]).* By undertaking to carry out these extraordinary public purposes, the defendants have assumed the public obligations to abide by the same restraints that bound the public grantor of the powers and benefits.**

* In *Connecticut College* v. *Calvert,* supra, an effort was made to condemn land for the benefit of a privately-owned college. There was no evidence, however, that the college was prohibited from rejecting applicants for racial or religious reasons. The Court consequently felt compelled to deny the benefits of the eminent domain power. *University of Southern California* v. *Robbins,* supra, was a similar proceeding. There, the Court upheld exercise of the power of eminent domain, but only after satisfying itself that the charter of the college prohibited discrimination on racial or religious grounds.

** If the City were to have no interest in the completed project it would have not been careful to forbid a mortgage on the property. Presumably, the City did not want this public development to fall into the hands of a mortgagee who would not be bound by the public purposes to which Stuyvesant Town is obligated by the contract terms.

The danger of lending public controls without holding the beneficiaries accountable for compliance with the Constitution was recognized by the Supreme Court at the 1943 term in *Smith* v. *Allwright,* supra, as follows:

> "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process *in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.* (*Lane* v. *Wilson,* 307 U. S. 268, 275, 59 S. Ct. 872, 876, 83 L. Ed. 1281.)"

What applies to the electoral process applies as cogently to the use of the eminent domain, police and tax powers.

If the defendants are correct in their contention that theirs is a strictly private operation, free of any requirements to observe equality under the law, then we have surely set a dangerous precedent. We will have declared that government itself, enjoined against discrimination and abuse of the essential freedoms, may divest itself of its powers and prerogatives to aid private corporations which may then openly refuse to abide by the restrictions to which government itself is subject when it exercises those powers and prerogatives. The electoral process at least restrains the public agency against abuse of the individual's rights and the people can exercise these restraints at the polls, but it cannot curb a corporation that is controlled by a private board. Here in the name of slum clearance would be a device for the evasion of the troublesome Bill of Rights with all its cumbrous insistence on equality and due process. If the precedent is carried over from urban redevelopment to other enterprises as well, we will have opened the door toward a perilous innovation in our governmental institutions. It would mean that private companies operating under the color of public purpose or general welfare may draw upon the arsenal of governmental powers and employ them as arbitrarily as they choose. If this is permitted it would soon make a skeleton of the body politic and reduce democratic safeguards to a shell. These are no sweeping generalizations; they are the inevitable sequence of the formula as the defendants seek to interpret it. Fortunately, the Courts still have the opportunity to guide and shape that formula into the framework of the Constitution. They can superimpose public obligation and constitutional limitations upon every grant of governmental power to private enterprise.

POINT II

The Courts have restrained even private corporations from discriminating where they have become repositories of official power.

In the last few years the Supreme Court, noting the increased use of private instrumentalities for the performance of governmental functions has subjected them to corresponding duties, particularly by requiring them to abide by the requirement for the equal protection of the laws. Thus, a private labor union and a political party were enjoined against discriminating because of race. In another case, a privately-owned "company town" was held subject to restraints embodied in the First and Fourteenth Amendments to the United States Constitution. In a Circuit Court case, a library with a private board of trustees, but publicly as well as privately subsidized, was restrained from discriminating. These corporations are far more "private" than the Stuyvesant Town Corporation through which public obligations, public subsidies and public powers weave from the inception of the enterprise to the day of its final termination. If the Supreme Court's test is applied, the determining factor would be only whether the defendants are acting by virtue of the statute and as delegates of

the state power under it. If under color of that power they discriminate against any particular race, the discrimination would be held to derive its force and virtue from state action, i.e., from the statute and would therefore be voided (*Smith* v. *Allwright,* supra).

The test is not whether the private corporation is the representative of the state "in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action" (Mr. Justice Cardozo, *Nixon* v. *Condon,* supra, p. 487). In the case above cited the Legislature authorized a political party to prescribe the qualifications of its own members. The executive committee of the party adopted a resolution qualifying only white Democrats. The argument was made that the political party was merely a voluntary association aloof from the impact of constitutional restraint, as is a Masonic lodge. Mr. Justice Cardozo held as follows:

> "The pith of the matter is simply this, that, when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the state itself, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. *What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere.* They are not acting in matters of merely private concern like the directors or agents of business corporations. *They are acting in matters of high public interest,* matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly. * * * Delegates of the state's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black. Ex parte Virginia, supra; Buchanan v. Warley, 245 U. S. 60, 77, 38 S. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201. The Fourteenth Amendment adopted as it was with special solicitude for the equal protection of members of the Negro race lays a duty upon the court to level by its judgment these barriers of color."

