

ADMINISTRATIVE-LEGAL METHODOLOGIES IN ELIMINATION OF SUB-STANDARD HOUSING

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PERSPECTIVE

The elimination of sub-standard housing has two polar aspects. The administrative problems involved in the achievement of each polar aspect differs somewhat from the other. The first problem involves the elimination of individual places used for habitation purposes. Each dwelling is here a unit and must be approached in terms of a criterion and method designed to elevate the particular inadequacies of the unit. The second problem involves the contiguous, or nearly contiguous, area in which a number of housing units exist, but which are treated as existing together. Emphasis is placed upon the area rather than upon the particular unit; a presumption being made that a composite of inadequacies support administrative action directed against the total problem. While the criterion, or criteria, involved must be closely related to the attack upon the individual unit, the evidentiary justification for action must relate to broader environmental factors than would seem necessary in action against a single housing unit.

Attention, up to the present, has been directed most successfully against preventing future construction from immediately reaching the sub-standard class. It is in the struggling attempts to determine the positive standards against which building and zoning conditions are fixed that attention must be turned to find criteria for elimination of existing places to some extent. But the prospective use of regulation is basically different, in its psychological atmosphere, from the use of retrospective authority. A standard supporting future limitation, in addition, might be expected to provide a lesser margin above minimum standard values than would seem necessary to justify intervention to destroy existing use values in property. But the presence of this differential need not curtail the development of a second body of data to support elimination of a use for present and future purposes that conflicts with an accepted scientific criterion or criteria. As a matter of historical development, the problem is not the determination of the possibility of a double standard, one prospective and the other immediately operative against present and future use, but the determination of a method by which the criterion, or criteria, supporting curtailment of present and future use, can be made to operate with greater utilization of contemporary and evolving scientific knowledge of the relation of housing to health and culture.

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Traditionally there has been an established legal principle limiting private use of property when it conflicts with public use and the concept had been projected against housing and living places primarily as a development in nuisance doctrines. Nuisances, by definition, are uses of property so contrary to public interest as to support abatement. But nuisances have, traditionally, been essentially judicially defined. Thus the criteria have been conformable to maintenance of a relatively consistent pattern of protecting private property interests. Lawyers and judges are experts in patterns of property interests; not necessarily in health, welfare, cultural well-being and engineering safety. The basic problem becomes, to a considerable extent, the development of an administrative mechanism to facilitate the reevaluation of the property interest pattern of values against the newer expertnesses against which housing must be measured if our communal use of scientific discovery and invention are to be reflected in our living conditions.

THE NUISANCE DOCTRINE

It is practically impossible to separate the standard against which governmental action is projected to take place and the methods by which this is to be done. The nature of the elimination of sub-standard housing, however, permits of certain observations if maximum success is to be achieved. Historically certain factors can be observed that have significance. Perhaps it is of noteworthy importance that the first housing laws were developed as applications of health authority.¹ These were in New York. It should be emphasized that this start at regulation was made (in 1801) prior to the germ theory of disease; as a consequence the claim to expertness in the health authorities as being based upon a body of cause and effect data beyond the understanding of any but a trained person could not be sustained with competence. It would only meet necessary limitations of the times when the three commissioners were given power to enter buildings to inspect to determine if situations existed wherein the "public health or that of individuals shall be endangered thereby." After examination the commissioners, or a majority of them, could declare the premises to be a nuisance and notify the owner and declare a time within which abatement must take place. Failure of the owner to comply left a duty on the sheriff, acting upon order of the mayor or recorder, to abate or remove the nuisance. The owner became liable for payment of up to \$100, out of which costs of abatement or removal, were to be deducted.

In its time the grant of power to the Health Commissioners in New York City was extraordinary. "No such extensive grant of power had been previously made to any officers of the city."² Although the doctrine of combining expertness and protection of legitimate property interests had not emerged at this early date, the statute was forward looking; perhaps too much so, because the absence of procedural

¹ N. Y. Laws 1801, c. 92. See FORD, SLUMS AND HOUSING (1936) *passim*. For a summary of the evolution of the situation in New York City, see MCGOLDRICK, GRANBARD & HOROWITZ, BUILDING REGULATIONS IN NEW YORK CITY (1944) ch. II.

