

88-6178,

-8072, -8074, -8076

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

YONKERS BRANCH - NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE, et al.,

Plaintiffs-Intervenors-Appellees

v.

YONKERS BOARD OF EDUCATION,

Defendant

and

CITY OF YONKERS,  
and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants-Appellants

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR THE UNITED STATES AS APPELLEE

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## TABLE OF CONTENTS

|                                                                                                                                    | Page |
|------------------------------------------------------------------------------------------------------------------------------------|------|
| STATEMENT OF THE ISSUES .....                                                                                                      | 1    |
| STATEMENT OF THE CASE .....                                                                                                        | 2    |
| A. The liability and remedy orders .....                                                                                           | 3    |
| B. The consent decree .....                                                                                                        | 5    |
| C. The long term plan order .....                                                                                                  | 7    |
| D. Enforcement of the consent decree and<br>long term plan order .....                                                             | 10   |
| ARGUMENT:                                                                                                                          |      |
| I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION<br>IN ENTERING THE LONG TERM PLAN ORDER .....                                   | 17   |
| II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION<br>IN ISSUING ITS JUNE 29 AND JULY 26 ORDERS .....                             | 20   |
| A. The district court did not err in selecting<br>civil contempt as the appropriate sanction<br>for the City's noncompliance ..... | 22   |
| B. The level of fines imposed upon the City<br>were an appropriate means of coercing<br>compliance .....                           | 24   |
| C. The district court did not err in ordering<br>the City to enact legislation .....                                               | 27   |
| 1. The district court's orders did not<br>unduly intrude on local prerogative .....                                                | 27   |
| 2. The doctrine of legislative immunity<br>is not applicable here .....                                                            | 29   |
| III. THE DISTRICT COURT DID NOT ERR IN HOLDING<br>THE CITY IN CONTEMPT .....                                                       | 30   |
| IV. THE DISTRICT COURT DID NOT ERR IN HOLDING<br>THE INDIVIDUAL COUNCIL MEMBERS IN CONTEMPT .....                                  | 33   |
| V. NO ADDITIONAL STAY OF THE DISTRICT COURT'S<br>CONTEMPT ORDERS SHOULD BE GRANTED .....                                           | 34   |
| CONCLUSION .....                                                                                                                   | 37   |

# TABLE OF AUTHORITIES

Page

## Cases:

|                                                                                                                                                 |        |
|-------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| <u>Badgley v. Santacroce</u> , 800 F.2d 33 (2d Cir. 1986),<br>cert. denied, 107 S. Ct. 755 (1987) .....                                         | 32, 33 |
| <u>Bush v. Orleans Parish School Board</u> , 191 F. Supp.<br>871 (E.D. La.), aff'd sub nom. <u>Denny v. Bush</u> ,<br>367 U.S. 980 (1961) ..... | 29, 30 |
| <u>City of St. Louis v. Praprotnik</u> , 108 S. Ct. 915<br>(1988) .....                                                                         | 31     |
| <u>Coleman v. Paccar, Inc.</u> , 424 U.S. 1301 (1976) .....                                                                                     | 35     |
| <u>Crane Co. v. American Standard, Inc.</u> , 603 F.2d 244<br>(2d Cir. 1979) .....                                                              | 18     |
| <u>Donovan v. Sovereign Security, Ltd.</u> , 726 F.2d 55<br>(2d Cir. 1984) .....                                                                | 34     |
| <u>Dubose v. Pierce</u> 761 F.2d 913 (2d Cir. 1985),<br>vacated on other grounds, 108 S. Ct. 2890 (1988) .....                                  | 35     |
| <u>Franks v. Bowman Transp. Co.</u> , 424 U.S. 747 (1976) .....                                                                                 | 17     |
| <u>Fullilove v. Klutznick</u> , 448 U.S. 448 (1980) .....                                                                                       | 17     |
| <u>Griffin v. County School Board</u> , 377 U.S. 218 (1964) .....                                                                               | 28, 36 |
| <u>Hutto v. Finney</u> , 437 U.S. 678 (1978) .....                                                                                              | 22     |
| <u>Ingraham v. Wright</u> , 430 U.S. 651 (1977) .....                                                                                           | 26     |
| <u>Local 28, Sheet Metal Workers v. EEOC</u> , 106 S. Ct.<br>3019 (1986) .....                                                                  | 22, 26 |
| <u>McComb v. Jacksonville Paper Co.</u> , 336 U.S. 187<br>(1949) .....                                                                          | 22, 34 |
| <u>Northside Realty Assocs. v. United States</u> , 605 F.2d<br>1348 (5th Cir. 1979) .....                                                       | 22     |
| <u>O'Brien v. Brown</u> , 409 U.S. 1 (1972) .....                                                                                               | 35     |
| <u>Pembaur v. City of Cincinnati</u> , 475 U.S. 469 (1986) .....                                                                                | 31     |