Smith v. *Allwright,* supra, applied the same rule though recognizing that *membership* in a political party was no concern of the state.

> "The privilege of membership in a party may be, as this Court said in Grovey v. Townsend, 295 U. S. 45, 55, 55 S. Ct. 622, 626, 79 L. Ed. 1292, 97 A. L. R. 680, no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action. * * * We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election. *The party takes its character as a state agency from the duties imposed upon it by state statutes;* the duties do not become matters of private law because they are not performed by a political party."

The reasoning is analogous. Whom Stuyvesant Town chooses as tenants may be no concern of the state just as who are the members of the political party is no concern of the state. When effective exercise of the franchise is denied because of race or color by act of a political party acting pursuant to state law or where participation in a public benefit is denied because of race or color by a private organization having governmental functions, the denial of the franchise or the benefit is an act of the state and comes within the restraints of the Fourteenth Amendment.

A far smaller degree of state regulation was involved in *Steele* v. *Louisville,* supra, than in the case at bar. There, a labor organization enjoyed under the Railway Labor Act the exclusive power to negotiate contracts with a railroad covering employees in a specified craft, including non-mem-

bers. Its power to execute contracts binding on the non-members was purely statutory. It executed a contract which discriminated against Negro members of the craft. It was argued that if the Railway Labor Act empowered unions to execute such contracts, it was unconstitutional.

The Supreme Court, at the outset of its discussion of the legal questions involved, ruled that "If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty towards its members, constitutional questions arise" (323 U. S., at p. 198).

After reviewing the provisions of the statute, the Court held that it imposed on the union "at least as exacting a duty to protect equally the interest of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates" (*ibid.*, at p. 202). This included "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them" (*ibid.*, at p. 203).

The Court went on to point out that the union could make contractual distinctions among the employees affected based on legitimate economic considerations (just as Stuyvesant Town may here choose its tenants on proper grounds). It concluded, however, that "discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations" (*ibid.*, at p. 203).

The Court in the *Steele* case recognized that the labor organization had "the right to determine eligibility to its membership" (*ibid.*, at p. 204), but again held that that did not permit it to discriminate on account of race. If Metropolitan chooses to discriminate on the basis of character, responsibility or other qualifications comparable to the criteria for membership in a labor union or other private organization, it may do so but it may not do so on the

basis of race alone. As was said in Mr. Justice Murphy's concurring opinion in the *Steele* case:

> "Nothing can destroy the fact that the accident of birth has been used as the basis to abuse individual rights by an organization purporting to act in conformity with its Congressional mandate. Any attempt to interpret the Act must take that fact into account and must realize that the constitutionality of the statute in this respect depends upon the answer given.
>
> The constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation" (*ibid.*, at p. 209).

Kerr v. *Enoch Pratt Free Library*, 149 F. 2d 212 (C. C. A. 4, 1945), involved a situation even closer to that of the case at bar. The defendant library barred the plaintiff from its school for librarians because she was a Negro. It appeared that the library was founded by Pratt with a grant of more than a million dollars, on condition that the City contribute $50,000 a year and that the library would be run by a board of trustees appointed by Pratt with the power to fill vacancies in its own ranks. The gift was accepted by state statute and municipal ordinance. Later, the library fund was greatly expanded by the state and City until at the time of the case most of the funds came from the state. But the independent and self-perpetuating board of trustees retained control with City supervision as to fiscal and other details. Summarizing these facts, the Court said (149 F. 2d, at pp. 216-217):

> "The donor could have formed a private corporation under the general permissive statutes of Maryland with power both to own the property and to manage the business of the Library independent of the state. *He chose instead to seek the aid of the state* to found

a public institution to be owned and supported by the city but to be operated by a self-perpetuating board of trustees to safeguard it from political manipulation; and this was accomplished by special act of the legislature with the result that *the powers and obligations* of the city and *the trustees* were not *conferred* by Mr. Pratt but *by the state* at the very inception of the enterprise."

The Court found in these facts *"so great a degree of control over the activities and existence of the Library* on the part of the state that it would be unrealistic to speak of it as a corporation entirely devoid of governmental character" (*ibid.,* at p. 219). Accordingly the Court concluded that since "the authority of the state was invoked to create the institution and to vest the power of ownership in one instrumentality and the power of management in another", it was necessary to hold that "the special charter of the Library should not be interpreted as endowing it with the power to discriminate between the people of the state on account of race and that if the charter is susceptible of this construction, it violates the Fourteenth Amendment since the Board of Trustees must be deemed the representatives of the state" (*ibid.,* at p. 218).

