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United States Housing Act: Municipal Rights and the Equal Protection Clause

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THE UNITED STATES HOUSING ACT: MUNICIPAL RIGHTS AND THE EQUAL PROTECTION CLAUSE

I. Introduction

The problem of providing decent, safe, and sanitary dwellings for every American citizen is national in its scope. However, it is recognized that the primary responsibility for its solution should be left with local communities. Under the United States Housing Act, there are many ways in which the federal government can and should render financial and technical aid and advice to local communities which determine that they want that assistance.

The main prerequisite to participation in this extensive federal housing program is still local determination of need and local consent to the project. Consent is required at several stages in the project and in several forms. For example, consent is required in the form of a resolution before an initial planning survey can even be made; in some states, consent takes the form of voter referendum of approval; and finally, consent is evidenced in a cooperation agreement, the last stage before final agreements are entered between the federal government and the local housing authority. Without local approval or consent, there can be no federal assistance.

A variety of recent federal court actions have defined the limitations on a municipality to control housing programs financed by the federal government. This note will briefly examine the judicial approach to the question of whether a municipality can refuse to cooperate.

A. Federal Framework

The United States Housing Act of 1937 is the basic enabling legislation for public housing programs. The 1937 Act, fully developed by its subsequent amendments, established a federal housing agency authorized to grant federal financial and technical assistance to state agencies for slum clearance and low-income housing projects built and managed by local housing authorities. In the

3 Id.
6 The original "authorized agency" to administer federal financial assistance was the United States Housing Authority. This was followed by the Public Housing Administration (PHA) which was later succeeded by the Federal Housing Administration (FHA) and finally the Department of Housing and Urban Development (HUD).
7 24 C.F.R. § 275.1(e) (1973) defines "Local Authority" as "[a]lany State, county, municipality, or other governmental entity or public body which is authorized to engage in the development or administration of low-rent Housing or slum clearance. A 'Local Authority' is a public housing agency as defined in the [United States Housing] Act."
Housing Act of 1937, Congress declared that the public housing program may not be put into force in an area unless there has been "demonstrated . . . that there is a need for such low-rent housing which is not being met by private enterprise." 8

In the Housing Act of 1949, the cooperation agreement requirement was added to the United States Housing Act. This requirement makes the low-income housing program a local option. Initial determinations of whether the private housing market has failed, whether there are significant slums or blight areas which need to be eliminated, and whether the local governmental unit desires to bear the expenses of participation in the program are to be made by local governments. This determination of need may be made by a local governing body or may be put to a vote of a local electorate if state legislation allows referendums. Once a local determination has been made that a housing problem exists requiring federal funds, then local consent to a federally funded program is evidenced by entering a "cooperation agreement" contract. Without this consent no federal agency may make any contract for loans or for annual contributions for any low-income housing project unless the governing body of the locality has entered into an agreement with the local housing authority providing for cooperation. 9

A cooperation agreement spells out the ways in which a municipality must cooperate with the local housing authority in the development of a housing project. The local government body must agree to provide all municipal services for the units and to waive all real and personal property taxes on the property. The local services which must be provided include schools, police and fire protection, sanitary sewers, drains, streets, and lighting. In addition, the locality must also agree to take action in the dedication, sale, or lease of property for the project; the adoption of zoning ordinances necessary to permit such projects; the creation of parks and other recreational facilities; and the elimination of a number of unsafe, unsanitary, or unfit dwellings within the community equal to the number of units to be contained in a project. 10

In consideration for these actions by a local government, cooperation agreements provide for the reimbursement of municipalities for some of their expenditures by authorizing uniform payments in lieu of taxes (PILOT) equal to 10 percent of the housing project's shelter rents. 11 However, local housing authorities fix rents in accordance with the tenants' ability to pay rather than the

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9 24 C.F.R. § 275.1 (f) (1973) defines a "Cooperation Agreement" as "[a] contract between a Local Authority and the governing body of the locality providing for tax exemption, elimination of unsafe and unsanitary dwelling units, supplying of public services and other forms of cooperation by the local government, and for payments in lieu of taxes by the local authority in connection with a low rent housing project."
12 These are the standard provisions of a "cooperation agreement" as required by 42 U.S.C. § 1410 (1970).
13 In the standard cooperation agreement contract form "shelter rents" are defined to mean the total of all charges to tenants of a project for dwelling rents and nondwelling rents (excluding all other income from such project), less the cost to the local housing authority of all dwelling and nondwelling utilities.
economic value of the unit. Thus payments in lieu of taxes (PILOT) rarely equal full real estate taxes upon property of equivalent value.