**Cases (cont'd):**

**Page**

|                                                                                                                                                                           |               |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| <u>SEC v. American Board of Trade, Inc.</u> , 830 F.2d 431<br>(2d Cir. 1987), cert. denied, 108 S. Ct. 1118<br>(1988) .....                                               | 34            |
| <u>Shakman v. Democratic Org.</u> , 533 F.2d 344<br>(7th Cir.), cert. denied, 429 U.S. 858 (1976) .....                                                                   | 34            |
| <u>Shillitani v. United States</u> , 384 U.S. 364 (1966) .....                                                                                                            | 22            |
| <u>Star Distributors, Ltd. v. Marino</u> , 613 F.2d 4<br>(2d Cir. 1980) .....                                                                                             | 29, 30        |
| <u>United States v. City of Parma, Ohio</u> , 661 F.2d 562<br>(6th Cir. 1981), cert. denied, 456 U.S. 926 (1982) ....                                                     | 28            |
| <u>United States v. City of Providence</u> , 492 F. Supp. 602<br>(D.R.I. 1980) .....                                                                                      | 33            |
| <u>United States v. Dien</u> , 598 F.2d 743 (2d Cir. 1979) .....                                                                                                          | 26            |
| <u>United States v. Handler</u> , 476 F.2d 709 (2d Cir. 1973) ...                                                                                                         | 22            |
| <u>United States v. Paradise</u> , 107 S. Ct. 1053 (1987) .....                                                                                                           | 17            |
| <u>United States v. United Mine Workers</u> , 330 U.S. 258<br>(1947) .....                                                                                                | 26, 32        |
| <u>United States v. Yonkers Board of Educ.</u> , 624 F. Supp.<br>1276 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir.<br>1987), cert. denied, 108 S. Ct. 2821 (1988) ..... | 3             |
| <u>United States v. Yonkers Board of Educ.</u> , 635 F. Supp.<br>1577 (S.D.N.Y. 1986), aff'd, 837 F.2d 1181 (2d Cir.<br>1987), cert. denied, 108 S. Ct. 2821 (1988) ..... | 2, 3, 4       |
| <u>United States v. Yonkers Board of Educ.</u> , 837 F.2d<br>1181 (2d Cir. 1987) .....                                                                                    | <u>passim</u> |
| <u>Uphaus v. Wyman</u> , 360 U.S. 72 (1959) .....                                                                                                                         | 26            |
| <u>Vuitton et Fils S.A. v. Carousel Handbags</u> , 592 F.2d<br>126 (2d Cir. 1979) .....                                                                                   | 22, 24        |
| <u>Walker v. City of Birmingham</u> , 388 U.S. 307 (1967) .....                                                                                                           | 32, 36        |

**Constitution and statutes:**

|                                           |    |
|-------------------------------------------|----|
| <b>Constitution of the United States:</b> |    |
| Eighth Amendment .....                    | 26 |
| Fourteenth Amendment .....                | 3  |

**Constitution and statutes (cont'd):**

**Page**

|                                                                              |    |
|------------------------------------------------------------------------------|----|
| Fair Housing Act of 1968, as amended, 42 U.S.C. 3601<br><u>et seq.</u> ..... | 3  |
| 42 U.S.C. 1983 .....                                                         | 29 |

**Miscellaneous:**

|                             |    |
|-----------------------------|----|
| Fed. R. Civ. P. 65(d) ..... | 33 |
|-----------------------------|----|

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BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF THE ISSUES

1. Whether the district court erred in entering the Long Term Plan Order and subsequent enforcement orders;
2. Whether the district court erred in holding the City of Yonkers in contempt for failing to comply with its orders;
3. Whether the district court erred in holding four individual council members in contempt;
4. Whether the district court's contempt orders should be stayed pending the resolution of these appeals on the merits.

