

BUILDING CODES, HOUSING CODES AND THE CONSERVATION OF CHICAGO'S HOUSING SUPPLY†

Various means, increasingly sophisticated, have been employed by governments in an attempt to control the maturation, aging, death and resurrection of our city neighborhoods. From simple fire and health regulations, government activity has extended to zoning, comprehensive building and housing codes, electrical and plumbing codes, to public housing, slum clearance and finally to programs designed to encourage the conservation and rehabilitation of existing buildings. Each of these programs has failed as a panacea.¹ Today, as these devices cumulate about us, the hope is that a proper combination of all will do what no one could by itself:² provide "a decent home and a suitable living environment for every American family."³

Of these programs, the one attracting the greatest interest today is the rehabilitation of existing housing.⁴ It is recognized that the nation's housing stock represents our largest national asset, and that "if we are to meet today's housing needs, we cannot depend on new housing alone."⁵ Simply put, we cannot as a nation afford to tear down and replace all of the dwelling units we consider substandard. If we want better housing, we must learn to maintain and improve what we already have. This, at least, is the official reason. Other factors are important. One is growing recognition that large scale clearance is expensive and has not worked very well. While it has a salutary effect on the immediate neighborhood, it is commonly believed that new slums develop faster than they are cleared.⁶ There has also been increasing community resistance.

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¹ Julian Levi, Executive Director, Southeast Chicago Commission, in a seminar discussion at the University of Chicago, 1963.

² *Ibid.*

³ Housing Act of 1949 § 2, 63 Stat. 413 (1949), 42 U.S.C. § 1441 (1958).

⁴ For a discussion of the problem in relation to "blighted areas" see, Levi, *Problems in the Rehabilitation of Blighted Areas*, 21 FED. B.J. 310 (1961).

⁵ Address by William Slayton, Acting Director, Urban Renewal Administration, at a conference sponsored by the Department of Urban Renewal of the City of Chicago on "Rehabilitation & Neighborhood Conservation," April 30, 1963.

⁶ This opinion, while frequently expressed, is difficult either to support or to disprove. One would expect that the United States Census would provide adequate data, but the Bureau of the Census has changed its definitions of housing quality

Residents who are to be cleared oppose the dislocation of community life. Critics charge that the end-product is a mass of planning blunders expressed in sterile architecture.⁷ Opposition is common from whites who identify urban renewal with the expansion of the Negro ghetto and from churches, especially the Catholic Church, which do not like to see parish life disrupted, nor to expend spirit, energy and money for rebuilding.⁸

between 1950 and 1960, so that it is impossible to make direct comparisons over the decade. And, even if the definitions were comparable, other problems would make comparison difficult. During the fifties there was considerable clearance, which probably resulted in the elimination of a great proportion of the housing that could be described as slum or blighted because of dilapidation or the absence of plumbing facilities. It is possible to have housing facilities that are quite bad, even though there is adequate plumbing and no fear that the building is about to collapse. Buildings may be so overcrowded and filthy that they can be properly described as blighted, though they lack those characteristics with respect to structural soundness and adequacy of plumbing, which the census uses to distinguish housing quality. Census standards have become too crude to provide an adequate measure. One basis on which this assertion can be supported is the visual observation of what is going on within Chicago in such communities as Lawndale. It is clear that the west side of Chicago is the center for the low income Negro and that the west side areas are gradually developing all of the characteristics of a slum community, even if the census does not catch the process as it occurs.

⁷ JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961), is one of the principal critics of present planning.

⁸ This last is not a criticism of the churches; if anything, it is a criticism of urban renewal. The Catholic Church, at least in Chicago, has become strongly community oriented in its approach to urban problems. Thus, when appearing in behalf of the then newly appointed Cardinal Meyer, Msgr. John Egan, Director of the Archdiocesan Conservation Council, told the United States Commission on Civil Rights: "Our communities are capable of far seeing and united action. The individuals in them, their businesses and industries, our Catholic parishes, the Protestant churches, the synagogues and temples have the leadership and ability to work out a variety of forms of *local cooperation* in order to stabilize the populations, *to control and guide conservation and development*, and to make sure Negroes of like economic and social backgrounds do gain admission in a manner that is harmonious As communities gain a control over their own future, they shall be excellently situated for seeing to it that Negroes are welcomed in a number and manner that will both assure them continued existence and growth, and at the same time accord to the Negro middle classes the rights that are incontestably theirs." 1 *Hearings Before the United States Commission on Civil Rights: Housing*, Hearings Held in New York, Atlanta and Chicago 807-08 (1959). (Emphasis added.) This desire for neighborhood "self-determination" and stable communities is related to a frank concern for the problems of the parish in a changing neighborhood: "Wherever the Negro tide has rolled over an entire neighborhood with lightning-like speed, it has reduced the parish congregation to a tenth of its former size almost overnight." Curran, *A Report on Our Program and Our Progress in the Negro Convert-Apostolate*, in *THE CATHOLIC CHURCH AND THE NEGRO IN THE ARCHDIOCESE OF CHICAGO* 9 (1960). A preference for rehabilitation over large scale clearance is a reasonable corollary of the approach suggested by the above. If community organization is viewed as the principal means of solving such problems as racial segregation and as a tool for achieving "conservation and development," it follows that large scale clearance, which destroys one community and puts great burdens of absorption on adjoining communities, would be looked upon with disfavor.

But rehabilitation as conceived today is not a unitary program. Even in conservation areas there is clearance, both because structures have decayed beyond economic rehabilitation and because space may be required to provide additional community facilities, change traffic patterns and provide tracts of appropriate size and shape for resale to private developers. There is common agreement that the existence and enforcement of codes⁹ designed to set standards for human habitation and

⁹ Housing and building codes are the two basic types. A building code sets standards for new construction, and includes detailed structural requirements. A housing code is a minimum code for human occupancy applicable to all buildings; it has effect on the structure itself only by implication. The housing code sets such standards as plumbing facilities required per person, family or dwelling unit, without setting the standards for the equipment itself or its installation. Similarly, the housing code requires such things as garbage cans, screens and temperature to be maintained where the landlord supplies heat. There is a certain amount of overlapping, as where the housing code sets exit requirements, room and window sizes which have an obvious connection with the structure and its design. Basically, however, the building code can be considered a new construction code and the housing code a standard for existing buildings.

Some confusion exists in Chicago with respect to the terms building and housing codes because, while in common discussion the words are used as above, within the city code all of those chapters respecting buildings including all the specialized codes, are classified under the general term "Buildings." CHICAGO, ILL., MUNICIPAL CODE chs. 39-92 (1939).

In the Chicago code there are no provisions dealing specifically with the rehabilitation of existing structures. As an existing inhabited structure stands, it must conform to the Housing Code. If "major" rehabilitation is begun, the structure must be brought into conformity with the Building Code provisions applicable to new construction. Technically "major" is determined by the relation of the cost of the rehabilitation to the value of the structure. CHICAGO, ILL., MUNICIPAL CODE ch. 78 §§ 78-8.5 to 78-8.8 (1939).

In practice the applicability of the Building Code is often determined by whether or not there is a change in use, *e.g.*, from multi-family to single family, from three units to six units. Wherever such a change in use occurs, the Department of Buildings will not issue a building permit unless it is shown that the structure will be brought into conformance with the Building Code.