B. State Legislation

The federal laws require the consent or cooperation of the municipality with the local housing authority. Therefore, in order for a state to participate in the low-income housing program, it must pass any necessary constitutional amendments and statutes establishing local housing authorities (LHA's). Such legislation must grant the LHA's the power of eminent domain, the authority to issue and secure bonds, to assume financial obligations, and to make agreements necessary for guaranteeing low rents. All fifty states have enacted such enabling legislation.

There are more than 3,000 such local authorities throughout the United States. These housing authorities are typically quasi-autonomous corporate bodies established by local government pursuant to state laws for the purpose of developing, owning, and managing low-income housing projects. The housing authorities which administer the low-income housing program at the local level vary in form but generally operate under the direction of a Board of Commissioners. LHA boards have the primary responsibility for planning projects, setting income limits, determining specific criteria for admission to public housing, and making other appropriate administrative decisions.

Whatever its particular organizational form may be, the LHA is the party to whom the local governing body must give its consent for the low-income housing project. Without the existence of either the legislatively authorized LHA or the local consent and cooperation, there can be no federally aided low-income housing project.

II. Local Consent

Even before a project is proposed, a municipality may have the right to absolutely determine that it does not want or need federal assistance in solving any of its housing problems and may refuse to give its consent. A traditional form of such control is home rule. Home rule is a state constitutional or statutory

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14 Of course, these rents are set artificially low; see, James v. Valtierra, 402 U.S. 137, 143 n. 4 (1971).
15 For a comprehensive listing of each state's enabling legislation and citations to the pertinent constitutional provisions and major court decisions regarding them see, 3 BNA HOUSING & DEVELOPMENT REPORTER 160:0101-160:0147 (1973).
16 The LHA is usually independent of the municipal government in the area in which it operates. But, in Arizona, Kentucky, Michigan, New Mexico, and New York local housing authorities are classified as dependent agencies of local governmental units. Such agencies, when independent, are special district governments and may be coterminous with city or county boundaries. In addition, six states (Alaska, Delaware, Hawaii, Maine, South Carolina and Vermont) have established statewide housing authorities.
17 The most commonly used term for the local administrative body is "Authority." However, in Iowa, Kentucky, and Michigan these bodies are called "Commissions." Occasionally, the terms "Agency," "Board," and "Committee" are used.
18 Mass. Gen. Laws Ann. ch. 121, § 26K (1965) is a typical state enabling statute, and reads: "... [e]very such authority shall be managed, controlled and governed by five members, appointed or elected as provided by the [Act]." Id.
provision allowing self-government to municipalities and counties.\textsuperscript{19} At present, some thirty states recognize this traditional form of local self-government and control over community affairs. Twenty-eight states provide for home rule in their constitutions, while an additional pair have statutory provisions granting home rule powers to municipalities.\textsuperscript{20} The spirit of home rule is best described by a judicial recitation of the constitutional purposes in providing for home rule:

\ldots to enable municipalities to conduct their own business, control their own affairs to the fullest possible extent in their own way. It was enacted upon the principle that the municipality itself knew better what it wanted and needed than did the state at large, and it gave that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs.\textsuperscript{21}

Even if home rule does not exist in a particular state, a municipality may exercise control over the project’s development through the consent requirement.

There are three additional methods by which local control can be exerted over actions taken under the auspices of the United States Housing Act’s low-income housing program. These three methods of controlling a municipality’s consent are, (1) the use of administrative procedures such as those outlined by the Office of Management and Budget, (2) the use of local electorate referendums, and (3) the refusal to cooperate within the meaning of the United States Housing Act language. While each of these methods is generally separate from the others, situations might exist in which a combination of these methods might be appropriate.\textsuperscript{22}