STATEMENT OF THE CASE

On August 2, 1988, the district court adjudged the City of Yonkers (City) and three members of the Yonkers City Council (Fagan, Longo, and Chema) in civil contempt of court (8/2/88 Tr. 21-24, 42, 62; 8/2/88 Order).<sup>1/</sup> On August 4, a fourth member of the City Council (Spallone) also was found in civil contempt (8/4/88 Order; 8/4/88 Tr. 35-36). These findings of contempt resulted from the City's and the Council members' refusal to comply with remedial orders entered by the district court, including the May 28, 1986, Housing Remedy Order (United States v. Yonkers Board of Educ., 635 F. Supp. 1577 (S.D.N.Y. 1986), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 108 S. Ct. 2821 (1988)); the January 28, 1988, Consent Decree, which was approved by the City Council and to which the City consented; the June 13, 1988, Long Term Plan Order; and the July 26, 1988, Order issued by the district court seeking to enforce its previous orders. In this Statement, we focus primarily upon the orders under review and the proceedings which relate directly to those orders. However, because the City's most recent refusals to comply with the court's orders are a part of a pattern of contemptuous conduct -- "the latest of a series of contempts"

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<sup>1/</sup> Because of the short briefing schedule, the record has not yet been filed in these appeals. However, this case has been before this Court before and much of the record has been docketed in connection with the pending consolidated appeal Nos. 87-6070 and 88-6078. Where possible, we refer to documents in that record by record number ("R."). Documents that are not already docketed in this Court are identified by date and title. It is our understanding that counsel for the City will be providing copies of such documents to the Court after the briefs have been filed.

(8/2/88 Tr. 23) -- we have set forth as Addendum A to this brief a record of the court's efforts to enforce its housing remedy orders, and the City's failure to comply with those orders over the last two years.

A. The liability and remedy orders

On November 20, 1985, the district court found the City liable for intentional housing segregation, in violation of the Equal Protection Clause of the Fourteenth Amendment and the Fair Housing Act of 1968, as amended, 42 U.S.C. 3601 et seq. United States v. Yonkers Board of Educ., 624 F. Supp. 1276, 1289-1376 (S.D.N.Y. 1985).<sup>2/</sup> Following remedial proceedings, the district court entered its Housing Remedy Order on May 28, 1986. Yonkers, 635 F. Supp. 1577. This Court affirmed the district court's liability and remedy orders "in all respects" Yonkers, 837 F.2d at 1184.

In its liability opinion, the district court found that the City had deliberately concentrated virtually all of its public and other subsidized housing in the southwest quadrant of Yonkers, and had done so to maintain residential segregation in the city. Yonkers, 624 F. Supp. at 1289-1376. One of the bases

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<sup>2/</sup> The district court also found the City and the Yonkers Board of Education liable for intentionally segregating the Yonkers public schools, Yonkers, 624 F. Supp. at 1537, 1545, and ordered the City to fund a system-wide desegregation plan to be implemented by the Board. Yonkers, 635 F. Supp. at 1583. This Court upheld the school liability findings and remedy orders. Yonkers, 837 F.2d at 1184. The City's appeals of the district court's denial of its motion to modify the school remedy to delete the requirement that it fund the construction of two new schools are now pending before this Court (Nos. 87-6070, 88-6078).

for the district court's liability findings was the City's deference to the extreme, race-based public opposition that developed whenever subsidized housing was proposed outside of southwest Yonkers. Id. at 1294-1300, 1306-1307, 1314-1316, 1362-1363, 1369. This Court specifically affirmed this basis for liability. Yonkers, 837 F.2d at 1221-1226.

Part VI of the district court's May 28, 1986, Housing Remedy Order required the City to develop and implement a Plan for the creation of subsidized housing outside the southwest quadrant of Yonkers (the Long Term Plan).<sup>3/</sup> Yonkers, 635 F. Supp. at 1582. The district court expressly declined to set a goal for the number of assisted housing units to be provided, to establish a timetable for the development of such housing, or to prescribe the mechanisms by which such housing should be provided. Ibid.; R. 149, p. 6. Rather, it left to the City both the opportunity and the responsibility for proposing the substance of the Long Term Plan. The Order required the City to submit its proposed Plan no later than November 15, 1986. Yonkers, 635 F. Supp. at 1582.

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<sup>3/</sup> Part IV of the Housing Remedy Order required the City to provide sites for 200 units of public housing in east Yonkers. Yonkers, 635 F. Supp. at 1580-1581. The public housing aspect of the remedy is not directly at issue in this appeal, although the City's noncompliance with that portion of the Housing Remedy Order forms part of the background to the district court's findings of contempt here (see Addendum A). Related appeals which grew out of the public housing aspect of the remedy orders in this case are pending before this Court (Yonkers Racing Corp. v. City of Yonkers, No. 88-6140; St. Joseph's Seminary and College v. City of Yonkers, No. 88-6146).