² MCGOLDRICK *et al.*, *op. cit. supra* note 1, at 58.

conditions to extensive powers tended to cause the courts to strictly construe the substantive authority, in keeping with the notion that the courts were quite capable of examining into the presence of nuisance conditions. The Act of 1801 did not delegate power to the officials of the local government. The Commissioners of Health were state officers having territorial jurisdiction within the City of New York. Apparently the absence of faith in local administration was somewhat overcome by centralizing power directly under the Governor and within scrutiny of the legislature. But there was no method provided for making rules and regulations, although the power to create standards defining "illegal nuisance" and lawful use of property was delegated. There was no method provided by which the factual observations of the inspectional processes could be clearly reduced to record evidence. Nor were the findings of the commissioners accorded presumptive conclusiveness as to the presence of illegality in cases of enforcement difficulties. The use of a hearing of interested parties was nowhere mentioned. The statute was silent as to judicial review—a silence that opened the door to judicial definition in the absence of legislative prescription.³

The Act of 1801, with its emphasis upon nuisances as criteria for regulation relating to housing standards, would be only of historical interest but for the fact that the pattern became deeply implanted in our administrative-legal system. In 1866 the New York Legislature provided for the creation of the Metropolitan Sanitation District with continuing state control and absorption of the previous functions of the Health Commissioners.⁴ The new agency was to be presided over by a Metropolitan Board of Health and this authority was to be made of four sanitation commissioners and the metropolitan police commissioners acting *ex-officio*. "The principal changes in the law from the Act of 1801 were the wider jurisdiction vested in the board and the specified procedure for hearings. The act represented the first major attempt by the government to correct housing evils by regulating conditions within buildings. It permitted the Board of Health to define and to rectify any dangers to health it found in a building or elsewhere."⁵

The hearing process under the Act of 1866 was not well developed by contemporary standards, if the purpose was to obtain a maximum of finality for the administrator in cases of court review. The Board determined by filing in its records the facts and proof sufficient to cause it to declare something a nuisance, defined vaguely in the state as "a condition dangerous to life or health." An order was issued upon the owner, occupant or tenant that the nuisance be removed or otherwise abated. Except where there was imminent danger from pestilence (a determination that must have been technically difficult to support before germs were known) an opportunity to seek a hearing was granted. At the hearing the person adversely affected could have his factual position recorded and entered in the minutes. The right of the person to know the Board's evidence and to confront the inspector or whoever

³ *Rogers v. Barker*, 31 Barb. 447 (N. Y. Sup. Ct. 1860).

⁴ N. Y. Laws 1866, c. 74.

⁵ *McGoldrick et al., op. cit. supra* note 1, at 50.

supplied the data supporting the order is uncertain. The hearing seems to have been intended to permit the introduction of whatever evidence that the parties adversely affected thought material and the Board would receive under its rules. After the hearing the Board could reaffirm, rescind or modify its order. Again it will be noted that hearing comes after the order has been issued; not in the process of determining whether or not an order should issue.

The judicial history of the Act of 1866 is one of the classic sequences of decisions upon which the basic doctrines in American administrative law have been developed. In *Reynolds v. Schultz*⁶ a number of issues were raised that have been so firmly settled since that there is no use in noting them. But the court was feeling its way into unknown ramifications of the law, and a feeling was left that there would have been greater certainty attached to the administrative processes if the hearing had preceded the order, although the method used was not declared to be fatal. The party adversely affected is in the court's opinion entitled to confront the witnesses against him. The evidence upon which the Board had acted was partly obtained through Board member inspection and apparently the inspection had resulted in a finding of fact in the form of a conclusion, rather than a statement of factual itemization. This created difficulty and the court decided that any injustice might be corrected on certiorari through judicial reconsideration, but there was no determination how far the Board could make rules, nor how far it must follow its rules once made. The issues are such that they confront contemporary administration and cannot be ignored in determining a mechanism for elimination of sub-standard housing, particularly as related to individual places. Although the court did sustain the action of the Board, it did not sustain a doctrine that gave the Board an independence from judicial review to see whether or not the factual conditions of nuisance met the court's definition of a legal nuisance. The unfortunate wording of early legislation made this type of association inevitable as a condition to establishing a reviewable jurisdiction by the Board.