Some provisions of the Housing Code may also affect rehabilitation. I refer especially to the requirement that all glass crash panels be eliminated. CHICAGO, ILL., MUNICIPAL CODE ch. 78 § 78-15.9(a-b) (1939). A glass crash panel is a door with glass of specified dimensions that provides a means, where each of two apartments has a single exit, of getting from one apartment to the other in the event of fire. These panels are often used where a large apartment with a front and rear exit has been divided into two smaller apartments. In the event of a fire in the front apartment blocking the front exit, residents of that apartment can escape by breaking the glass and using the rear exit. During the Second World War, it was considered patriotic to convert buildings so as to increase the number of units and glass crash panels were permissible as a means of satisfying requirements for a second exit. It has been estimated to me that there remain in Chicago some 40,000 units employing such panels. The principal objection is that occupants often place heavy furniture in front of them, thus making them useless. It is also urged that the occupant of one apartment will not be familiar with the layout of the apartment to which it is adjoined by the panel and he will therefore be hindered in his escape. The problem raised by this requirement is that the owner of the subdivided building must either provide, often at great cost, a second

building construction are prerequisites to a successful rehabilitation program.¹⁰ The purpose of this comment is to consider how Chicago's building and housing codes are affecting the city's rehabilitation program.¹¹ There is strong evidence to suggest that the city's vast rehabilitation program—50,000 of Chicago's housing units are in areas designated for conservation¹²—is more likely to be frustrated than aided by present building regulations. If this analysis is valid, it may be possible to generalize from it, for the troublesome characteristics of the Chicago codes are common to many larger cities.¹³

I.

Though terminology has changed under the influence of the study of human ecology, today's problem of urban blight is essentially America's perennial housing problem.¹⁴ Building and housing codes, designed originally to set a floor under the safety and health standards of habitable

exit that does conform with code requirements, or deconvert his building and thereby reduce the number of available units. Reduction of the number of units in an area makes the problem of general code enforcement more difficult by reducing the owner's incentive to improve his property and by increasing the problems of dislocation that are inevitable with enforcement, especially where the code standards are high. Furthermore, the enforcement of housing codes is, in itself, an enforcement of rehabilitation, at least to minimal standards. In higher income areas, housing code enforcement appears to be used as a means of sparking rehabilitation beyond housing code requirements. And housing code conformance may require such extensive modification as to bring the building code into play.

¹⁰ Here is a typical statement: "[T]he police power, embodying the enactment or improvement and the sound administration and effective enforcement of adequate local codes, is crucial to the successful long-term accomplishment of planned rehabilitation Without question, the failure to enact, improve, soundly administer, and effectively enforce adequate local codes, more than any other single cause, accounts for the huge tasks of the present urban renewal effort." Osgood & Zwerner, *Rehabilitation and Conservation*, 25 LAW & CONTEMP. PROB. 718-19 (1960).

¹¹ It must be borne in mind that the two programs are administratively divided, rehabilitation being largely within the province of the city's Department of Urban Renewal, while code enforcement is largely the responsibility of the city's Department of Buildings (with the help in some areas of the Fire Department and the Board of Health). This separation presents problems of administrative coordination.

¹² Address by William Slayton, *supra* note 5.

¹³ NASH, *RESIDENTIAL REHABILITATION: PRIVATE PROFITS AND PUBLIC PURPOSES* (1959).

¹⁴ The following are some of the works that have dealt with this problem: RIIS, *A TEN YEARS' WAR* (1900); CHICAGO CITY HOMES ASS'N, *TENEMENT CONDITIONS IN CHICAGO* (1901); VEILLER, *HOUSING REFORM* (1910); ILL. PUB. BLDG. COMM'N REP. (1923) (dealing with building trade monopoly); REP. OF PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP (Gries & Ford ed. 1932); EDITORS OF FORTUNE, *HOUSING AMERICA* (1932); ABBOTT, *THE TENEMENTS OF CHICAGO 1908-1935* (1936); TWENTIETH CENTURY FUND, *HOUSING COMM., AMERICAN HOUSING* (1944); SERT, *CAN OUR CITIES SURVIVE?* (1944); ABRAMS, *THE FUTURE OF HOUSING* (1946); EDITORS OF FORTUNE, *THE EXPLODING METROPOLIS* (1958); JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

structures, provide a guide to the dimensions of that problem. Housing codes as we know them today are probably the direct result of the tenement building, "introduced in New York as a means of producing congestion, raising the ground-rents and satisfying in the worst possible way the need of the new immigrant for housing."¹⁵

Prior to 1902 in Chicago, there were two separate lines of building restriction—fire safety and health.¹⁶ Health restrictions, largely aimed at conditions outside the home and directed at the control of epidemics,¹⁷ were enforced by Health Department officials at their discretion—an unsatisfactory arrangement.¹⁸ Fire safety restrictions (from which our present building codes developed) existed in Chicago as early as 1849; the Department of Buildings, however, was not created until 1875 and then only to administer a code designed to assure structural safety. In 1898 the Department was given a revised code and new powers for dealing with violations.¹⁹

A movement directing public attention to the inadequacies of housing for working class people originated in England during the last quarter of the nineteenth century. The movement spread rapidly to New York, where Jacob Riis was its principal spokesman.²⁰ The same concerns in Chicago led to the organization of the Chicago City Homes Association, a welfare group centered around Hull House that surveyed tenement conditions in three of the city's worst neighborhoods. Its report, published in 1901 and signed by Jane Addams as well as two women from the socially and economically prominent McCormick family, vividly depicted the foul conditions of tenement living.²¹ Within the following year, Chicago adopted a tenement code that can aptly be described as the city's

¹⁵ MUMFORD, *STICKS AND STONES* 109 (1924). Allison Dunham, University of Chicago Law School, disagrees with the idea of insidious intent implied by Mumford. Dunham argues that the dumbbell tenements, so named because vertical airshafts designed to bring light and air to center rooms in long, narrow buildings gave the floor plan the appearance of a dumbbell, were built according to the standards of the time—standards that we have since rejected. It is possible that the truth is some amalgam—that the standards of the time were colored by avarice and prejudice. It should be noted that no private, low income building has been undertaken since controls on tenements were applied; the only new housing built since the turn of the century for such people has been subsidized.

¹⁶ ABBOTT, *op. cit. supra* note 14, at 36.

¹⁷ *Id.* at 37-50.

¹⁸ CHICAGO CITY HOMES ASS'N, *op. cit. supra* note 14, at 162.

¹⁹ ABBOTT, *op. cit. supra* note 14, at 55. Neither the health nor safety requirements dealt adequately with the tenements where the sources of difficulty were excessive land coverage, inadequate light and air, unsanitary interiors, inadequate plumbing facilities and overcrowding. CHICAGO CITY HOMES ASS'N, *op. cit. supra* note 14.

²⁰ ABBOTT, *op. cit. supra* note 14, at 50.

²¹ CHICAGO CITY HOMES ASS'N, *op. cit. supra* note 14.

first modern housing code. In the problem areas pointed out by the survey the new code went far beyond earlier health or building regulations. Land coverage was restricted so as to leave some open space between buildings; occupancy standards and minimum room sizes were set; minimum window areas were determined; running water and interior toilets were required.²²

Despite the tenement code and the continually more detailed building codes it was possible to say in 1935 that efforts to date "have not yet brought about slum clearance, nor provided, on anything but a pitifully small scale, good homes that workingmen and workingwomen with low wages can afford to rent."²³ And almost twenty years later, in 1954, the Citizen's Committee to Fight Slums stated that Chicago had "twenty-three square miles of blighted areas and . . . fifty-six square miles of threatened middle-aged residential neighborhoods . . ."²⁴ Just yesterday, so to speak, it was pointed out that the city has 50,000 units in areas slated for conservation.²⁵

It is clear that the housing problem is still with us. In assessing the effects of the 1902 tenement code, Edith Abbott said,

For approximately thirty-five years the sanitary authorities have been trying to enforce [it] . . . and they have found it impossible to require expensive structural changes or to evict the unfortunate tenants for whom no better homes are available at rents they can probably afford. . . . No one of the sanitary officials has known what to tell these poor tenants to do. The people cannot pay the rents that are asked for better and larger homes. Household congestion . . . is a condition that comes from scarcity of decent apartments at rents that are low enough to be within the purchasing range of the great mass of earners, and other low-income family groups. Bad housing and slums, therefore, remain together as one of the consequences of low wages, and it is difficult to see how, even if slums are abolished, they can be kept from reappearing unless people have adequate earnings to pay adequate rents. A permanent housing subsidy is probably the only alternative. Bad housing goes back to the same cause as poor and insufficient food. But bad housing is more obvious, a reproach to city pride, while underfed people can be more easily kept out of sight.²⁶

²² ABBOTT, *op. cit. supra* note 14, at 59-61.