The City refused to submit such a proposal, and stated to the court by letter dated November 14, 1986, that "it is not anticipated that a plan will be submitted to the Court in accordance with Part VI of the Order" (11/14/86 Letter, Sculnick to Judge Sand; 7/1/87 Order at 4-5). On December 5, 1986, the United States moved to have the City held in contempt, and on December 9, the NAACP moved for the appointment of a special master to carry out the City's responsibilities. Rather than imposing such sanctions, in early 1987, the district court permitted the City to appoint an Outside Housing Advisor (OHA) to prepare its Long Term Plan proposal (7/1/87 Order; R. 233).<sup>4/</sup>

B. The Consent Decree

In January 1988, following this Court's affirmance of the district court's liability and remedial decisions, the parties entered into negotiations designed to resolve outstanding issues relating to compliance with the original housing remedy order,

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<sup>4/</sup> Over the next months, much of the time and energies of the OHA and the parties were devoted to the public housing aspects of the Housing Remedy Order (see Addendum A, ¶¶7-19). On July 1, 1987, the district court found that the City "has failed to take many of the actions required by the Housing Remedy Order. Instead the City has delayed meaningful remedial action and declined repeated opportunities accorded to the City to act itself in the first instance in taking remedial action" (7/1/87 Order at 1-2). The court ordered the City to take a number of actions relating to both the Long Term Plan and the public housing aspects of the remedy order (*id.* at 2-6), and ruled that its failure to comply would result in a finding of contempt and the imposition of fines of \$100 per day, doubled every day until the City complied (*id.* at 6-7). The City complied with the letter of the July 1 Order but not with its spirit (see Addendum A, ¶¶ 13-17). In September, the OHA submitted his suggestions for a Long Term Plan, and the parties filed comments on the OHA's submissions in January 1988.

including the Long Term Plan. After weeks of negotiations, the parties reached agreement on the First Remedial Consent Decree in Equity (Consent Decree), which was approved by the City Council on January 27, and entered by the district court on January 28, 1988 (1/28/88 Consent Decree).

Sections 12 through 18 of the Consent Decree, entitled "Assisted Housing," set forth the basic outlines of the Long Term Plan (id. at 7-11). The Decree set a long term goal of 800 units of assisted housing to be developed over 4 years (id. at 7), "in conjunction with or as part of" developments of market rate housing (id. at 8). In Section 17 of the Consent Decree, the City agreed to adopt "Mandated Incentives," including legislation establishing various incentives designed to encourage the development of such housing by private developers (id. at 9-10).<sup>5/</sup> The Decree required the City to adopt such legislation

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<sup>5/</sup> Section 17 of the Consent Decree provides, in pertinent part (id. at 9-10):

The City agrees to adopt, among other things, legislation (a) conditioning the construction of all multi-family housing \* \* \* on the inclusion of at least 20 percent assisted units; (b) granting necessary tax abatements to housing developments constructed under the terms of the legislation referred to in clause (a); (c) granting density bonuses to such developers; (d) providing for zoning changes to allow the placement of such developments, provided, however, that such changes are not substantially inconsistent with the character of the area; and (e) other provisions upon which the parties may subsequently agree \* \* \*.

"as promptly as practicable but, in no event, later than 90 days after" January 28, 1988, i.e., by April 27, 1988 (ibid.).

Section 18 of the Decree required the parties to negotiate a second consent decree by February 15, 1988, with regard to the unresolved details of the Long Term Plan (ibid.).

On March 21, citing intense public opposition to the remedy, the City moved to modify the Consent Decree (3/21/88 Deft. Motion to Amend). In connection with that motion, the City stated its willingness to refund more than \$29 million in federal funds that it had received since 1980, if it were relieved of its obligation to provide sites for public housing in east Yonkers, as required by the Housing Remedy Order and the Consent Decree (see Addendum A, ¶ 23). The court denied the motion (3/31/88 Tr. 64).

C. The Long Term Plan Order

Pursuant to the Consent Decree, the parties began negotiations on the details of the Long Term Plan in February. Drafts of the Plan were prepared by counsel for the City. However, the City broke off negotiations in April after the plaintiffs would not agree to amend the Consent Decree and the court denied the City's motion for such amendment (see Addendum A, ¶¶ 23, 24). On May 2, 1988, the United States and the NAACP submitted to the court a proposed Long Term Plan Order, which was based upon the draft that had been prepared by the City's lawyers, and which largely reflected the parties' agreements reached during negotiations (5/2/88 Joint Motion at 4-8).