Under the Act of 1866 the question of proof of conditions warranting the extraordinary curtailment of property use was raised and basic patterns developed that cast a shadow down to the present time. Thus the Court of Appeals of New York was confronted with the sufficiency of evidence to support an order declaring a situation dangerous to health and a public nuisance. The Board of Health filed, among its records, "statements of competent persons under oath, that said business endangered the health of the people of the vicinity, was offensive to their senses, and rendered their life uncomfortable, and of facts sustaining such statements." Upon this evidence the Board based its order. The defendant was granted a right to be heard following notice of the order and he could not complain of the Board's action if he did not avail himself of the opportunity to be heard.⁷

The basic pattern of seeking elimination of undesirable property uses based upon

⁶ 27 N. Y. Sup. Ct. 282, 34 How. Pr. 147 (1866).

⁷ Metropolitan Board of Health v. Heister, 37 N. Y. 661 (1868).

police power to protect public health had become well established when the Court of Appeals was confronted with the *Copcutt* case in 1893.⁸ This case involved construction of a public health law applicable to all cities in New York State, except New York, Brooklyn and Buffalo. Under this Act⁹ Health Boards were to receive and examine "into the nature of complaints made by any of the inhabitants concerning nuisances or causes or danger or injury to life and health within the limits of the jurisdiction; to enter upon or within any place or premises where nuisances or conditions dangerous to life and health are known or believed to exist, and by appointed members or persons to inspect and examine the same . . . and said board of health shall furnish said owners, agents and occupants a written statement of results or conclusions of said examinations; and every board of health shall have power, and it shall be its duty, to order the suppression and removal of nuisances and conditions detrimental to life and health found to exist within the limits of its jurisdiction." It is granted power to make orders and regulations in special and individual cases, not of general application, as it may see fit, "concerning the suppression and removal of nuisances." Violation of orders and regulations is made a misdemeanor, but the Board may commence actions to restrain and abate nuisances, and to enforce its orders and regulations.

The issue had become: Can the Board of Health declare a use of property a nuisance? "If the decisions of these boards were final and conclusive, even after a hearing, the citizen would in many cases hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated, and generally unfitted to discharge grave judicial functions. Boards of health, under the acts referred to, cannot, as to any existing state of facts, by their determination make a nuisance which is not in fact a nuisance."¹⁰

It is within the principle of the *Copcutt* case that the celebrated *Trinity Church* tenement house case was decided.¹¹ It would seem that no matter what the procedure used, the health officer cannot act under the guise of nuisance in circumstances in which the courts will not in fact find a nuisance on review. In other words, the limiting of elimination of sub-standard housing to concepts in the law related to nuisance denies any standard of expertness that is not subject to possible construction against the nuisance concepts of the courts. It is possible that through a slow process of redefinition of nuisances through the accumulation of judicial decisions a new standard can be developed; but this method seems somewhat futile if utilization of modern standards of health and housing expertness is to be made available to the communal interest. No more significant observation can be made than that the basic pattern of regulation of land use, in which the elimination of sub-standard housing is a segment, was largely developed before the germ theory of

⁸ *People ex rel. Copcutt v. Board of Health of the City of Yonkers*, 140 N. Y. 1, 35 N. E. 320 (1893).

⁹ N. Y. Laws 1855, c. 270.

¹⁰ *Copcutt* case, *supra* note 8, 140 N. Y. 1, 7, 35 N. E. 320, 321 (1893).

¹¹ *Health Dep't of City of N. Y. v. Rector, etc. of Trinity Church*, 145 N. Y. 32, 39 N. E. 833 (1895).

disease was made part of the equipment of scientific control, not to mention the advances since that time.