²³ *Id.* at ix-x.

²⁴ CITIZEN'S COMM. TO FIGHT SLUMS, HOUSING ACTION REPORT OF 1954, at 4. This in a city of approximately 220 square miles.

²⁵ See text accompanying note 12 *supra*.

²⁶ ABBOTT, *op. cit. supra* note 14, at 480-83.

II.

Edith Abbott's summary raises most of the problems facing us today as the successors of the old tenement laws and structural safety laws are called upon to aid in the newest effort to solve the housing problem—rehabilitation. It is worth stressing again one notion in Miss Abbott's remarks: "For approximately thirty-five years the sanitary authorities . . . have found it impossible to require expensive structural changes . . ." ²⁷ That is, it was impossible to bring existing structures into conformity with the tenement code because of the costs imposed by the Code. Before a building owner will invest in rehabilitation (or new construction) he must be able to foresee a market in which the housing can be disposed of at a price that will compensate him for his investment. It is obvious that no one would invest as much in rehabilitation in the Maxwell Street area as one would in the Old Town Triangle. Maxwell Street is the city's open-air market: Old Town has become a prestige area for artists, intellectuals and those who wish they were. In a free market situation, money will flow for rehabilitation to those areas where the added investment is justified. ²⁸

The first principle for the design of codes, both building and housing, is that they must bear a reasonable relation to existing conditions. If standards set are too low—if the economy can afford and the market generally demands higher standards—there is little point in having a code cluttering up the books. ²⁹ On the other hand, "exceptionally high standards will result in a program with costs which no reasonable community can hope to undertake." ³⁰ The effect will be either circumvention or a general raising of prices that will encourage overcrowding. ³¹ This is obvious with examples that are sufficiently exaggerated such as the Maxwell Street—Old Town comparison. But in matching a code to a real-life situation, it is necessary to be more subtle. An additional cost of a few hundred dollars can make the difference when the decision is whether

²⁷ *Id.* at 480.

²⁸ NASH, *op. cit.* *supra* note 13, at 107-28.

²⁹ Prof. Allison Dunham of the University of Chicago Law School indicated in a private conversation that the City of Chicago had made an error in its Building Code which left for several years a loop-hole that would allow a developer to build without providing hot water. It is quite clear that no new buildings were constructed during this period that lacked hot water. Why, then, impose the requirement? In fact, so long as other restrictions are imposed, generally putting new housing in a certain price range, no one specific restriction is necessary, for consumers in that price range will expect that such things as hot water would be provided. If there were no restrictions at all, much cheaper new housing would be built, probably including some lacking hot water.

³⁰ NASH, *op. cit.* *supra* note 13, at 182.

³¹ *Id.* at 107-28.

or not to rehabilitate.³² But such relatively small differences are hardly noticed by the courts which in fact impose on owners improvements costing thousands of dollars per building.³³ In order to see the effect of such rulings, bear in mind that a cost to tenants of ten dollars per month for each thousand dollars invested by a landlord is considered quite reasonable.³⁴ And this cost will normally be borne by the housing consumer.³⁵ The point is emphasized by looking at the problem on a city-wide basis. If we assume that the 50,000 units in conservation areas in Chicago are rehabilitated as desired and that it costs \$2,000 per unit to do so,³⁶ the new investment in buildings would amount to \$100,000,000. At the rate of \$10 per month per \$1000, additional rents would be \$1,000,000 per month. If this were paid, the 50,000 families involved would not be able to spend that \$20 per month elsewhere. Or, if they

32 ANDREWS, URBAN GROWTH AND DEVELOPMENT 223 (1962).

33 *Kaukas v. City of Chicago*, 27 Ill. 2d 197, 188 N.E.2d 700 (1963). It was found that a requirement that \$5,000 to \$10,000 be invested in a building purchased for \$36,000 and improved to a value of \$59,000 was not unreasonable. The court cited *Adamec v. Post*, 273 N.Y. 250, 7 N.E.2d 120 (1937) (where \$5,000 in improvements were required in a building assessed at \$13,500), and *Queenside Realty v. Saxl*, 328 U.S. 80 (1946) (where \$7,500 was required to be invested in a house having a value of \$25,000), in finding that in the instant case the burden imposed upon the property owner was not so great as to outweigh the public interest in obtaining code conformance. The difficulty with the *Kaukas* decision is that it does not weigh in the actual dollar cost to the community of obtaining conformance in all situations similar to that in *Kaukas*; i.e., the court does not consider the total cost of its decision. No one knows how many buildings have crash panels, and therefore, no one knows how much the community is going to have to pay for their elimination. If the building in the *Kaukas* case is a large 3 flat, now divided into six units, *Kaukas* may either add the additional staircase at, say, \$10,000, in which case the rent will have to be raised \$16.67 per month to cover the cost of rehabilitation, or the building can be deconverted to its original three units; in that case, *Kaukas* will have to double rents per unit in order to come out even. If *Kaukas* is alone in his area in being forced to so radically change his market, he is likely to have great difficulty maintaining tenancy. If everyone in the area is under the same pressure to raise standards, the character of the community will change; that means the poorest people will go elsewhere to housing they can afford. Only if *Kaukas'* property is the worst in the area will he find it economically reasonable or desirable to conform to this code requirement. If the property involved in *Queenside Realty* was a single family home, the raise in value from \$25,000 to \$32,500 would change it from a home salable to persons in the \$8,000 to \$15,000 income bracket to a home salable to persons in the \$12,000 to \$20,000 bracket. If the rest of the community consisted of \$25,000 homes, chances are the additional investment could not be realized upon resale, and that the owner could no longer afford to live in the home.

34 NASH, *op. cit. supra* note 13, at 110.

35 Perhaps the difficulty in the courts is the questionable public image of the gouging slum landlord from whose pocket it is assumed the price of rehabilitation or code conformance can be easily and justly extracted.

36 NASH, *op. cit. supra* note 13, at 96-104, describing the average investment in rehabilitation in an area of St. Louis. In fact, much old housing requires investment much greater than \$2,000 to bring it into a condition appropriate for its area.

responded by doubling up, the owners would be left with their investment standing idle.

The costs to a community of codes with excessively high standards are not to be measured in dollars alone. Such codes will be used as weapons. They may be used by prospective purchasers to soften sellers.³⁷ They can be used by building contractors and suppliers as a means of drumming up business.³⁸ They can be used as weapons to assure party regularity.³⁹ And they can be used simply for graft.⁴⁰ Louis Brownlow summarized this point admirably:

Politically, the benefits will be considerable if cities make their codes conform to economic and technological reality, even if they do not go beyond the removal of what many builders con-

³⁷ It was suggested to the author that one method of improving your bargaining position when negotiating a house purchase is to report the building to the Department of Buildings, so that the owner will be put under the threat of court action if he fails either to sell or improve.