\textbf{A. Circular A-95}

One method available for local control of federally funded projects is provided by Circular A-95,\textsuperscript{23} an instructional memorandum issued by the Federal Office of Management and Budget. The circular created what is known as the Project Notification and Review System (PNRS). Circular A-95 attempts to expand intergovernmental cooperation in administering the existing Federal Grant-in-Aid system. It sets procedures for the implementation of Title IV of the Intergovernmental Cooperation Act of 1968\textsuperscript{24} and of the existing

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\item \textsuperscript{19} Generally, home rule provides broad grants of power which cover the administration of the municipal government and also cover the management and control of municipal property. For a complete discussion of the area of home rule, see I C. Antieau, Municipal Corporation Law § 3.00-36 (1973, Supp. 1974); 4 C. Antieau, County Law § 31.05 (1966, Supp. 1974).
\item \textsuperscript{20} For a detailed listing of all the relevant state constitution provisions see I C. Antieau, supra note 19, at 95-96.
\item \textsuperscript{21} Fragley v. Phelan, 126 Cal. 383, 387, 58 P. 923, 925 (1899).
\item \textsuperscript{22} One such situation could be hypothesized as when a local governing body refused to give its “consent” and later acquiesced, or where a referendum was required in which approval was given by the local voters, then the Circular A-95 review procedures would become effective to assure that the low-income housing project conformed to any “master” plans for the development of the locality.
\item \textsuperscript{24} 42 U.S.C. §§ 4231 et seq. (1970).
planning requirements of the Demonstration Cities and Metropolitan Development Act of 1966.\(^ {25}\) PNRS seeks to facilitate the coordination of federal, state, and local planning and development by means of early contact with applicants for federal assistance.

Circular A-95 allows state, regional, and metropolitan planning agencies to condition their consent by influencing decisions on proposed federally assisted projects which may affect their own programs. Through this review procedure, the PNRS assures the coordination of planning and the expenditure of federal funds in a manner most beneficial to the community as a whole.\(^ {26}\)

The citizens of the local community most affected by the proposed federally assisted program have the right to present their views and comments upon the application. By utilizing public hearings, the A-95 review process allows for invaluable participation in the decision-making process by individuals or their elected representatives.

However, unlike referendums or refusals to cooperate, Circular A-95’s procedures are advisory in nature and not a form of absolute local control. Any LHA plans for a proposed low-income project may be revised, but there is little potential for the complete dismissal of such plans as a result of the PNRS procedures. If a community has shown sufficient reasons, in the course of the review process, to reject such a project then it should resort to a referendum or simply refuse to cooperate.

### B. Referendums

Referendums are a significant and valid electoral device for exercising local control over low-income housing projects. In contrast to the PNRS, referendums are absolute in their nature. If a proposal for a housing project requires referendum approval but fails to receive the required margin of votes, then there is no local consent for the proposal even if the local governing body had given its tentative approval. The “Phillips Amendment” to the First Independent Offices Appropriations Act of 1954\(^ {27}\) permits any local governing body in the nation to authorize a referendum in the community to determine whether public housing is needed in that community.\(^ {28}\) At least 10 states use this method to control municipal consent to low-income housing projects. These referendums require citizen approval at various stages of the process and fall into overlapping categories.

The most common form of referendum requirement is illustrated by Article

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26 Circular A-95, ¶ 5.
28 It is unclear whether the Phillips Amendment was meant to be permanent legislation or not. On the basis of the legislative history and the language employed in the statutory provision, HUD has concluded that it was meant to be permanent legislation and was not reenacted for that reason. HANDBOOK ON HOUSING LAW ch. IV, pt. II at 9-10 (1973). However, a United States District Court held in the case of City of Hialeah v. United States Housing Authority, 340 F. Supp. 885 (S.D. Fla. 1971), that the Phillips Amendment expired at the end of fiscal year 1954 due to a lack of any express language exemplifying permanency.
XXXIV of the California Constitution, which "requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority." Other states require referendum approval whenever the locality must provide a direct loan or grant to the proposed project. Another type of state statute permits referendums on proposed projects but does not make a referendum mandatory. Under this type of statute a referendum may be initiated by the local governing body. The third method of voter approval is characterized by state laws which require a referendum before a local housing authority may even be created.