THE EXPERT CRITERIA—ADMINISTRATIVE EFFECTUATION

As a problem in strategic organization of governmental authority to accomplish an administratively increased role in shaping legal policies, the basic difficulty lies in providing a mechanism that will give maximum significance to administrative action before the results of this action are subject to judicial review. Administrative action, then, becomes the more significant to the extent that it supplies results which give clearest support to itself from the vantage point of judicial officials. The problem is not to avoid a method of judicial review, but rather to create a situation in which the administrative determination of the public interest behind a finding and conclusion is so well supported as to cause the judiciary to give presumptive weight to an administrative conclusion. The attainment of this objective has two aspects; substantive, in which the criteria is established and defined against which sub-standard housing is measurable and procedural, in which the evidence producing devices bring together data under circumstances supporting a conclusion that maximum fairness compatible with resources has been part of the processes. As long as either the substantive criteria, or the procedural standard of fairness is undeveloped, the administrative presumption of expertness can hardly be attained. This general condition can be expected to exist, both as to area elimination, and particularized elimination, of sub-standard housing.

POLICY MAKING

Probably the pyrrhic victories of health administrators, with the resulting curtailment of the jurisdictional review related to the nuisance criteria, was a cause of shifting emphasis in health administration to education, with de-emphasis upon enforcement. But effective administration involves a skillful blending of persuasion and coercion in situations involving regulation and prohibition. The rule-making functions cannot be treated as separate from the enforcement functions anymore than the educational aspects can be divorced from the enforcement aspects of administration. Rules must be made with both an educative purpose as well as to provide a basis for enforcement processes. There will normally be a willful few beyond the reach of an appeal directed to social interest or patriotism. The relative use of education and persuasion and coercive processes is a critical issue in any administrative system. Certainly the consideration of administrative elimination of sub-standard housing involves this matter. Elimination must come only after criteria have been established and understood and socially accepted as a reputable purpose of power. There must be recognition of honest attempts at correction which are within the range of toleration and the toleration point must be relatively explainable, both to the average citizen and to an appellate body of judges or legislators. Policy making then, has a double aspect: one is the establishing of general principles within the scope of public understanding and support; the other the making of a

relatively particularized body of rules and regulations which provide guidance to the enforcement processes and clarify the standards which are to be imposed.

No agency, not particularly able to evaluate the status of public reaction, could be expected to properly place emphasis upon relative general education, particular persuasion of individuals, and enforcement processes. This matter is broader in its implications than the simple coordination of technical information through which various experts come to a common conclusion. It involves taking into account the nature of organized opposition to changed restrictions upon property uses and the utilization of devices and techniques to overcome this resistance or adapt to it before critical test cases emerged which can unsettle basic authority and power. It involves the careful evaluation of the various responses which exist to projected policies and the realization that democratic processes require patience by experts, but not abandonment of hope.

There is need for an agency to coordinate basic policy relative to housing standards. This agency should have authority to reduce such policy, once it is adequately supported, to rules and standards. At present the expertness that relates to housing standards is distributed beyond hope of common action. The key to the arch of housing regulation has been, and promises to continue to be, the germ theory of disease and its ramifications. But structural safety and fire prevention play a part. The prevention of moral hazards and crime is significant in evaluating a particular dwelling or a dwelling area. Recreation has a claim of its own. Aesthetics is becoming more important. Housing standards must emerge through the consolidation of these specialties into a common pattern. At present the structure of the administration disrupts, through jealousies and fear of reduction in status of existing units, the very units in which the expert competence exists and which must be marshalled if a united front is to be developed to support maximum administrative finality.

There have been many experimental agencies which might be looked to as suggestive guides for meeting the demand for a consolidated concentration of expertness relative to housing. In a sense the history of public health administration, starting with the Act of 1801, evidences the problem. The Public Health Council, in New York State, is more than a rule making agency; it is a sounding board and a broadly representational collection of experts in a single competence. The Board of Examiners, under the Charter of 1901, in New York City, was an example of representational organization combining expert competencies. Public safety agencies in many cities are devised as composites to combine two or more expertnesses into a unified administrative pattern. The experience under the McCall Act¹² not only emphasizes the nature of the problem, but indicates the necessity of careful definition of power and duty of representational bodies having jurisdictional relations with existing departmental units.