³⁸ A businessman whom I interviewed had been ordered at one time to tuckpoint his building; he believed this to have occurred because a local tuckpointing contractor was in need of work. The same requirement was imposed at the same time on a neighboring building. The businessman was asked by the judge supervising compliance whether he had been referred by the inspector to a particular contractor. He had not been, but the fact that the judge should inquire suggests that the gambit has been tried. It should be noted that there is general agreement that there is now much less graft in the Department of Buildings in Chicago than there was a few years ago.

³⁹ "Whitehead [1960 candidate for committeeman of Chicago's 24th ward] had been put under terrific pressure. Those of his workers who were home owners had building inspectors sent after them, an old tactic to quiet dissidents." Ernest Scribner (Nicholas von Hoffman), *Shadow of a Gunman Over the 24th Ward*, Chicago Scene, April, 1963, pp. 20, 25. "And there is a racket in building inspection [in the 24th ward] . . ." Mallette, *Ben Lewis and the 24th Ward*, New City, April 1, 1963, pp. 4, 6. Both of these articles were commentaries on the recent murder of Negro Alderman Benjamin Lewis. Whitehead was a Negro who tried unsuccessfully, before Lewis's election, to take advantage of the transition of the 24th Ward from white to Negro and to wrest political power from the old-guard, white leaders.

⁴⁰ The businessman interviewee, note 38 *supra*, asserted that the small businessman accepts building inspector graft as a normal expense. He estimated that he had paid inspectors \$200 over the last ten years, and would probably have paid more had he been less persistent and resourceful. In one of his bouts with the department he patiently installed a safety relief valve on a hot water tank in three different positions, each time exactly as the inspector directed. On another occasion he was ordered by the Fire Department to remove the lath and plaster from the walls of his shop, leaving the bare brick exposed. Subsequently, a building inspector tried to get him to reinstall it. The interviewee stated that when he first entered business for himself he did not recognize the inspector's approach. While some were quite frank, others would come in and "hem and haw around" until an offer was made. Generally, he said, inspectors want only small sums—\$5 to \$20—so that the owner will not be pressed to appeal to higher authority. It is ironic that the interviewee remembers with particularity one Fire Department inspector who *refused* an offer of \$10 and went about his business after the offer with fairness and dispatch.

sider the necessity of corrupting inspection forces to buy revision of public laws imposing antiquated and unnecessary restrictions⁴¹

The purchase of code revision through payments to building inspectors is only one of several ways in which the codes are avoided. Codes are modified by the Building Department⁴² and the Municipal Court⁴³ through discretionary enforcement. Finally, they are modified by the acceptance of fines by owners.⁴⁴

In 1962, approximately \$385,000 in fines were imposed by the Municipal Court for code violations. Using again as a rough means of comparison the \$100,000,000 cost for rehabilitating the 50,000 units in conservation areas, the disproportion of building fines can be seen. It would take over 250 years before the fines imposed by the city equalled the cost of rehabilitating these areas. Under these circumstances, it is no wonder that a fine may be accepted in preference to bringing a building into conformance. Fines imposed, it has been said, are so small in relation to the cost of rehabilitation that they amount to licensing fees for code violations.⁴⁵ Nor is equitable relief the answer. In 1962 equitable orders

⁴¹ Brownlow, *The Proposed Temporary Illinois State Housing Commission*, REP. OF THE PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP, SLUMS, LARGE-SCALE HOUSING AND DECENTRALIZATION 117 (Gries & Ford ed. 1932).

⁴² Sidney Smith, Acting Commissioner, Chicago Department of Buildings, stated in a public appearance on April 30, 1963 (see note 5 *supra*) that anyone having difficulty complying with the city's new electrical code (which requires electrical outlets every 12 feet and electric lights in all closets of over five square feet, CHICAGO, ILL., MUNICIPAL CODE §§ 88.560.4-88.560.6 (1939), should come in to see him, and that he would be reasonable in enforcing the requirements with anyone reasonable enough to discuss the matter. He said, also, that he thought the code might not be enforceable retroactively, as it apparently purports to be, and that he did not want to be in the position of being "bound" by a code that is unenforceable.

⁴³ Calvin Sawyer, member of the Board of Directors of the Metropolitan Housing and Planning Council, an attorney, and one of the principal drafters of the Chicago Housing Code of 1956, appearing at the same conference (see notes 5 and 41 *supra*), expressed the opinion that the Building Department should not over-use the equitable remedies obtained in the Circuit Court of Cook County (vacate orders, receivership) for fear the circuit court would become as injured to housing violations as has the Municipal Court (which operates, in effect, as a compliance board).

⁴⁴ Julian Levi, at the same conference (see notes 5, 42, 43 *supra*) stated that some slum owners have tried to charge off building fines as normal business expenses for income tax purposes.

⁴⁵ There are at least two interrelated reasons for the low fines. One is that the Municipal Court judges have been reluctant to make use of the procedure that allows them to impose the maximum fine for each day that the violation is known to have existed. Sawyer, see note 43 *supra*, expressed the opinion that one reason for this was that the inspector who made the initial inspection often did not make the final inspection or was not the one who appeared in court, so that there could be no testimony regarding the length of time the violation had existed. Smith replied that this was not an adequate explanation, since there has been an effort to have one

issued out of the Cook County Circuit Court with respect to 567 buildings. If this procedure were counted upon (and figuring an average of two units per building), it would take over forty years to deal with these same 50,000 units.

Codes that are not enforceable because they are too rigorous lead to corruption and wholesale avoidance. They lead to disrespect of the law; they lead architects, even officials when it suits their purposes, to encourage avoidance.⁴⁶

Another result of overly rigorous codes is unequal enforcement. After noting that a highly exacting housing code is unsuitable for existing low rent areas, William Nash, writing for A.C.T.I.O.N., says, "local code officials find a stiff code has great utility in their neighborhood-conservation areas."⁴⁷ The temptation is certainly there to enforce a stringent code in limited areas in order to achieve urban renewal policies that are not directly related to the basic health and safety standards that a housing or building code is intended to achieve.⁴⁸ And, for better or worse, such unequal enforcement is widely recommended by urban renewal experts.⁴⁹

inspector follow a case through from beginning to end, and that where this is not true, the complaining inspector has the complete records of the results of prior inspections. The second reason is that the building court views itself, apparently, as a compliance board, although there is compliance machinery within the agency and the court is supposed to be the last resort of the Building Department for dealing with cases of complete recalcitrance.

⁴⁶ This is an impression that it would be difficult to substantiate, but it is my opinion that staff of the rehabilitation section of the Department of Urban Renewal will wink at minor violations when dealing with a person who is attempting a kind of rehabilitation that will make them look good; that is, where the code and the possibility of successful rehabilitation conflict, they will choose—sensibly enough—the latter.

⁴⁷ NASH, *op. cit. supra* note 13, at 182.

⁴⁸ This was done in St. Louis. *Id.* at 97. It is also being done in Chicago, though Acting Commissioner of Buildings, Sidney Smith, has denied that there is any inequity by district in code enforcement. (This statement was made in response to a question directed to him by the author at the April, 1963 meeting of the Chicago chapter of N.A.H.R.O., where he was the main speaker.) Whether or not this pattern is being followed in Chicago is a factual question. The door-to-door inspections being carried on in Hyde Park are certainly not used throughout the city as the means of determining whether violations exist. All in all, the assertion that enforcement is uniform throughout the city seems highly doubtful.