Stuyvesant Town is not "a corporation entirely devoid of governmental character" (*Enoch Pratt* case, supra). "The powers and obligations" of Stuyvesant Town Corporation were "conferred * * * by the State at the very inception of the enterprise" (*Enoch Pratt* case, supra). Its discriminatory policies "based on race alone are obviously irrelevant and invidious" (*Steele* case, supra). Although the defendants could have built a housing project independently, as indeed they did in Cooper Village adjoining Stuyvesant Town, they "choose instead to seek the aid of the state to found a public institution to be * * * supported by the City but to be operated by a self-perpetuating board of trustees" (*Enoch Pratt* case, supra).

It is not easy to christen the Stuyvesant Town Corporation. It is definitely not private.* In many respects it is more like a public corporation for it resembles in most respects the limited dividend corporation or housing company (*Public Housing Law,* section 170, et seq.). The main differences are that the housing company may operate on vacant as well as slum land, and is regulated as to rents, occupancy and operations by a housing commissioner instead of by the Comptroller. Both have their dividends limited and the general structural pattern of the corporation is in most respects the same. The limited dividend corporation has been likened to the New York City Housing Authority as a public corporation (*New York City Housing Authority* v. *Muller,* supra, p. 342). Assuming, however, that the clearest classification for the Stuyvesant Town Corporation is that of a quasi-public corporation such as a railroad or public service corporation, no discrimination could be practiced** (*Madden* v. *Queens County Jockey Club,* 296 N. Y. 249). But whether this creature be public, quasi-public or even private, by drawing its power from a statute, the inhibition against its right to bar Negroes stands firm.

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* *McQuillan, on Municipal Corporations,* Vol. 1, Sec. 125, defines the three classes of corporations as either "public, quasi-public or private * * *". First, public corporations, variously styled public, political, civil and municipal created by the sovereign power for public or political purposes, having for their object the administration of a portion of the power of the state, as counties, townships, parishes, schools, reclamation, irrigation, road, levee, drainage, sanitary, fire and taxing districts, cities, towns, villages and boroughs, or municipal corporations, full or quasi-corporations, invested with certain subordinate powers to be exercised for local purposes connected with and designed to promote the public good. Public corporations are not only creations, but instrumentalities of the state and are subject to visitation and control.

Second, corporations technically private, but yet of quasi-public character having in view some public enterprise in which the public interests are involved to such an extent as to justify conferring on them important governmental powers, for example, the right of eminent domain. Such corporations include railroad, turnpike, canal, telegraph, telephone, gas, water, and other public service companies.

Third, corporations strictly private, the direct object of which is to promote private interests as banking, insurance, trading and manufacturing.

** "A public utility is obligated by the nature of its business to furnish its service or commodity to the general public, or that part of the public which

POINT III

Even if Stuyvesant Town were completely private as it contends, its very physical pattern would bring it within the restraints of the Constitution.

Stuyvesant Town resembles in many respects the town of Chickasaw, a suburb of Mobile, Alabama, owned by the Gulf Shipbuilding Corporation (see *Marsh* v. *Alabama*, 326 U. S. 501 (1946)). Like Stuyvesant Town "the property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block on which business places are situated' * * * in short the town and its public district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." A Jehovah's Witness who was arrested for distributing religious literature contended that her right to freedom of press and religion guaranteed by the First and Fourteenth Amendments had been abridged. The Court stated the question as follows:

> "Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town? For it is the state's contention that the mere fact that the property interests to the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms. We do not agree that the corporation's property interests settle the question. The State urges, in effect

it has undertaken to serve, without arbitrary discrimination, and it must, to the extent of its capacity, serve all who apply, on equal terms and without distinction, so far as they are in the same class and similarly situated. Accordingly, a utility must act toward all members of the public impartially, and treat all alike; and it cannot arbitrarily select the persons for whom it will perform its service or furnish its commodity, nor refuse to one a favor or privilege it has extended to another, since the term 'public utility' precludes the idea of service which is private in its nature and is not to be obtained by the public. Such duties arise from the public nature of a utility, and statutes providing affirmatively therefor are merely declaratory of the common law" (51 *Corpus Juris*, p. 7).