Politically, it is generally desirable to utilize existing structure in so far as possible, rather than make change dependent upon new organs of government. Changes in

¹²N. Y. Laws 1933, c. 764. For a discussion of the inter-agency conflicts arising from the McCall Act, see MCGOLDRICK *et al.*, *supra* note 1, at 111 *et seq.*

structure should normally be made only when the long term political direction seems to provide a basis for new loyalties and new technical competencies to be combined. It would seem that conditions of this type are present relative to housing. There is no doubt but that the present governmental organization contains the essential expert technical competencies needed to achieve fuller realization of housing conditions and that the political direction is sound and supported by technical data. But there is a lack of coordinating authority. This must be introduced by one method or another. After puzzling over the matter for considerable time the following suggestion seems worth making. There should be an agency representing the heads, or designated official near the headship, of each department in each city seeking to undertake the elimination of sub-standard housing and this agency should, by authority of state law, clear all policies relative to housing regulation. It should have a duty to approve all regulations, in the technical sense, issued by any agency in the city government and make such additional regulations as it considers necessary after full opportunity for public hearings and consultation with potentially affected parties. Unless a new over-all quality in housing expertness develops—and presumably would through university projection of present programs—the leadership in such an authority would seem logically best placed in the health officer. Even without statutory authority an advisory agency of the type here indicated would seem desirable. Consideration of the relation of housing to enforcement, however, will indicate weaknesses in an advisory agency if it is developed to coordinate educational processes, rule making, and act as hearing body in enforcement cases.

Two separate principles are involved in the clarification of policy as the foundation for standards, rules and regulations supporting enforcement processes. The first is the coordination of expert resources. The second is the method of procedure. Procedural methods are involved in the coordination of resources in the sense of establishing working relations to maintain representation of specialities so that the enforceable rules reflect the combined expertness of the participant sciences. Beyond this, however, there is a problem that is more or less independent of the organization of the rule making authority. The methods of rule making are subject to certain conditions if maximum authority is to be found in them for purposes of meeting attacks in court processes. A basic problem in elimination of sub-standard housing lies in creating an enforceable standard able to provide relative finality when countered by the traditional standard of protection of property interests. A particular enforcement directive or order when clearly supported by compliance with a carefully determined body of rules specifying, in so far as possible, the standard against which illegality is projected has a much greater chance of being given the degree of presumptiveness which is the essence of administrative finality, than the same directive or order made against a previously unstated body of rules.

The methods of rule making involve broad respect for democratic participation by interested and affected parties, as well as maximum integration of scientific specialities. Even if the regulation and prohibition of sub-standard housing is in the

health department, as the only operating authority able to undertake the problem, success can be enhanced if attention is given to creation of a formal rule making process utilizing democratic principles in so far as possible. No rule should be promulgated until it has been subject to scrutiny and criticism of those it would control. No administrator should presume the authority to announce rules in final form until after a maximum conciliation and adjustment has been made in light of interested parties' scrutiny and criticism. The explanation for a rule, shown in the processes of development to be subject to critical antagonism, should be authoritatively made at the time the rule is announced. In so far as possible, a mechanism for appeal of the rule, or the methods by which it has been developed, before any enforcement is undertaken, should be provided. Again, the announced rule should be critically evaluated as to the timing of its going into effect; a prospectively operating rule will give better chance for educational processes and adjustment. To some extent these matters are psychological in nature, and competence in administrative processes must include understanding of psychological responses. As a general principle it is much easier to face opposition and criticism in the rule making processes than in the enforcement processes because there is no gauntlet down on the administrator's part. And if opposition is fully heard and every consideration made to accommodate legitimate interests in the processes of development of a rule, the rule's validity in subsequent attack is greater. It might be suggested that the basic defect in seeking enforcement through the summary type of process associated with nuisances, is largely in the absence of a prior, well thought through rule making process to support the action of the official. As a consequence the administrator tends to find himself caught in the judicial processes with a minimum of record support for his action in relation to his professional standards.

ENFORCEMENT

The basic problem in successful enforcement in an administrative system, when an evolving scientific standard is sought to be advanced to the modification of a traditional standard of property values, is the creation of a compelling body of data supporting the scientific standard, and proof that this standard has not been respected in the particular case under consideration. No statute can ever be expected to provide the scientific foundation for eliminating sub-standard housing because of its technical and evolving nature; the most a statute could do in providing substantive standards would be to indicate general conditions and leave the working rules to administration. A statute might outline the methods, in general terms, of enforcement; but no statute could provide the detail and intricate pattern adapted to particular cases without freezing experimentation and defeating the possibilities of continued improvement. Again it must be emphasized that there is a tradition in our system that is common to competent administration and to competent judicial action. Enforcement, in this tradition, must give adequate notice of what is complained about in circumstances that the adversely affected person understands the