Cases discussing alleged discrimination associated with these referendum requirements may be grouped into two general categories. Within the first category are cases regarding the validity of state constitutional provisions, referendums, or enactments of local governments which attempt to establish a "negative policy" toward open housing by restricting governmental interference with an individual's right to dispose of real property. Reitman v. Mulkey sought to validate such a negative policy embodied in Article I, § 26 of the California Constitution which was enacted as an initiative measure by the people of California as Proposition 14 in a statewide ballot in 1964. The United States Supreme Court rejected Article I, § 26, saying that "Proposition 14 invalidly involved the State in racial discriminations in the housing market."

Shortly after Reitman, the Supreme Court invalidated another government's "negative policy" toward open housing in Hunter v. Erickson. In Hunter, the citizens of Akron, Ohio, amended their city's charter to require that any ordinance regulating real estate on the basis of race, color, religion or national origin could not take effect without approval of a majority of those voting in a city election. Any other housing ordinances would take effect without the necessity of having to survive any special mandatory referendum. Hunter, therefore, rested on the conclusion that Akron's referendum law denied equal protection of the laws by placing "special burdens on racial minorities within the governmental process."

The second category of referendum cases relates to the validity of state constitutional provisions or local government enactments which require submission
of fair or open-housing proposals to a public referendum for voter approval. This category of cases may be exemplified by *James v. Valtierra*\(^{38}\) and *Spaulding v. Blair*.\(^{39}\)

*James v. Valtierra* involved a challenge to California’s Constitution, Article XXXIV. That article required a local referendum before any governmental body could acquire or develop any low-income housing project. The Supreme Court distinguished *Valtierra* from the situation in *Hunter* by saying that “unlike the Akron referendum provision, it cannot be said that California’s Article XXXIV rests on ‘distinctions based on race.’”\(^{40}\) The Court found that the record would not support a claim that such a provision, seemingly neutral on its face, was in fact aimed at racial minorities.\(^{41}\)

The Court found that “[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.”\(^{42}\)

Referendum approval of low-rent public housing projects . . . ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community.\(^{43}\)

This case law supports the right of a municipal population to use this electoral device to reject the establishment of a low-income housing project within its boundaries without a violation of the equal protection clause.

If a state makes statutory provision for referendums with respect to questions of consent to a low-income housing project, the neutrality of the statutory language will determine its lawfulness. If the referendum fails, then the voters’ refusal to consent to the project is absolute. A municipality in a state without statutory referendum provisions may forcefully and absolutely refuse its consent for a proposed low-income housing project by simply refusing to cooperate.

**C. Consent Requirements**

The final method of local control relies upon the consent requirements of the United States Housing Act. The public housing program’s enabling statute requires some approval or consent by the third party affected by a federally funded project. HUD will not make any preliminary loans, any contracts for loans, or any contracts for annual contributions with a local housing authority unless the governing body of the locality has given its consent to the development of a low-income housing project within the community.

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39 403 F.2d 862 (4th Cir. 1968).
40 402 U.S. at 141.
41 Id.
42 Id.
43 Id. at 143. See, Spaulding v. Blair, 403 F.2d 862 (4th Cir. 1968). In another case involving referendums and low-income housing projects, the Ninth Circuit held that referendums not based upon explicit racial classifications should be upheld. See, Southern Alameda Spanish Speaking Organization (SASSO) v. City of Union City, California, 424 F.2d 291 (9th Cir. 1970).
Consent must be given in two ways by the local governing body. The first method of consent is for the governing body of the locality to pass a resolution approving the local housing authority's application for a preliminary loan to pay for the surveys and planning for the proposed low-income housing project. The second method of consent requires that, before HUD will contract for loans (other than preliminary loans) or for annual contributions, the local housing authority must have entered into a "Cooperation Agreement" with the local governing body.

The time when the city might halt the project is before it has given the approval which authorizes the authority to proceed to make applications for and procure the federal loans. The city is given the power to prevent a project's being initiated, and no project under the state and federal laws may be commenced or loans made without its approval and entry into a cooperation agreement.

III. Mahaley v. Cuyahoga Metropolitan Housing Authority

Mahaley v. Cuyahoga Metropolitan Housing Authority is the first case to test specifically a local governing body's right to control the location and development of federally assisted housing projects by its refusal to enter into the required cooperation agreement contract. In Mahaley, the constitutionality of the cooperation agreement requirements of the United States Housing Act were challenged by a class of low-income residents of the Greater Cleveland Area. The plaintiffs sought a declaration that the cooperation agreement requirements were unconstitutional and an order compelling five suburban communities to construct low-income housing units. The threshold question was whether this "required consent" can be properly refused by a local governing body without denying equal protection of the laws; whether the right of refusal requires a compelling governmental interest became the paramount issue.