⁴⁹ NASH, *op. cit. supra* note 13, at 107; Osgood & Zwerner, *Rehabilitation and Conservation*, 25 LAW & CONTEMP. PROB. 705, 718 (1960); Slayton, *Conservation of Existing Housing*, 20 LAW & CONTEMP. PROB. 436, 450 (1955). The proposals made here are similar to the *Zoned Housing Code*, a proposal made in 1947 by Dr. Krumbiegel, Milwaukee Health Commissioner, which would achieve different standards in different areas by means of legislation, rather than by discretionary enforcement. It is generally agreed that the zoned code would be unconstitutional, Comment, *Municipal Housing Codes*, 69 HARV. L. REV. 1115 (1956). That being the case, it would

Question can certainly be raised about the limits of the police power by persons subjected to agency initiated, uniform inspection of limited areas, whether that selective enforcement is initiated as an integral part of a federally supported urban renewal project, or simply at the discretion of the local building department. The argument that the enforcement is necessary to health and safety is considerably weakened by failure to carry out similar enforcement in other, often worse, areas. Question can also be raised by the persons subjected to rigid Housing Code enforcement in areas where the building inspection does not occur at the initiative of the Department. In order to maintain the appearance of uniformity it is necessary to prosecute such offenders as rigorously as offenders in conservation areas.⁵⁰ What this means, however, is that the individual owner singled out for attention because of the testiness of his neighbors or tenants or because a local contractor needs business, or because of the unacceptability of his politics, is likely to be crucified on a cross of equal enforcement.

The need for relating codes to economic conditions has been recognized by others than Miss Abbott. Harry Osgood, Director, Urban Renewal Division, Sears Roebuck, writing with A. H. Zwerner of the H.H.F.A. legal staff, states:

Effective enforcement of codes embodying raised standards presupposes, wherever a truly substantial segment of the population is affected . . . that the people can afford the higher standards.⁵¹

Economists Davis and Whinston say:

If the existence of slums per se violates one's ethical standards, then, as economists, we can only point out that for elimination of slums the main economic concern must be with the distribution of income, and urban renewal is not sufficient to solve that problem.⁵²

The point that ideal housing and building codes should conform to economic reality is also shown by the suggestion of these economists that a zoned housing code might be developed on a voluntary basis, the zoning being based not on whether there is a conservation program, but upon the character of the housing in the area. It is assumed that if the

seem doubtful whether a court, confronted with such unequal enforcement could help but find it unconstitutional.

⁵⁰ This is all I think could have been meant by Mr. Smith's assertion (see note 48 *supra*) that there is no difference in code enforcement.

⁵¹ Osgood & Zwerner, *supra* note 49, at 721.

⁵² Davis & Whinston, *The Economics of Urban Renewal*, 26 LAW & CONTEMP. PROB. 105, 112 (1961).

planner responsible develops an appropriate code he will obtain the assent of the community.⁵³ If his proposal is inappropriate—if it fails to gain assent—the planner goes back and tries again, until he produces a code that is acceptable. It is assumed that owners will invest the maximum that is economically reasonable where they have assurance that other owners will do likewise. Where, without knowledge of the intentions of other owners, one owner considers whether or not to invest in rehabilitation, he is faced with a “prisoner’s dilemma,” the logical solution of which is to do nothing.⁵⁴

Much the same point was made by Brownlow in 1932 in respect to building codes:

The whole matter of *governmental regulation* in the housing field occupied by the private capitalist should be studied with a view to relieving the real estate operator of conditions that impede him in his work and that are not necessary for the public safety, health and welfare The study also should . . . include an inquiry into the problem of how public laws for the regulation of buildings erected by private capital may be amended, in the light of the best modern usage, so as to still further protect the public safety, public health and public welfare; and at the same time further to assist and not impede the work of the real estate operator.⁵⁵

⁵³ In Little Rock, Arkansas, a community conservation program was carried out without the assistance of a building code. Standards were set by covenant with the property owners within the community. HIRTEN, *The Gray Areas*, in *THE NEW RE-NEWAL* 68, 77-78 (1961).

⁵⁴ Davis & Whinston, *supra* note 52, at 107-10. The “prisoner’s dilemma” is a problem posed in game theory. Two men have been taken into custody on suspicion of having jointly committed a crime; they are kept in separate cells. If neither confesses, both will be convicted on a minor charge. If one confesses and the other does not, the latter will have the book thrown at him. If both confess, both will be treated with reasonable lenience. As long as the two are unable to consult, and therefore neither can know what the other is going to do, the most reasonable course is for each to confess. Confession will insure reasonable treatment if both do, and quite favorable treatment if only one does. Failure to confess means a 50-50 chance of very severe treatment. Essentially the same kind of dilemma faces the owner considering remodeling, as long as he does not know what other owners intend to do. Certainly the most satisfactory decision on his part is not to invest; if others do not as well, conditions will go along as they are; if the others do, the first will reap unearned benefit from the others’ improvement of neighborhood standards. However, a mutual decision to invest is likely to work to the profit of all.

⁵⁵ Brownlow, *supra* note 41, at 115. (Emphasis in the original.) Further support for this contention can be found in BANFIELD AND GRODZINS, *GOVERNMENT & HOUSING IN METROPOLITAN AREAS* 93-98 (1958); TWENTIETH CENTURY FUND, *AMERICAN HOUSING* 22 (1944); Thompson, *Building Regulation & Housing Problem*, *HOUSING: THE CONTINUING PROBLEM* 209 (Nat’l Resources Planning Board ed. 1940). Despite substantial agreement, confusion arises because in some areas, especially small cities and towns,

III.

Some evidence has been adduced indicating that the City of Chicago has excessively stringent codes, codes that overregulate and that are not uniformly enforceable:

1. The Code is differentially enforced by geographic area, indicating a recognition that the Code could not be uniformly enforced throughout the whole city. (Some differential enforcement may be occasioned by federal requirements for approval of urban renewal programs.)

2. The municipal courts are quite lenient in enforcement, which, while it may in part suggest ignorance or corruption, almost certainly demonstrates that there is a strong feeling on the bench that the Code is too harsh.

3. The Department of Buildings is willing to deal "reasonably," at least on some specific matters, with building owners.

4. Threat of Code enforcement is apparently a very effective form of blackmail, which would not be the case if Code conformance were economically reasonable.

5. Housing codes can be used, at least since *Kaukas v. City of Chicago*,⁵⁶ to require an unknown but undoubtedly large number of building owners to invest thousands of dollars per building.⁵⁷

Another indication that Chicago's Housing Code is overregulatory is the common belief that a building inspector can go into any existing building and find violations. An interviewee⁵⁸ told the story of a friend who had built a new plant according to plans approved by the Department of Buildings. When the inspector showed up, he was told not to bother putting his hand out because the new building complied fully with the code. The inspector asked the owner whether he would like to tear down a wall after showing him the Code requirement that the wall violated. The owner continued to pay. It is difficult to judge the ac-

there is a real problem with inadequate regulations. The frequent calls for stronger and better codes almost certainly apply to those numerous towns with no codes at all, or with thoroughly inadequate ones. See, e.g., MEYERSON, TERRETT & WHEATON, *HOUSING, PEOPLE, AND CITIES* 295 (1962). It is unfortunate that concern with inadequate codes obscures the difficulties created by overly-adequate ones. BANFIELD & GRODZINS, *supra* at 98, point up the problem: "The problem of raising the level of regulation in small cities is probably less difficult than that of lessening the overregulation which so often exists in the larger cities. Studies like that made by the Metropolitan Denver Home Builder's Association, which pointed out added costs attributable to unreasonable regulation, may do much to prepare the way for change."

⁵⁶ See note 33 *supra*.

⁵⁷ The discovery in the Denver, Colorado area that local codes could add as much as \$554 to the cost of a house led to the adoption in all but two communities of that area of a uniform minimum code. BANFIELD & GRODZINS, *op. cit. supra* note 55, at 95, 98.

⁵⁸ See note 38 *supra*.

curacy of such stories, but if it is true that minor violations can be found in most buildings, the code is not consonant with economic and technological reality.