standard against which he is being held. There must be full opportunity for registering opposition to either the factual findings of the administrative processes, or the methods by which they were found. There should be unqualified reluctance, by administrators, to act upon undisclosed facts or upon values ascribed to "expert knowledge." If administration cannot disclose the basis of its expertness in particular cases in understandable terms, it is only fair, in a democratic system, to assume that non-disclosure may shield incompetence or ignorance. This does not mean that the adversely affected person need agree, nor fully understand the technical methods by which the administrator reached his conclusion, but the facts and their significance should be presented and under circumstances permitting cross-examination and presentation of conflicting data. And all of these matters should be clearly recorded. Without records a "review" either by a higher administrator, legislator, or court is meaningless. Simply stated, if there is to be given a strong presumption that the administrator has finality in construing the facts, the processes by which he operates must be disclosed.

Fairness in administration seeking to accomplish a scientific curtailment of previously recognized property freedom is essential if finality is to be accorded. The forms of fairness should respect the traditions of the judicial system if that system is to operate to maintain even justice. For this reason it becomes somewhat obligatory on administrators subject to judicial review and seeking to act in compliance with their obligations, to develop methods approvable upon judicial review. Fortunately this is normally not a very difficult matter because the recently expanded experience of administration generally provides adequate guide posts. But it would be quite impracticable to outline a method that would apply independently of particular jurisdictions, or outside of particular circumstances. A few suggestions, however, might be made that would seem to have generic application.

Some coordination might be achieved through unifying the inspectional processes relating to housing.¹³ Coordination of inspectional functions, however, requires direction from authority able to interpret findings and relate findings to educational and enforcement policies. Either a coordinated inspectional system requires combination of specially trained inspectors, working jointly, or a category of generally trained inspectors able to represent the various expertnesses. The latter direction would tend to either falsely subordinate certain qualities, or result in a degree of training somewhat disproportionate to our traditional ideas of inspector competence and tend to put administrative superiors at the technical mercy of subordinates. To bring together a supervisory authority over such highly trained subordinates would require a new consolidation of expertness in its various ramifications at the policy making and controlling level. Moreover, without the development of a consolidated supervisory authority over housing "expertnesses" a unified inspectional staff would

¹³ Some cities, the largest to my knowledge being Detroit, have experimented with coordination in inspectional processes but usually with indifferent success. I know of no situation, however, in which the inspectional coordination is under an authority which reflects, within itself, the integration of qualities which are necessary to bring maximum expertise to the foundation of housing regulations.

be subordinated to the particular expertness of its immediate superior. The utilization of any existing departmental unit for this supervisory purpose would create inevitable suspicion and potential jealousy among governmental units.

Every inspection should be made with one eye on the possibility of starting an enforcement proceeding. Records should be kept in such shape that the original can be made available at every stage in the enforcement process and in form acceptable to judicial standards. The step in which the inspection record is determined to provide the basis for a follow-up examination of greater thoroughness should be recorded. Any and all attempts to obtain adjustment through conciliation or temporary relaxation of rules should be in writing and in usable form. These should be reviewed before a notice relative to a hearing is issued to be certain that no defects exist. The notice should clearly indicate the violation in terms of standards known, or reasonably knowable, to the party affected. The records, up to this point, should leave no opportunities for a later charge of absence of knowledge or care in seeking to obtain voluntary compliance.

Before a hearing is scheduled it would seem wise to check the record against any data available in any other department or governmental unit involved in any way with housing, health or police standards. This would be facilitated if an integrated housing authority exists and would be facilitated if copies of all records relating to housing were on file and subject to a composite index. If such a system is hopelessly impracticable, the voluntary system of requests may be all that is left. Absence of interest or jealousy as to jurisdictional interest may mitigate against success all too often in such situations. Every effort should be made, however, to pool all resources to support an enforcement that is proceeding primarily in terms of even a single departmental criteria. But the extent and nature of this pooled data should be known before a hearing is organized. The notice can possibly permit collaborative material to come into the hearing and the administrative record in the hearing processes, by incorporating data from such sources, can quite possibly add substantiation to findings and conclusions. But it would appear, in final analysis, that coordination beyond that possible through single department leadership would appear necessary if maximum resources are to be available in terms of all of the scientific evaluation possible within a governmental unit. If housing authority can be made to exist, it should have authority to make rules governing the conditions precedent to holding a hearing; these rules should permit clearance of particular cases as to construction of operating rules before hearings are scheduled, although the case should not otherwise be considered without opening an unnecessary door to the charge of unfairness.