> that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We can not accept that contention. Ownership does not always mean absolute dominion. * * * Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation *cannot curtail the liberty of press and religion* of these people consistently with the purposes of the Constitutional guarantees * * *. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation."

Whether the restriction be a denial of free press or religion or whether it be a denial of the equal protection of the law, the principle is the same. If Stuyvesant Town cannot deny access to a Jehovah's Witness who will insist upon distributing her literature within its walled city, then by similar token Stuyvesant Town may not bar Negro citizens from the benefits of its facilities solely because of their race. Of course, the public visitation is of a wider order in Stuyvesant Town than in Chickasaw. Not only will the public enter as servants, visitors, friends of tenants, delivery men, etc., as they entered the company town, but all sewers, water mains, electrical conduits and all other city facilities are to be relocated, the City consenting to the reconstruction by the corporation of the City's public facilities under the streets (Sec. 403-404 of the Contract). Moreover, as previously stated, the eminent domain power was utilized for what are public uses, not private uses, and tax exemption is extended to the project for twenty-five years.

POINT IV

If the Redevelopment Companies Law empowers the Stuyvesant Town Corporation to bar Negroes, it would be unconstitutional. The Court should, therefore, construe the law to effect a constitutional purpose.

One of the main purposes of the Urban Redevelopment Law is the replanning of slum areas and as such represents an exercise of the police power (*New York City Housing Authority* v. *Muller,* supra, *Murray* v. *LaGuardia,* supra). The replanning was to be accomplished "in effectuation of official city plans including the master plan" (*Redevelopment Companies Law,* Secs. 2 and 15). The City Planning Commission is to approve the project prior to its acceptance and actually did (City Planning Commission Report No. 2765, adopted May 20, 1943). The City Charter Revision Commission outlined the primary duty of the City Planning Commission to be the making of the master plan. "The Commission in preparing the plan should consider not only the *distribution of the population* but its comfort and health and the beauty of the surroundings in which they live. The development of residential areas and the location of such housing projects as are to be undertaken are important parts of intelligent planning * * *. Zoning is an important element in planning and must always be related to the growth and development of the City and to the master plan" (Report of the City Charter Revision Commission in Tanzer, *New York City Charter,* pp. 496-497). The charter itself incorporates the recommendation and directs the commission to prepare a master plan "as will provide for the improvement of the City and its future growth and development and afford adequate facilities for the housing, transportation, *distribution,* comfort and convenience, health and welfare of its population" (New York City Charter, Sec. 197).

The location of the housing will determine the nature of the population distribution. Not only buildings but people determine the character of the City's plan. The Negro population of New York City is only 7 percent of the total. Whether they are isolated into ghettoes or live in heterogeneous communities is the most important phase of our master planning to be determined. If the Negroes of New York are evenly distributed in the new public and private large-scale projects, their presence would hardly be noticed. They were widely distributed in many areas, fashionable and otherwise, up to World War I. Thereafter they were herded together, by force of social pressure and inability to move about freely as is the privilege of white citizens. Restrictions against Negroes have created a new pattern, harmful to them, and harmful to the City as a whole. Forced into isolated sections and desperately in need of living space, they reach out wherever new dwellings become available, creating new ghettoes in the newly-found neighborhoods, while the net around the other sections tightens to exclude any further infiltration. The opportunity to replan the City now presents the City with an opportunity to set up communities where tensions can subside and mutual interracial understanding be attained. But the first great redevelopment project under the City plan becomes an instrument for permanently isolating them from their fellow-citizens. Stuyvesant Town lays down its policy to the effect that there will be no Negroes among the 25,000 people who will inhabit its project.

These facts bring this case within the prohibition laid down by the United States Supreme Court in *Buchanan* v. *Warley,* 245 U. S. 60. There a local ordinance was passed, ostensibly to promote the general welfare by requiring, as far as practicable, the use of separate blocks for residences by white and colored people respectively. It was made unlawful for any colored person to occupy as a residence any house upon any block in which a greater number of houses were occupied by white people than were

occupied by colored people. It likewise made unlawful occupancy by white people of areas predominantly occupied by colored people. No existing rights were to be affected. The Supreme Court held the ordinance unconstitutional stating:

> "As we have seen, this Court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provided for separation in the public schools of white and colored pupils where equal privileges are given. But, in view of the rights secured by the Fourteenth Amendment to the Federal Constitution, such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. We think these limitations are exceeded in laws and ordinances of the character now before us."