When the city is entering upon a large scale program of rehabilitation, it is particularly important that such conformity be achieved. If the Building Codes demand more than can be afforded, potential renovators will decide against investment, rather than put themselves in a position where they will be forced to do more than seems economically justified to them. William Spooner,⁵⁹ a Chicago architect who specializes in rehabilitation, was asked whether in his experience building and housing code requirements interfered with rehabilitation. Spooner emphatically stated that they did and listed several problems that he had encountered.

1. Exit requirements. When the number of units in a building is changed, a rehabilitator is normally required to conform with the Building Code. Frequently one result is to require the addition of a second internal stairway.⁶⁰ This, Spooner feels, is unnecessary (considering the cost) in buildings with a small number of units, not over three or four stories high, twenty-five feet in width, and fifty to sixty feet in length. One internal stairwell in these circumstances, perhaps with the addition of an external stair or ladder, should be sufficient. The requirement of two stairwells, he feels, is reasonable in a high-rise building occupied by two or three hundred families. But dividing the cost of a second stairwell between the tenants of buildings of three to six flats places upon them an excessive burden.

The *Kaukas* case indicates that a second stairwell may range in cost from \$5,000 to \$10,000.⁶¹ Using the \$10 per month per \$1,000 improvement cost,⁶² the table below shows how the cost of the improvement would affect rents.

INCREASE IN MONTHLY RENT DUE TO IMPROVEMENTS

If the building contained:	If the improvement costs:	
	\$5,000	\$10,000
3 units	\$16.67	\$33.33
4 units	\$12.50	\$25.00
6 units	\$ 8.33	\$16.67

⁵⁹ The information comes from an interview.

⁶⁰ CHICAGO, ILL., MUNICIPAL CODE, ch. 67 § 67-4(d) (1939).

⁶¹ See note 33 *supra*.

⁶² Probably a quite reasonable increment, NASH, *op. cit. supra* note 13, at 110.

Moreover, the necessity of increasing rent levels is not the only problem. There is the prior question: considering this added cost, will renovation be undertaken at all?

In 1932, the requirement of a second internal stairwell was considered one that could be eliminated without any reduction in safety.⁶³ The requirement is by no means universal today. The FHA does not require more than one egress per apartment in three story buildings when the number of units between fire walls is nine or less.⁶⁴ Philadelphia, whose building code is successfully enforced,⁶⁵ also permits a single internal stairwell in small multi-story, multi-unit buildings.⁶⁶ The Board of Fire Underwriters' *National Building Code* requires at least two exitways from all multi-story, multi-unit buildings, but they may be either internal or external.⁶⁷ Finally, it should be borne in mind that the majority of deaths due to fire are not the result of burning, but of smoke inhalation.⁶⁸ This suggests that ventilation requirements are more important for personal safety in fires than are exit requirements.

2. Noncombustible wall requirements. The requirement that stairwell walls in four story buildings be made with noncombustible framing—not simply that they be given noncombustible surfacing—makes it impossible in most renovations of such buildings to use existing framing. The new framing must be of lightweight steel or concrete block. The needless work and material involved in providing noncombustible framing, Spooner feels, should more properly go into amenities.

Taking due regard for the amount that can be wisely invested in an existing building, it is almost always true that a builder will be better off investing in modernization of kitchens and bathrooms, adequate wiring and built in storage facilities, than he would be in investing in steel framing within stairwell walls. When substantial sums are expended on structural improvements, even more must be spent to provide the amenities that will attract those who can afford to pay for the structural improvements.

Once again, it must be remembered that we are dealing with small buildings with relatively few units. There are two reasons for requiring

⁶³ Brownlow, *supra* note 41, at 115-16.

⁶⁴ FHA, MINIMUM PROPERTY REQUIREMENTS FOR PROPERTIES OF THREE OR MORE LIVING UNITS, § 1807-A(1) (1961). The F.H.A. requires elevators for buildings of four stories or more.

⁶⁵ MEYERSON, TERRET & WHEATON, *op. cit. supra* note 55, at 190.

⁶⁶ THE PHILADELPHIA CODE, ch. 4, §§ 2002(2),(3) & (9), 2004(1)-(2); ch. 7, §§ 203(d)-(e); ch. 5, §§ 2202(3)(a)-(b) (1959).

⁶⁷ §§ 601.1(b), 602.2.

⁶⁸ Information from an interview with Paul E. Basler of the Building Officials Conference of America.

fireproof stairwell frames. One is to protect the building; the other is to protect the residents by assuring adequate means of egress. The latter will be satisfied if the residents can move down a stairway and through a passage during the time that the passage will resist fire. How long it takes people to get out is a question of the number of the people and the width of the passage. By the formula of the *National Fire Underwriters' Code*,⁶⁹ a normal stair width of thirty-four inches is adequate for a population of forty-five persons per floor. The buildings we are speaking of are almost certain to have thirty-four inch wide stairways, but have populations considerably less than forty-five persons per floor. That means that there is a wide margin of safety and that rapid passage through such a stairway should be possible without congestion. The incombustible wall requirement is excessive; it adds an extra margin of safety, where safety is already high, at considerable cost.

If a building is left as it is, the incombustible wall requirement is not applied; if the building is remodeled, but the number of units not changed, only two-hour surfacing is required. The requirement for non-combustible framing applies, then, only when there is remodeling that results in a conversion.⁷⁰

3. Noncombustible external structures. It is not permitted to build frame structures, except fences, within six feet of a lot line in the greater part of the city.⁷¹ In the older sections of the city especially (most of which are within the fire zone), lots tend to be very narrow—sixteen, twenty and twenty-five feet. Twenty feet is a very common width for row-house lots. Thus on a twenty foot lot, any frame structure must be built within an eight foot wide strip down the center of the lot.

This restriction raises problems in two different situations—where extensive remodeling is being done and such frame structures are desired for reasons of aesthetics and convenience and where, probably most often in poorer areas, the code would otherwise accept an external frame stairway to satisfy exit requirements. Among people who are inclined to do extensive remodeling of old buildings, open decks, covered patios and other yard structures are very popular; small yards are arranged for serving and entertainment in line with contemporary design ideas of

⁶⁹ §§ 604.5, 601.2.

⁷⁰ There are a lot of bad words in the housing field of which *conversion* is certainly one. In fact, proper conversion may be the only way to make economic use of large, old buildings. Conversion, therefore, can be socially useful, as the only practical means of conserving our national housing resources; and that, after all, is the goal of community conservation. After all, conversion means simply a change in use. When a conversion results in lowering density, the public sympathy for stringent control of the increase of density should favor conversion. It may, but the Building and Zoning Departments often do not see things that way.

⁷¹ CHICAGO, ILL. MUNICIPAL CODE, ch. 50, §§ 2.1, 4.1, ch. 62, § 7.4 (1939).

blending exterior and interior decor. Standard practice in these situations is to show on the permit application that a structure such as that desired already exists and that it is to be repaired. Even where eight feet are sufficient to build the desired structure, competing aesthetic values and especially the value of maximum use of limited space may argue for lot-line building. Comparable costs quoted by Mr. Spooner indicate that the required noncombustible construction will run about three times the price of frame construction (he cites \$350 as the cost for a frame open-deck and \$1,000 as the cost for one in noncombustible materials). Where adjoining buildings are of noncombustible shell construction, the price of code conformity seems far too high.

The second trouble situation is where regulation requires the addition of an external stairway.⁷² Again, this situation is most likely to arise in dense, inner-city areas, where the reasonable, and perhaps the only possible, location is in, on or near the lot line. Because the stairway must be noncombustible the owner is faced with an insoluble cost dilemma.