A three-judge district court held that the local consent requirements, specifically the cooperation agreement, were constitutional both on their face and as applied. However, the question of whether the defendants had used the statutory consent requirement as a tool to perpetuate segregation was referred to a

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47 In discussing Mahaley v. Cuyahoga Metropolitan Housing Authority in this note, citation is made to three different court decisions of the case. The decision of the three-judge district court which found the cooperation agreement requirement of the United States Housing Act to be constitutional is 355 F. Supp. 1245 (N.D. Ohio 1973). The decision of the single-judge district court regarding the question of discrimination by the defendant municipalities is 355 F. Supp. 1257 (N.D. Ohio 1973). The circuit court of appeals' reversal of the single judge's decision is 500 F.2d 1087 (6th Cir. 1974).
48 The constitutionality of the United States Housing Act of 1937 was upheld by the United States Supreme Court's decision in City of Cleveland v. United States, 323 U.S. 329 (1945). However, the City of Cleveland case was decided in 1945 and passed only on the validity of the United States Housing Act of 1937 prior to its amendment by the Housing Act of 1949, 63 Stat. 413, which added the present cooperation agreement requirement now codified at 42 U.S.C. § 1415(7)(b) (1970).
single judge (Chief Judge Frank J. Battisti). Without a further evidentiary hearing, Chief Judge Battisti held that the defendant municipalities, by failing to enter into cooperation agreements, had used the statutory requirements as a shield to protect their inhabitants from integration by low-income minority persons.

Chief Judge Battisti ordered the defendant, Cuyahoga Metropolitan Housing Authority (CMHA), to prepare and submit to the court within 90 days a plan reflecting the "need" for low-income housing within each municipality of Cuyahoga County. Before CMHA submitted its plan to the district court, counsel for the defendant municipalities filed for a stay of the district court's order and for appeal of the single judge's determination.

The Sixth Circuit held that the statutory requirement of a cooperation agreement between the local governing body and the local housing agency was constitutional both on its face and as applied. However, the court also held that the single judge's finding of a violation of the plaintiff's civil rights was "utterly inconsistent" with the three-judge panel's decision. The court stated that since the United States Housing Act of 1937 was constitutional and constitutionally applied by the defendant municipalities, the plaintiffs had no cognizable civil rights claim. The plaintiffs could have maintained their civil rights claim only if the court had held the act to be unconstitutional or unconstitutionally applied by local officials. It was also noted that since there is no constitutional right to public housing in one's own city, there is no right to public housing in a municipality in which the plaintiff does not reside.

It should be noted that at the same time that the Sixth Circuit decided Mahaley v. CMHA, the Second Circuit decided Aceveda v. Nassau County, New York, dealing with similar issues on the right to housing. The Second Circuit held that the county and its officials had no constitutional or statutory duty to provide low-income housing just as there was "no constitutional guarantee of access to dwellings of a particular quality." The Second Circuit said that although the county had instituted a plan which would have benefited minority groups and promoted integration, it was not compelled to undertake the plan in the first place. Therefore, the court held that the imposition of an affirmative duty to construct housing, as the plaintiffs sought, was "clearly not required by any provisions of the Constitution" or the Fair Housing Act of 1968.

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50 355 F. Supp. at 1268.
51 500 F.2d at 1092.
52 Id.
53 Id.
54 Id.
55 Id. at 1093; see Lindsey v. Normet, 405 U.S. 56 (1972).
56 500 F.2d 1078 (2d Cir. 1974). Mahaley was decided on July 9, 1974, while Acevedo was decided one week earlier, July 2, 1974.
57 500 F.2d at 1080-81.
58 Id. at 1081; see Lindsey v. Normet, 405 U.S. 56, 74 (1972).
59 500 F.2d at 1081.
60 Id.
61 Id. at 1082.
IV. Constitution Aspects

What degree of judicial review must a municipality’s refusal to enter a cooperation agreement satisfy in order to avoid violating the equal protection clause? Initially, because the federal low-income housing program rests on a legal foundation of both federal and state legislation, analysis of the constitutional questions which arose in *Mahaley* must begin with the Supremacy Clause.