The Court cited the following language from *Strauder* v. *West Virginia,* 100 U. S. 303:

> "It (the Fourteenth Amendment) was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons and to give to that race the protection of general government in that enjoyment whenever it should be denied by the State. It not only gave citizenship and the privileges of citizenship to persons of color but it denied to any State the power to withhold from them the equal protection of law, and authorized Congress to enforce its provisions by appropriate legislation. * * * It ordains that no State shall deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction equal protection of the laws. What is this but declaring that the law in the States shall be the same for blacks as for whites; that all persons, whether colored or white, shall stand equal before the laws of the State, and, in regard to the colored race for whose protection it was primarily designed, that no discrimination shall be made against them by law because of their color. * * * The Fourteenth Amendment makes no attempt to enumerate the rights it decided to protect.

> It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection either for life, liberty or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution."

It then cited the following language from *Ex Parte Virginia,* 100 U. S. 339, 347:

> "Whoever by virtue of public position under a State government, deprives another of property, life or liberty, or denies or takes away the equal protection of the laws, violates the Constitutional inhibition, and if he acts in the name of and for the State and is clothed with the State's power, his act is that of the State."

The Court dismissed the argument that the proposed segregation was intended to promote the public peace by preventing race conflicts. It said, "Important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal constitution."

It will be said that *Buchanan* v. *Warley* is distinguishable because the discrimination was by a public ordinance whereas the discrimination in Stuyvesant Town is by an internal policy. There are these answers. First, the City is a party to the contract which made the discrimination possible. It voted approval of the contract knowing that it was conferring upon the Stuyvesant Town Corporation the right to exclude Negroes.*

This Commissioner Moses called an effort to vindicate "social objectives" (Affidavit of George Gove). In Moses'

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* The following statement of Newbold Morris, then President of the New York City Council, at the Board of Estimate meeting on June 3, 1943 confirms that the declaration was part of the plan:

"This is one of the most difficult votes I have had to cast in my five and one-half years on this governing board of the City of New York.

"The division between my colleagues and me revolves solely around the question of whether this is a private or public project. I am unable to agree that it is private. If it were, why are we debating it here in this chamber?

affidavit attached to Ecker's affidavit in the *Pratt* case, Moses said, "The selection of tenants, like other management problems, is a matter for the Corporation to decide" (*see* papers on *Appeal, Pratt* v. *LaGuardia*). The exclusion of Negroes was thus made a public act to which the defendants as well as the City were parties. Whether the exclusion was accomplished by contract or by ordinance made no difference in substance. For the contract was approved by the Board of Estimate after which streets were conveyed and the eminent domain power exercised. It was just as effective as an ordinance. It was acted upon with all of the powers at the City's disposal. It was known at the time that Metropolitan intended to discriminate although no policy had then been set.

Three years later, Mr. Ecker's "intention" becomes in fact a "policy". The clear effect of this policy is that Negroes will not live in Stuyvesant Town. Both ordinance

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Although fifty million dollars are involved, the people of this City are granting to the Metropolitan Life Insurance Company the power of eminent domain and substantial subsidies, in the form of tax exemption on the improvement for a quarter of a century.

"Commissioner Moses says these grants are 'aids and inducements'. Whether you call them that or 'powers and subsidies', it matters not. They are being granted by *all* the people, not just by white people or gentiles, and as a member of this Board of Estimate I represent all the people.

"It was not I who raised the question of race discrimination. The President of the Metropolitan Life Insurance Company raised it himself. I always presume that individuals or corporations in America are committed to our principles. Until I am shown that they do not believe in them, I would have assumed then that the Metropolitan Life Insurance Company people believed in democratic principles. But, the fact is they are on record. Representatives of the Company have been sitting here all afternoon and have heard the record presented and have made no attempt to clear up the apprehension, which every member of this Board must feel. They could remove the issue from this discussion right now, yet not one of them stirs.

"Now, in casting my vote in the negative, I know full well the responsibility I am taking. I know full well that if my point of view prevails, it may mean the end of Stuyvesant Houses. As Commissioner Moses says, it may mean the end of all such privately-initiated projects. Huge as this project is, it dwindles down into insignificance as compared to the principle.

"The principle of equality is as old as our nation. Men of all races have thought it good enough to make supreme sacrifices for in every generation. It was enunciated in the Declaration of Independence, it was written into the Constitution. It is the law of the land. It is the keystone of the arch of our free society.

"Once we are committed to that principle, we cannot be content to invoke it on some occasions and discard it for compelling reasons on others.

"As we sit here men are dying for that principle; the least we can do is to live it.