Applying Building rather than Housing Code standards when there is to be a change in use or an extensive remodeling may force a person planning improvements to do more than he can afford. As long as nothing is done conditions considered objectionable by new building standards will continue. As soon as renovation is undertaken, the Building Code is invoked; the renovator, before he can consider adding amenities, must absorb the cost of bringing the building into conformance with a code enacted after the building was constructed. The cost of doing so may well be prohibitive. The result is to discourage rather than encourage renovation.

That Chicago codes are excessive and detrimental to rehabilitation was confirmed by a Government housing official, who prefers to remain anonymous. With the exception of some projects of special public interest⁷³ almost all applications to the Chicago FHA office for federal guarantees of remodeling loans are rejected. They are rejected because of problems raised by architectural standards. One large group is turned down because the remodelers are restricting their programs to minimal face-lifting: The reason, according to the official, is that the remodelers do not want to undertake major rehabilitation, requiring a Chicago building permit. They want to avoid the added expense that would result from being required to comply with the Building Code. Others are rejected because they fail to comply with FHA structural requirements.⁷⁴ Recog-

⁷² This comes not from Mr. Spooner, but from watching permit applicants at the Department of Buildings.

⁷³ *E.g.*, experimental programs carried out on a not-for-profit basis under the National Housing Act, 73 Stat. 667 (1961), 12 U.S.C. 1701(q) (Supp. 1959-62).

⁷⁴ FHA, *op. cit. supra* note 64. FHA limitations would result in the rejection of a

nizing the problem resulting from its own standards, the FHA is, at this writing, preparing to publish a new minimum standard regulation specifically designed for community conservation areas.⁷⁵ The new standards are less stringent, so that the FHA can make loan guarantees on a greater proportion of the buildings in conservation areas. The government housing official interviewed believes that these changes will not help in Chicago. The reason is simple: The FHA is lowering its standards in recognition of the special problems of rehabilitation; the City of Chicago is not doing the same. Although it may be possible to get FHA approval, it will still in some cases be impossible to get a permit from the Department of Buildings. Chicago's present code stands squarely athwart the path to a successful rehabilitation program.

IV.

It is apparent that a successful program of rehabilitation in Chicago will require that the city go through the same process as has the FHA—an overhauling of codes with a view toward the special problems of rehabilitation. The Building Code was intended to apply to new structures. The Housing Code was intended to apply to existing structures. When rehabilitation was unimportant to the community's housing supply, application of the Building Code to the remodeling of houses was expedient. But this mechanical application is not desirable when rehabilitation becomes important. In drafting a code applicable to existing buildings that are to be renovated, the following points should be kept in mind.

1. The rehabilitator should be encouraged, rather than penalized, for undertaking a rehabilitation program. Initiation of a program of rehabilitation should not invoke standards that make costs prohibitive.

2. Fire safety requirements should be judged in terms of total cost measured by the number of units that would have to be brought into compliance. This cost should be weighed against the known injuries to persons and property attributed by actuaries to the absence of the safety feature in question. It is idle to talk of perfect safety; we go through the same balancing process in not requiring buildings to be tornado-proof, in not uniformly requiring cars to be equipped with safety belts, and in not requiring restaurants to be bomb-proof. Each of these decisions necessarily represents an assessment of the cost and the risk.

loan application to remodel Rosenwald Apartments or Old Town Garden Apartments, two excellent moderate rental developments of about 600 units each, because they are five story walk-ups. The FHA requires elevators in buildings over three stories.

⁷⁵ The new code has since been published but copies were not generally available at press time.

3. No requirements should be imposed that cannot be justified as necessary to maintain minimum conditions of health and safety consonant with the ability of the city to absorb the cost.

4. Standards should be set only after a careful examination of the structures located within present and potential conservation areas and a reasoned evaluation of the economic possibilities. Architects experienced in rehabilitation should be consulted.

5. It should be borne in mind at all times that a rehabilitation program will not succeed if the only rehabilitation actually carried out is "caprice rehabing"—rehabilitation regardless of costs to satisfy the sophisticated tastes of the well-to-do. Rehabilitation will be successful only if it does not raise overall housing costs so much as to produce marked dislocation. The vast majority of owner-occupants of small buildings should be able to rehabilitate sufficiently to meet code standards without pricing themselves out of their own buildings. Apartment building owners should be able to comply without pricing out their tenants.

Stringent building codes were promulgated at a time when renewal was not at the center of public attention. But contemporary experts in the housing field often continue to favor stringent codes as a means of obtaining renewal objectives. Such a use of the codes creates a dilemma. The higher the code standards, the more effective their use to further renewal programs. But the higher the standards the more difficult they are to enforce where the poor live. It is conceivable that a point will be reached—it may have already been reached in Chicago—where enforcement of the stringent code in the poorer areas is worse than no code at all.⁷⁶ High standard building codes may also discourage rehabilitation by all except the well-to-do.

When, as now, rehabilitation can be compelled by housing codes requiring the initiation of remodeling and a building code setting high standards for its completion, community rehabilitation can only be achieved at the expense of a change in the socio-economic character of the neighborhood.

A minimal standard code will protect the poor and encourage rehabilitation.⁷⁷ This solution requires either (1) that housing and building

⁷⁶ An argument similar in effect to this is made by BANFIELD & GRODZINS, *op. cit.* *supra* note 55, at 83-84 (1958), though in somewhat different circumstances. They suggest, in discussing building codes in suburban areas, that excessively restrictive county codes may encourage incorporation of developments where state legislation allows incorporated areas to escape zoning and building laws. They conclude that "regulations of the larger unit should be established at minimum levels." Within a large city, the code cannot be legally avoided by certain areas, as these authors state has happened within some counties, but the code can be de facto avoided by selective enforcement.

⁷⁷ One of relatively few arguments for minimal codes is presented by BANFIELD &

codes be looked at and rewritten with a view to requiring only those safety and health measures that the society can afford for all its members and with a view to the specific problem of rehabilitating existing structures, or (2) that a separate code be designed specifically for rehabilitation.

A third suggestion has been offered—zoned housing and building codes. Though most legal observers believe zoned codes would be unconstitutional,⁷⁸ many urban renewal people favor them and they are not without their legal supporters.⁷⁹ The zoned code resolves the dilemma posed by the attempt (using a single code), to set minimal health and safety standards for the protection of the poor while at the same time setting high standards for urban renewal areas. The resolution is to have different codes for different areas. I do not intend to enter the constitutional debate more than to say that the opponents of zoned codes are concerned with the classification problem (the standard of classification ultimately is whether the housing is intended for the rich or the poor) while the supporters point out that zoning by use, type and size of structure is not inherently different than zoning according to the characteristics of structures covered by housing and building codes. (Obviously, zoned codes are not a solution to all the problems that I have discussed, unless the zoned codes themselves conform to those standards in respect to the areas they cover.)

But more than constitutional problems are raised by zoned codes. Zoned codes are commonly tied to a timetable for rehabilitation or replacement of all substandard housing in the community. According to Krumbiegel's original suggestion, residential areas would be classified according to whether they are to be demolished, rehabilitated, or protected; others have complicated this arrangement by dividing areas for demolition according to the timetable for their destruction.⁸⁰ Areas designated for demolition from, say, five to twenty years hence would be assigned codes of a severity increasing with the projected life span. The most obvious problem with this notion is that urban renewal planning and financing are now on a relatively short run basis. There is presently no mechanism for financing the staged redevelopment of the entire housing supply.

GRODZINS, *op. cit. supra* note 55, at 77-84. It is accompanied by a brief bibliography at 78 n.4.

⁷⁸ See note 49 *supra* and related text.

⁷⁹ *Ibid.*

⁸⁰ WHEATON, *The Cost of Comprehensive Renewal*, ENDS & MEANS OF URBAN RENEWAL 82 (1961). According to Wheaton, by increasing the percentage of the gross national product now invested in housing by five to ten per cent per year we would be, by 1970, investing at a rate that would allow renewal of cities within twenty years from that date.