A. Supremacy Clause

The Supremacy Clause\(^\text{62}\) applies only if a state law conflicts with a federal law and, in such instances, the federal law controls.\(^\text{63}\) In *Mahaley*, there was no conflict of federal and state law given the court’s interpretation of the cooperation agreement requirement of the United States Housing Act. The Sixth Circuit quoted Justice Black’s decision in *James v. Valtierra*:

> By the Housing Act of 1937 the Federal Government has offered aid to state and local governments for the creation of low-rent public housing. However, the federal legislation does not purport to require that local governments accept this or to outlaw referendums on whether the aid should be accepted [emphasis added].\(^\text{64}\)

By exercising its constitutional powers over the general welfare and spending, Congress has enacted a valid statutory provision requiring that a cooperation agreement be entered before HUD will approve any LHA’s application for financial assistance. Congress determined that local decisions and cooperation were essential to effectuate the low-income housing program.\(^\text{65}\) The constitutionally valid United States Housing Act, with its cooperation agreement requirement of § 1415(7)(b)(i), must prevail if it conflicts with any state’s housing authority laws. Therefore, neither the defendant municipalities nor any other community may constitutionally be compelled to accept the offer of federal aid.

B. Equal Protection\(^\text{66}\)

The equal protection clause of the fourteenth amendment was designed to

\(^{62}\) U.S. CONST. art. VI, § 2 provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . .”

\(^{63}\) A state law will be void under the Supremacy Clause if it would retard, impede, burden, or otherwise stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the federal law. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Even where the conflicting state law was enacted for some valid purpose and was not intended to frustrate federal law, it will be held void. *See Perez v. Campbell*, 402 U.S. 637 (1971).

\(^{64}\) 500 F.2d at 1091.

\(^{65}\) Congress has reaffirmed its belief in the continued appropriateness of local determination of need and cooperation in the Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 5(e)(2), 88 Stat. 653. This bill was enacted after the Sixth Circuit’s decision in *Mahaley v. Cuyahoga Metropolitan Housing Authority*.

\(^{66}\) For a general discussion of the entire area of the law and a complete background of the standards of judicial review employed by the courts in cases involving equal protection claims, see Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).
safeguard citizens from governmental actions implementing discriminatory legislation and from governmental inaction resulting in invidious discrimination. However, this theory does not preclude some classification between groups of people, where it is essential to efficient functioning of the state. The standard of review in equal protection cases depends upon both the nature of the classification and the importance of the interest affected. During the past few years, the courts have found virtually every phase of the administration of public welfare and public housing to be governed by the requirements of the fourteenth amendment.\(^6\)

In *Mahaley*, the threshold question was whether there is an equal protection problem when an impecunious person is denied access to public low-income housing by a municipality's refusal to enter into a cooperation agreement with the LHA. As noted, the policy of the federal low-income housing program is to make decent, safe, and sanitary housing available to all persons without regard to racial considerations. But, because of the current nature of American society, the majority of those persons eligible to reside in federally subsidized low-income housing, especially in major urban areas, are almost always Blacks. Therefore, the characterization of the groups of people involved in *Mahaley* becomes significant. The choice of classification, either "wealth" or "race," will be reflected in the standard of judicial review which is applied.

While race may be an important factor in characterizing the tenants and potential tenants of many of the federally assisted low-income housing projects, it is not the criterion upon which eligibility for participation in the program is based. HUD's regulations and each LHA's income limits determine eligibility.\(^6\) Therefore, race cannot be the relevant classification in cases like *Mahaley* for purposes of selecting which standard of judicial review should be applied in deciding any equal protection issues. The United States District Court for the Southern District of New York set down in its decision in *Citizens Committee for Faraday Wood v. Lindsay*,\(^6\) the most current judicial opinion on this matter. While noting that the standard of review in equal protection cases is unclear, the court held that "[a]bsent [a] prima facie showing of racial discrimination or the denial of a fundamental constitutional right, the courts continue to apply the 'rational basis' test..."\(^7\)

In many federal housing program cases, the close correlation between the tenants’ and potential tenants’ racial characteristics and economic status has been used to argue for equating these two characteristics and thus requiring the courts to use “strict scrutiny” applied to suspect classifications. However, there are major theoretical obstacles to linking “wealth” to race as a “suspect classification."\(^7\) Some of the obstacles are the positive value that society places upon

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\(^7\) Under 42 U.S.C. § 1410(g) (1970), LHA’s are empowered to establish income limits and other criteria of eligibility.