"Commissioner Moses has a wonderful record of accomplishment. Everything he touches is consummated in beauty. Surely, if Stuyvesant Houses

and redevelopment law are accomplished under the aegis of "planning", both involve a redistribution of the population in pursuance of City plans—and both should be unconstitutional.

The argument that Stuyvesant Town owns the property in which the discrimination is practiced falls under the logic of *Marsh* v. *Alabama* as well. It does not matter whether the act of discrimination was the act of the Stuyvesant Town Corporation or of the City itself. As the Court said: " * * * had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring the distribution of religious literature. * * * In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place were held by others than the public, is not sufficient to justify the State's per-

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are erected, the result will be a more beautiful section of our City, but that beauty is stained with a philosophy utterly opposed to everything we stand for.

"Commissioner Moses refers to the 'risk' involved, as if the Metropolitan were contemplating a social contribution. Now, let us have no illusions about that. The President of the Metropolitan Life Insurance Company has a primary duty to this Company. He would not be president if he were engaged in a 'risky' venture. My duty, however, is primarily to the people of our City. It is my view that in this case these two duties are in conflict.

"Because private capital is involved, I believe the landlord should have the right to select desirable tenants. No one wants to live in a building where the occupants are dirty or drunken or excessively noisy. Being 'desirable' doesn't hinge on racial origin. Desirability or undesirability cuts right across various races. There are desirable and responsible people of every race in our City so also are there undesirable and irresponsible people in every race.

"The President of the Metropolitan says that 'whites and blacks don't mix, perhaps in a hundred years they will'. A hundred years from now will be too late. Democratic way of life is on trial today. The time is Now, the place is New York City, which we claim with pride is the leading democratic city of the entire world. Private discrimination is a matter between the discriminator and his Maker. It is regrettable. But government by the people and for the people is an entirely different matter. That is more than regrettable. It is contrary to the fundamental principles on which our country was founded.

"Therefore, because I care more about the principle than I do about the project, because I cannot vote for public aid and public sponsorship of a private project, whose officers state with candor that racial consideration will enter into the selection of tenants, I cast the three votes of my office in the negative."

The President of the Borough of Manhattan joined with the minority to oppose the project on account of its proposed discrimination.

mitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute."

Nor is it relevant that the statute itself shows no intention to discriminate. In *Yick Wo* v. *Hopkins* (118 U. S. 356) the ordinance seemed valid on its face, but was nevertheless struck down because of its administration. The Court said:

> "* * * the cases present the ordinances in actual operation and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, 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 discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

That housing is a "necessity of life" (*Block* v. *Hirsh,* 256 U. S. 135) makes discrimination in housing so much more odious. Rents have been controlled in peace as well as war and drastic public intervention has been authorized where oppression is threatened, *People ex rel. Durham* v. *LaFetra,* 230 N. Y. 429, or the public health involved, *Adler* v. *Deegan,* 251 N. Y. 467. If the defendant's actions are sustained, the door would be opened for one of the most insidious forms of discrimination, the extension of which might well result in barring minorities from the right to one of life's great essentials.

POINT V

The Riverton Project is irrelevant to the constitutional issue here involved.

The affidavit of Gove states that the Riverton project "by virtue of the location of the project will be tenanted primarily, if not entirely, by Negroes." This is irrelevant for the "separate but equal" doctrine is repugnant to the public policy of New York. Article 1, Section 11, of the New York State Constitution, does not authorize separate but equal accommodations and every Civil Rights statute and every official act of this state has followed the policy of equality without separation. Such a policy given encouragement today would authorize separate restaurants, playgrounds, theatres, public facilities. It would set a dangerous precedent indeed if it were revived in this state.

Moreover, the question is academic. There is no assurance nor any proof that Negroes will be given equal accommodations in Riverton. Riverton is being constructed by another corporation than the Stuyvesant Town Corporation, though the stock in both redevelopment companies happens to be held by Metropolitan. Even assuming identity of fee ownership and assuming also that Negroes will be favored in Riverton, the provision of the dwelling facilities cannot possibly be equalized. Each property has distinct differences and peculiarities—each will have different rents, different facilities, different layouts and locations, different characteristics. One project is uptown, the other downtown. One is a large community, the other a small one about a seventh the other's size. One corporation might choose to pay up taxes as is its right under the contract, in which case rents would be considerably higher than in the other. The neighborhood schools, libraries, parks, churches and other facilities are different. There is no evidence as to how many whites are eligible for Riverton and how many have applied. Moreover, Metropolitan has

not, and may not, earmark any housing for one race or the other. Even if the noxious "separate but equal" doctrine were adopted here, to give equal accommodations to Negroes, Metropolitan would have had to give equal accommodations in both Riverton and Stuyvesant.