The notice should fix the time of the hearing, the place, and the references in the notice should permit clarification of the rights of the parties and the general nature of the procedures to be followed without undue effort and time being required of them. The hearing should come before any order or directive requiring positive action has been issued. Early health legislation ran into unnecessary difficulties by

ignoring the distinction between ordinary cases in which time was not sufficiently pressing to warrant summary power, and the few cases involving summary power. When summary action is necessary—action taken before a hearing is included in the processes—the administrator places himself at an increased disadvantage and may even open himself to personal liability for illegal destruction of property values. But a hearing scheduled before action is taken, with an opportunity for administrative appeal and judicial review, before the action becomes operative will be adequate in the destruction of sub-standard housing. Since no suggestion is entertained that this type of control will substitute for the existing nuisance power in summary action cases, it will be considered that the scope of action is limited to places which are outside of the nuisance category, but within a newly developed category. These will include marginal places and possibly marginal areas. Because it is wise to proceed to establish administrative power in most likely situations first when a long term policy is involved, it would seem desirable that individual rather than area problems be confronted and attacked first, with a view to extending the doctrinal basis of action after it has been sustained in sufficient cases to warrant broader generalizations. A statute authorizing a housing authority should clearly distinguish the nature of jurisdiction over individual places from areas primarily of sub-standard places; it should also specify the time of the hearing at the early, rather than late, stage of the enforcement processes. A significant comment upon the timing of the hearing is the following, in relation to New York City experience in building regulation: "However, the very doctrines which endow administrative agencies with immunity from judicial attack, despite absence of statutory provision for a preliminary hearing, explicitly require that a hearing be held at some later state of the proceeding. This poses the question whether the requirement of a later hearing enables administrative determinations to be more easily overthrown than if a prior hearing were required instead. Under the subsequent-hearing doctrine the preliminary administrative decision, if made in the exercise of discretionary authority, is not final. In the hearing that follows the administrative decision, the administrator may have to carry a larger burden of proof in justifying his action than if he had rendered his decision after holding a hearing himself."¹⁴

The conduct of hearings, beyond the statement that they should be covered generally by rules made by the administrator and related to the type of problems involved, is beyond this paper. Statute should not provide the methods of conducting such administrative processes, but there should be a well established self-imposed form in so far as possible. The presentation of evidence at such a hearing need not become involved in oaths and complex devices, although no regard for informality will avoid the difficult questions of keeping witnesses on the subject at issue, or settle matters of admissibility of data. However, it is in point to indicate that questions of jurisdiction—the authority of the hearing agency to hear the particular dispute—should be taken up at the beginning of the hearings and this question disposed of

¹⁴ McGOLDRICK *et al.*, *supra* note 1, at 565.

in so far as possible before other matters are considered. As experience is had in hearings there should be periodic reevaluation of processes and operating rules. When experience permits it may prove desirable to codify the more generally used practices to guide participants and officials and simplify the processes by eliminating unnecessary discussion. In light of this comment it becomes obvious that rule making and enforcement cannot be fully separated; but the review and evaluation of enforcement experience can be through the channels of rule making rather than simply allowed to accumulate without deliberative evaluation as to significance. This outlook is frequently missing in the evolutionary development of administrative hearing systems, leading to unnecessary confusion.