\(^7\) Id. at 659.

distinctions of wealth, the traditional state-imposed financial prerequisites for
the enjoyment of certain services and activities, the belief that poverty is remedi-
able, the difficulty in determining exactly what constitutes poverty, and the diffi-
culty in defining the limits on substantive areas to which equal protection should
apply. Since wealth, in contrast to race, is a relative factor, the level of income
at which a person becomes entitled to government-provided services is largely
discretionary.

While these arguments were being made in federal housing program cases
to link wealth to race, other cases and commentary have sought recognition of
wealth as a new category of suspect classification and housing as a fundamental
right. Several Supreme Court decisions have been interpreted as suggesting that
de jure wealth classifications were "suspect" and presumptively unconstitutional.
However, wealth has not been judicially recognized as a suspect classification as
witnessed by the Supreme Court's rejection of the concept in James v. Valtierra.
Except for Justice Marshall's dissenting opinion in Valtierra, wealth has only
been classified as "traditionally disfavored."

"Fundamental interests" involve any interest in a matter clearly basic to a
decent life. This general definition includes decent housing as defined in the
Housing Act of 1937. However, in Lindsey v. Normet, the United States
Supreme Court rejected arguments that the "need for decent shelter" was a
fundamental interest, requiring a more stringent standard of review than mere
rationality. In that case the Court stated:

We do not denigrate the importance of decent, safe, and sanitary hous-
ing. But the Constitution does not provide judicial remedies for every social
and economic ill. We are unable to perceive in that document any con-
stitutional guarantee of access to dwellings of a particular quality.... Absent
constitutional mandate, the assurance of adequate housing...[is a] legis-
lative, not [a] judicial [function].

Therefore, the district court in Citizens Committee for Faraday Wood v. Lindsey
accurately described the status of the law when it said "[h]owever necessary
housing may be it still falls within the area denominated by the Supreme Court
as 'economic and social welfare' and not the area carved out for special scrutiny
known as 'fundamental rights.'"

The Supreme Court has long recognized "that the Fourteenth Amendment
permits the states a wide scope of discretion in enacting laws which affect some
groups of citizens differently than others." The Court recognized that "in the
area of economics and social welfare, a State does not violate the Equal Protec-

Exclusionary Zoning, Equal Protection and the Indigent, 21 STAN. L. REV. 767, 785-87
72 See McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802, 807
73 402 U.S. at 144-45.
75 405 U.S. 56 (1972).
76 Id. at 74.
77 362 F. Supp. at 659-60.
tion Clause merely because the classification made by its laws is imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'.... 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' 79 Consequently, the minimal rationality test has frequently been applied in the area of economic and social welfare legislation. 80 However, this "rational relationship" test requires only minimal judicial scrutiny of the legislation or state action. This minimal analysis, reflected in *McGowan v. Maryland*, 81 can be limited to even a hypothetical rather than a factual situation.

The strict scrutiny standard of judicial review reserved for equal protection issues involving suspect classifications and fundamental rights under the Constitution does not apply in cases like *Mahaley*. This type of case, dealing with a municipality's denial of the requisite consent for a low-income housing project by refusing to enter a cooperation agreement, clearly falls within the general area of law delineated as "economic and social welfare." Because the courts cannot demand a "compelling governmental interest" as justification for the municipality's actions, under the "two-tier" approach to the equal protection scheme they must apply the reasonable relation or mere rationality test. The isolated decision to refuse to enter into a cooperation agreement must be judged according to the rational relationship test of the traditional equal protection clause as to whether it does or does not violate the fourteenth amendment.