Moreover, Metropolitan is barred by ordinance from giving "separate" accommodations to Negroes in Riverton. Riverton is tax exempt and as such subject to the provision that there shall be no discrimination as to race or color (Adm. Code, Sec. J 41-1.2). The only way Metropolitan could give separate accommodations to Negroes would be to violate that ordinance. The ordinance was enacted after Mr. Ecker's statement. It was enacted unanimously by the City Council. A few weeks ago another ordinance was enacted by the City Council covering insurance companies that might discriminate in tax exempt projects (Local Law 45, 1947). The purpose of these ordinances was not only to assure more accommodations to Negroes and other minorities but to preclude the very segregation which the defendants rely on for the "equal facilities." They were enacted because the local Legislature recognized that the public policy of this state is that equality under the law does not mean equivalence and that such a concept is opposed to the public policy.

POINT VI

A temporary injunction should be granted to prevent irreparable damage.

The affidavit of Gove admits that 100,000 applications have been taken and 70,000 applicants interviewed, that a temporary certificate of occupancy has been received, that one of the buildings will be ready a month from today, another two months from today and that all the buildings will be completed throughout 1947 and in 1948. The Gove affidavit does not deny the allegations of the plaintiffs or

of Shad Polier; in fact it reaffirms the defendants' right to discriminate and to segregate. The defendants assert that "the right of selection of the management cannot be impaired * * * and any qualified applicant * * * will be accepted unless his presence would, in the opinion of Stuyvesant Town Corporation, make it impossible or substantially more difficult to attract and retain other tenants through the life of the project and thereby endanger the economic success of the enterprise." The admission is as clear as diplomatic language permits. The defendants do not deny that they have in effect today an actual *policy* of discrimination (*see* Polier affidavit). Judge Shientag had said in 1943 that there was then no "policy" and therefore the action was premature. The Polier affidavit and the letter from Gove to the Civil Liberties Union clearly indicate that there is now a policy. That that policy might ultimately be changed is no answer, for it might also not be changed. It is the threatened fulfillment of the policy as it exists today that makes the injunction essential. If Metropolitan is permitted to fill its housing project with white tenants only and if subsequently the plaintiffs win their action, it would entail the ousting of white tenants and the substitution of Negro tenants with all it means in the heightening of interracial tensions. Experience of the Federal Public Housing Authority in defense areas has shown such action to be unwise. Interracial occupancy policies that have succeeded throughout the country have succeeded partly because they were laid down in advance and the tenants were told of the intention to mix the occupancy before they moved in.

Judge Shientag placed the time for an injunction as the present and held that the plaintiffs, as applicants in the project, would be the proper parties to seek the relief. For Metropolitan has now adopted an "illegal renting policy," the plaintiffs are "thereby aggrieved" and they are entitled to their "remedy in the courts."

CONCLUSION

An injunction restraining the defendants from barring Negroes would be of more than local significance. Often, in the course of history, the fragmentation of liberties takes place under the cloak of political or social reform. Measures ostensibly designed to promote national welfare are hammered into instruments of oppression. The creation of new government functions holds its dangers as well as its dividends. It is significant that it is in the new fields of housing and city planning that the most malignant perversions of well-intentioned reform measures have occurred. In our own generation, three distinct efforts to achieve housing reform have been subverted into noxious attempts to violate either our fundamental law or our libertarian traditions. Thus the restrictive covenant that seeks to exclude glue and gun-powder factories, charnel houses, brothels and other intrusions upon neighborhood dignity soon became perverted into a racial restrictive covenant to bar whole races from shelter. Eighty percent of the Chicago area is now said to be subject to such covenants.* See Gunnar Myrdal, *An American Dilemma,* Harper & Bro., 1942; *Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem* by Harold I. Kahen, 12 Univ. of Chicago Law Review 198, 1945; *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional* by Prof. D. O. McGovney, 33 California Law Review 5, 1945. For a discussion of race-bias in housing see Charles Abrams, *Race Bias in Housing,* published by the American Civil Liberties Union, American Council on Race Relations and National Association for the Advancement of Colored People, 1947. See also *The Future of Housing,* Abrams, Harper & Bro., 1946.