To enact zoned codes without a corresponding commitment on the part of state and federal governments would be to accept a cart without a horse.

A more fundamental problem is that there is no reason to assume that five years from now it will be more economically feasible than it is now to house all Americans according to, say, the standards of the FHA, or the Board of Fire Underwriters, or the Housing and Building Codes of the City of Chicago. We face today the problem of dealing with rapidly increasing unemployment due to automation,⁸¹ increasing resistance on the part of state and local governments to the continuing burden of public aid and increasing disillusionment with the public housing program.⁸² It is well to be reminded here of the economists' words quoted above.

If the existence of slums per se violates one's ethical standards, then, as economists, we can only point out that for elimination of slums the main economic concern must be with the distribution of income, and urban renewal is not sufficient to solve that problem.⁸³

One cannot dispose of the problem of income distribution by arguing that we will reach our urban renewal goal in planned stages rather than all at once. The situation is rather like that of a child offering five pennies for a ten cent ice cream cone after seeing another boy's nickel rejected

⁸¹ "The evidence that full employment is no longer an attainable objective seems to be growing No predictable rate of growth in the productive sectors of the economy seems equal to overtaking the current rate of technological disemployment." PIEL, *CONSUMERS OF ABUNDANCE* 8 (1961) (An Occasional Paper on the Role of the Economic Order in the Free Society Published by the Center for the Study of Democratic Institutions).

⁸² In Chicago, no new public housing, except for the elderly, is presently planned, though there was recently some discussion of the possible addition of 5000 units. Since 1949, all public housing constructed has been in Negro or transitional areas, and this has resulted in some disenchantment with the program. The housing for the elderly program is continuing, probably because the Chicago Housing Authority has adopted a policy that applicants for such units will be taken, at least initially, from the area immediately surrounding the project (one mile radius). That will mean that projects can be located in white areas without fear that Negroes will move in. This undoubtedly makes the prospect of public housing more attractive to aldermen of white wards, for it reinstates, in effect, the pre-1949 policy of the Chicago Housing Authority that the population of projects would reflect the population of the area in which they are located. See MEYERSON & BANFIELD, *POLITICS, PLANNING AND THE PUBLIC INTERESTS* (1955). The anti-public assistance crusade, begun in Newburgh, New York, spread to Illinois during the 1963 session of the state legislature. Ceilings were set on public assistance and much of the blame for the high cost of assistance was placed on the high rents recipients must pay in Chicago. One outgrowth was a legislative committee to investigate "rent gouging" of relief recipients. One of the immediate causes for the legislative debate was the consistent failure of the Illinois Public Aid Commission to live within its budget and its frequent requests for supplemental funds.

⁸³ Davis & Whinston, *supra* note 52, at 112.

as inadequate. One can say that without a solution to the problems of automation and income distribution within the next twenty years, we will be wracked by revolution, and thus we might as well, in our housing planning, assume that those problems will be solved. There is some force to this argument, but it would be helpful if someone were to give us rough guidelines as to approximately where we will be, approximately what we can afford or even how much it would cost to reach the goals we have already set for ourselves in our codes. And who will pay—how will the income distribution problem be resolved? Not only is the horse not there to pull the cart, but there is no clear idea where the cart might be pulled, were a horse available.

If we do not make the assumption that zoned codes are a step toward staged repair and replacement of all substandard housing, but assume, rather, that they are a static definition of neighborhoods by economic class, another set of problems arises. First, there is the huge political hurdle of designating an area as low standard. I doubt that the political fortitude exists to do so. The poor would be resentful of the institutionalization of their condition; the middle and upper classes, always embarrassed by the poor, would be resentful at having their consciences troubled. In making these designations, one must say either that the poor will stay in the areas they now inhabit (and they will not be able readily to escape those areas because of the higher costs imposed by the zoned code in other areas), or that the poor will live in some areas where they do not now live. This latter arrangement, doubly aggravating, is the one most likely to be necessary. The poor always live in the worst areas, those that will be slated for demolition. The hope is that their lot will be improved by their removal to nearby areas now occupied by those one step up the social ladder. If the low income area to be cleared is occupied by Negroes or Puerto Ricans, the political dynamite needs no spelling out.

The difficulties in zoned codes raise serious question as to why the well off should not be left to fend for themselves. The answer, of course, is that urban renewal is not intended to protect the well off, who could fend for themselves by moving to the suburbs, but to lure them away from leaving the city. But the costs and the problems of either uniformly high or zoned codes are too great. It is clear that codes sufficiently high to discourage rehabilitation are no use at all. It is not clear, if high standards are necessary to successful urban renewal (to solve the problem of the "prisoner's dilemma"⁸⁴), that other means cannot be found.⁸⁵

⁸⁴ See note 54 *supra*. That is, one possible justification for a high code may be the need to overcome the inertia in rehabilitation caused by the "prisoner's dilemma." This inertia is likely to be most pervasive in areas of large apartment buildings that are absentee-owned. This inertia might be overcome by appealing to the pride

While the principal purpose of this comment is to point up the problems in conservation areas produced by application of a code designed for new housing, it is worth mentioning that if the principles suggested for a rehabilitation code were applied to codes generally, they would eliminate many of the collateral ill effects produced by overregulation. Opportunities for blackmail would be reduced; respect for the law would be increased; codes could be enforced with good conscience and an even hand; evasion would not be more profitable than conformance.

The role of a housing code in rehabilitation should not be misunderstood. It should not impose the highest standards that it is hoped conservation programs will achieve. It is a common experience that the owner asked to comply with minimal codes decides then, while he is about it, to invest much more.⁸⁶ Basically, improvements will be made if they can be afforded, in the largest sense of that word. Code enforcement may be necessary to prick people into action, but it cannot successfully tell them exactly where to go, once they have begun.

and aesthetic sensibilities of owners—confronting them with architectural renderings of how their buildings might be redone, and following through with the presentation of a reasonable plan for financing. The process is, however, a slow one, and some officials favor more coercive power. There is, however, no clear evidence to indicate how strict a code must be to set off a program of rehabilitation. The most successful rehabilitation would be one in which people were moved to improve *and* maintain their buildings in ways that no existing or contemplated code could enforce, ways that reflect either pride and confidence in the community or effective market demand for good housing. This suggests that one way of overcoming the “prisoner’s dilemma” for the real estate investor is full employment and a reasonable vacancy rate.

⁸⁵ In addition to the means suggested in the preceding note, there are others that might be tried. One is property standards for an urban renewal area set by covenant. Thus, the requirements must be economically reasonable or it will be impossible to dispose of the property. (Or, I would assume, using eminent domain, the municipality would have to absorb at least some of the loss in value resulting from the imposition of standards not economically justified by the pre-renewal community.) Another, which might be achieved either by covenant or by legislative action, would be a sort of subinfeudation, the development of smaller, limited, governmental units within the city. Conceivably, a city could set a minimal code and such sub-governmental units set even higher standards should they choose to do so. Leaving the problem of standards beyond the minimum in the hands of the residents of a small area is entirely different than having either uniform or varied standards imposed by the city government. BANFIELD & GRODZINS, *op. cit. supra* note 55, at 81-82, argue for the desirability of a metropolitan area consisting of many small communities, offering, in effect, a wide variety of consumer choice in housing standards, educational standards, etc. There is no reason why, if this would be a desirable public policy, it should not be so within the central city, as well as without.

⁸⁶ NASH, *RESIDENTIAL REHABILITATION: PRIVATE PROFITS AND PUBLIC PURPOSES* 107-08 (1959).