However, judicial dissatisfaction with the limitations of the two-tier approach in instances where the strict scrutiny standard did not apply, and yet the mere rationality test seemed inappropriate, has created a third, intermediate standard of judicial review. This newest standard of equal protection, the "sliding-scale" or the "means-evaluation" test, considers such factors as: (1) the importance of the interests the state action is attempting to promote or protect, (2) the importance and character of the interests adversely effected, (3) the substantiality of the connection between the legislative classification and the legitimate purpose to be served, and (4) the alternative means for accomplishing those purposes. 82 The sliding-scale or means-evaluation test has been applied in some form by the Supreme Court in a variety of cases, including sex discrimination, 83 recoupment of legal defense fees expended on behalf of indigents, 84 picketing, 85 and exclusionary zoning. 86

81 366 U.S. at 426: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." Id.
82 The component factors for such an inquiry were suggested in Van Alstyne, *Student Academic Freedom and the Rule Making Powers of Public Universities: Some Constitutional Considerations*, 2 Law in Transition Q. 1, 20-29 (1965). For a full discussion of the judicial development of this "sliding-scale" of rationality test, see Gunther, * supra* note 66.
83 Reed v. Reed, 404 U.S. 71 (1971).
85 Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92 (1972).
If the issues involved in *Mahaley* are to be scrutinized under any method of analysis stronger than the mere rationality test, they must be reviewed under a sliding-scale or means-evaluation test. Congress has recognized and supported the concepts of a local determination of need and the absolute prerequisite of consent through a cooperation agreement; there are no other alternatives.\(^7\) Also, the close connection between the legislative classification of those involved in the federal housing program and the legitimate purpose served by the program is readily apparent. The United States Housing Act has long been determined to be a proper exercise of congressional power.\(^8\) and, in light of the need for adequate decent housing, those least able to afford housing without federal assistance are those who benefit from the program. The importance of the plaintiffs' interests in *Mahaley* has already been established. While there may be a need for decent housing, especially for the poor, access to housing of a particular quality is not a fundamental right guaranteed by the Constitution.\(^9\)

Only the first factor requires further examination. Under this test courts should not ask whether there is any reason to justify the municipality's action but rather should inquire into the particular importance of the interest sought to be protected. In *Mahaley*, the defendant municipalities advanced arguments regarding the financial burdens and obligations imposed by participation in the federal low-income housing program.\(^9\) Based upon a showing of due deliberation of the question of need for such housing and a consideration of the financial burdens placed on a municipality by cooperating, the greatest weight must fall on this factor. Therefore, even when balancing the interests of the parties as the sliding-scale or means-evaluation test does, a municipality's denial of consent by refusing to enter into a cooperation agreement could not be found to violate the Equal Protection Clause.

V. Conclusion

Courts have not and should not impose upon state and local governing bodies the affirmative duty to provide adequate housing for all persons, regardless of wealth. The *Acevedo*\(^9\) case, through its attack on a similar type of situation as arose in *Mahaley v. CMHA*,\(^9\) gives significant judicial recognition to local control as to participation in optional programs for low-income housing. If the governmental interest to be justified is local control over federally financed projects,
then the least onerous alternative is already provided by the Housing Act. This local control is provided through local legislative approval of each proposed housing project and cooperation agreement contracts with the LHA.

The Sixth Circuit relied in part upon the Supreme Court's decision in *James v. Valierra* with respect to the interpretation of the consent requirements of the United States Housing Act. After reciting the Supreme Court's reasons for the propriety of local determinations, the Sixth Circuit concluded:

The Supreme Court thus construed the plain language of the Act to mean exactly what it says, namely, that it is for the municipalities to decide whether they need low-rent housing and whether they desire to sign cooperation agreements. There is no basis to infer discrimination upon the part of a municipality for doing what it has a lawful right to do under the express provisions of the Housing Act.

Federal housing policies rest on the basic principle that if a municipality does not want federally assisted housing, it should not have it imposed upon it. These federal statutes and policies recognize that, although the housing problem is national in its scope, the factors determining patterns of housing and community development are complex and many are uniquely local in nature. The primary responsibility for local problems must rest with the local community; the need for any kind of housing action should be determined locally. Therefore, any determination of a lack of need for housing action in a municipality, exhibited by a refusal to enter into a cooperation agreement contract, should be judged by a rational relation rather than a strict scrutiny test. If there is a reasonable basis for that determination, there is no violation of equal protection of the laws.

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95 500 F.2d at 1092.