So, too, zoning has taken the same course. Designed to promote sound planning principles and decent neighborhoods, zoning soon becomes employed as a means for

* Certiorari on issues involving the legality of these restrictive covenants which are completely private agreements between owners has now been granted by the Supreme Court (*Shelley* v. *Kraemer* and *Sipes* v. *McGhee,* 15 U. S. Law Week 3478).

excluding minorities from shelter and the same device spreads quickly from community to community and state to state until it too becomes the instrument for establishing racial segregation. See *Clinard* v. *City of Winston-Salem,* 217 N. C. 119; *Liberty Annex* v. *City of Dallas,* 289 S. W. 1067; *Hopkins* v. *City of Richmond,* 117 Va. 692, 86 S. E. 139 (1915), overruled in *Irvine* v. *City of Clifton Forge,* 97 S. E. 310 (1918); *Hardin* v. *City of Atlanta,* 147 Ga. 248, 93 S. E. 401 (1917), overruled in *Glover* v. *City of Atlanta,* 96 S. E. 562 (1918); *Harris* v. *City of Louisville,* 165 Ky. 559, 177 S. W. 472, overruled in *Buchanan* v. *Warley,* 245 U. S. 60, 38 S. Ct. 16 (1916).*

The Supreme Court, however, intervened and put a stop to racial zoning as a violation of the Fourteenth Amendment.

Urban redevelopment laws now appear under the banner of "replanning devices". The pattern of its spread is the same as in racial restrictive covenants and race zoning. In the name of planning it would authorize the establishment for all time of white neighborhoods and black neighborhoods; soon it may be Jewish neighborhoods and gentile neighborhoods; Catholic neighborhoods and Protestant neighborhoods. Just as restrictive covenants, aimed mainly at Negroes, spread to embrace Jews, Mexicans, American Indians, Chinese and Japanese, so, too, may the redevelopment device, unless its limitations are defined. Fortunately, the defendants here have made their intention to segregate and discriminate clear. If their right to discriminate is sustained, the news will be heard in 20 states and forces hostile to minorities will soon be impressing urban redevelopment companies into service to achieve segregation and establish it for all time. For discrimination is epidemic. Tolerated in one case, it spreads to include other cases.

Precedents are created for further incursions. Gaining legal approval, they soon receive social endorsement and

* The ordinance involved in each case was similar. It was made unlawful for Negroes and Caucasians to occupy any house on a street in which the greater number of houses were occupied by the members of the opposite race.

ultimately win political approbation. In the belief that we preserve the sanctity of contract we may be moving back into the medieval regime of status.

In invalidating a restrictive covenant against Jews, a recent decision in Ontario, Canada, pointed up the danger which might well face us in urban redevelopment, *In re Drummond Wren* (4 D. L. R. 674, 1945). The Court held:

> "* * * How far this is obnoxious to public policy can only be ascertained by projecting the coverage of the covenant with respect both to the class of persons whom it may adversely affect, and to the lots or subdivisions of land to which it may be attached. So considered, the consequences of judicial approbation of such a covenant are portentous. If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants, Catholics or other groups or denominations. If the sale of one piece of land can be so prohibited, the sale of other pieces of land can likewise be prohibited. * * * nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups * * * than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or conversely, would exclude particular groups from particular business or residential areas."

The late Mr. Chief Justice Stone wrote in *Hirabayashi* v. *United States,* 320 U. S. 81, 100:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."

Mr. Justice Murphy concurring said at pages 110, 111:

> "Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. There was one law for one and a different law for another. Nothing is written more firmly into our law than the compact of the Plymouth voyagers to have just and equal laws."

If the defendants' contention is sustained, there will be, within a stone's throw of the United Nations buildings a gigantic undertaking in which racial segregation is not only being openly avowed but is being publicly subsidized and approved. It is undesirable. It is dangerous. It is unnecessary. We have bound ourselves by the United Nations Charter to take joint and separate action in cooperation with the organization to achieve the purposes set forth in Article 55. Whether the United Nations Charter has the force of a treaty binding upon private contracting parties as upon government is not clear, though some authorities claim that it has that force (*In re Drummond Wren,* supra; see also *Kennett* v. *Chambers,* 55 U. S. [14 How.] 38). But whether it is legally binding or not, there is a public policy in the making to which the Courts may not close their eyes. It is particularly applicable to new neighborhoods. It is that we "have faith in fundamental human rights, in the dignity and worth of the human person * * * promoting and encouraging respect * * * for the fundamental freedoms for all, without distinction as to race * * * living together in peace with one another as good neighbors" (United Nations Charter).

Respectfully submitted,

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