In general it would appear that the establishment of a housing authority should provide such authority with power to hear enforcement cases. Since the number of cases probably, in most jurisdictions, would not be great enough to warrant a preliminary sifting after the decision is made to proceed with the hearing, it would seem that the authority itself could hear cases directly. This would reduce the inspectional officers to witnesses. It is strongly recommended, however, that such an authority have a designated officer of trained ability to aid in the preparation of cases. The same recommendation is desirable for action within single departments, although reliance may have to be placed upon an existing official, such as a municipal counsel or even a prosecuting attorney. Our legal system is not very clear as to responsibilities of such officials in matters of this kind, however. At any rate it is desirable for consultation between the person, or persons, responsible for preparation and organizing presentation of cases before a hearing body and the prosecuting attorney. This is emphasized when it is realized that in most jurisdictions the enforcement mechanism beyond the administrative hearing, with its subsequent directive or order, lies in the control of public prosecutors. Satisfaction of the prosecutor that the case is relative intact will go a long way to obtaining cooperative execution of administrative orders requiring prosecution.

The administrative hearing should utilize records in so far as possible, showing the process as well as the substantive data introduced. If no stenographic help is provided, it is necessary that the presiding officer summarize these matters. They should be submitted to the parties for corrections before the hearing is considered finally closed. The finding which will support the order or other action should be based upon nothing outside of the record. The disposition of data not considered valid or otherwise controlling should be indicated. The directive or order should be issued only after a time for mature evaluation of findings. Normally it should be issued only after clearance with the agency necessary to carry the enforcement beyond the administrative processes. This means, in the ordinary structure of our system, the public prosecutor. In a large unit, such as New York City, it might prove desirable to operate through a special prosecuting system representing the administrative authority, but this is not possible generally. Once the order or directive is issued the administrator becomes a witness in instances of judicial re-

view. If he has followed well considered rules, clarified his position in the record, and based his directive or order on evidence within the scope of his jurisdiction, his chances of success should prove good in any court process.

There is no good reason why a hearing record, based upon a careful body of rules reflecting the maximum regard of the interests of affected parties, should not support any challenge in the courts. Possibly the Board of Standards and Appeals, in New York City, should suggest possible comparisons. McGoldrick, Graubard and Horowitz, after examining the many possible pitfalls into which the administrative processes might fall, came to the conclusion that "the stubborn fact is, however, that in only a small fraction of the cases heard by the board, there is ever an attempt to upset the determination, and in less than twenty-five per cent of the cases that go to court is the attempt successful."¹⁵ No system of enforcing regulations seeking to impose standards beyond those supported by existing legal doctrines can hope for complete success; the long history of emphasis upon nuisance principles with its resulting review of facts stands as a particular hazard to be faced. Any experimentation must risk defeat, but care in building a system that sustains findings against previously made rules through representational considerations and keeps the rules in accordance with combined scientific standards need consider a defeat no more than a temporary set-back. The broad discretion in the health administration is at the root of this attack to improve living conditions; supported by the newer engineering and social understandings that open a door to richer living. Underneath the administrative detail must be a broad vision that permits defeat at particular points, but keeps the defeat limited to the type of judicial decision that provides guidance for the future. There is no good reason, with the type of attack previously outlined, that defeat in a particular case would be more than this. A sympathetic understanding of the role of the courts by administrators will go some distance toward permitting a sympathetic understanding of administration by the courts.

SUMMARY

A trouble with the long delayed attack upon sub-standard housing has been the absence of a criteria from which rule making processes and educational processes to make way for enforcement can be projected. There is no available mechanism to implement and give meaning to the various qualities of expertness scattered throughout our administrative structures and bring this into a composite entity for rule making purposes. This could best be met through the development, under statutory authority, of a separate housing administration for interested jurisdictions. The possibility of a state-wide appellate agency to coordinate local units has been considered too far removed from the immediate problems confronting cities today to enter into the discussion, but it should be noted as a significant method of adding authority to administrative decision. Even without a separate housing authority much can be done, particularly through health administration, to focus attention

¹⁵ *Id.* at 622.

upon a rule making process and coordinate this into an educational and enforcement system. There is a possibility of greater coordination of inspectional systems operating through existing departments, but this does not seem particularly hopeful when compared with other methods of attack upon the problem. A hearing system before the issuing of orders or directives seems clearly desirable. A closer relationship with prosecutory officials, extending back through the entire enforcement processes can be considered of potential significance. Finally, success cannot be attained through the development of scientific knowledge, good resolutions or even a developed standard defining the qualities of sub-standard housing, without bringing these into well-thought-out processes by which a new concept of public interest is made part of our governmental system.