Consistent with the outline of the Plan set forth in the Consent Decree (1/28/88 Consent Decree at 7-11), the plaintiffs' proposed order contemplated a program of incentives and City actions designed to induce private developers to develop affordable housing, in combination with market rate housing, in east and northwest Yonkers (5/2/88 Plaintiff and Plaintiff-Intervenors' Proposed Long Term Plan Order). The proposed order granted the City discretion to establish the mix of Mandated Incentives which it would make available to each developer, and set forth examples of the types of Mandated Incentives which the City would implement (id. at 10-12). The United States and the NAACP also submitted joint amended comments setting forth the rationale for each aspect of their proposed order (5/2/88 Plaintiff and Plaintiff-Intervenors' Joint Amended Long Term Plan Comments).

The City opposed the plaintiffs' proposed order. In addition to opposing entry of any Long Term Plan Order on the ground that it had moved to vacate the Consent Decree (see Addendum A, ¶¶ 25-26), the City stated three specific objections to the plaintiffs' proposed order:

(a) its requirement that all multi-family housing be built in at least an "80/20" configuration is excessively restrictive, and the city proposes that the order contain a variance procedure for permitting less than 20% assisted units (though not less than 10%) in any development;

(b) its failure to provide for any efficiency or one bedroom units in the affordable price categories is contrary to the evidence that a need for such units exists; and

(C) no new Office of Implementation is appropriate or necessary, since existing City agencies and resources should be given the responsibility of implementing the plan.

(5/16/88 City's Memorandum In Opposition to Plaintiffs' Joint Motion to Enter Proposed Long-Term Plan at 3). In addition, the City suggested specific changes in the provisions regarding resale restrictions, architectural integration, mandated incentives, and the Affordable Housing Trust Fund (id. at 4). The City stated that the "overall thrust" of its proposed changes was "to give greater flexibility to the City to respond affirmatively to development proposals which do not meet all of the specific restrictions" in the plaintiffs' proposed order (id. at 19). In opposing the creation of a separate Implementation Office, the City emphasized its preference for retaining responsibility for implementation of the Plan in existing City agencies (id. at 13-16).

The district court then requested the plaintiffs to submit a revised proposed order reflecting, to the extent agreeable to the plaintiffs, the City's comments on the plaintiffs' initial proposal. Plaintiffs submitted such a revised proposal on June 2, 1988. Following argument on June 8 (6/8/88 Tr. 146-183), the Long Term Plan Order was entered, as further modified by the court, on June 13, 1988 (6/13/88 Long Term Plan Order).

The court's order included a number of modifications to the plaintiffs' proposed order, in response to the City's objections relating to the minimum percentage of subsidized units in a development (id. at 2), provision for some one-bedroom units (id.

at 3), architectural integration (id. at 9-10), and permissible uses of funds from the Affordable Housing Trust Fund (id. at 13-14). The court's order also included a provision giving priority to developer proposals that would "assure the provision of assisted housing in a dispersed manner and so to avoid the undue concentration of both public and assisted units in any neighborhood of Yonkers" (id. at 4). The City's objections to the order that were not accepted by the court involved the creation of an Implementation Office to implement the Plan (6/8/88 Tr. 178-180), the use of tax abatements (id. at 177-178), and the reduction of the transfer restriction for housing developed under the Plan from 30 to 20 years (id. at 178).<sup>6/</sup> The City has appealed the entry of the June 13 Long Term Plan Order.

D. Enforcement of the Consent Decree  
and Long Term Plan Order

As of June 13, more than four months after entry of the Consent Decree, and more than one month after the deadline to which it had agreed, the City had failed to pass the legislation required by Section 17 of the Decree. On June 17, with the Long Term Plan Order entered, and thus the specific content of the necessary legislation established, the United States asked the Court to set a timetable for the legislation's enactment (6/21/88

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<sup>6/</sup> The 30-year restriction originated in the drafts prepared by the City during negotiations, and was reflected in similar plans of a number of New Jersey towns which had been submitted by the City during negotiations (6/8/88 Tr. 155). The City acknowledged at argument that the dispute on this issue was "hard to resolve on the merits" (id. at 178).

Court Exh. A). In a telephone conference, counsel for the City stated that a consulting firm had been retained to draft the appropriate legislation, that a draft would be available for review by the plaintiffs and the OHA by July 19, and that City Council action could be anticipated at the next City Council meeting -- perhaps in August (6/21/88 Tr. 3). The district court expressed its concern about continued delay and requested the City Council to pass a resolution adopting the provisions of the Consent Decree and the Long Term Plan Order (id. at 3-4, 20).<sup>7/</sup> Counsel for the City drafted such a resolution "indicating [the City Council's] commitment to the implementation of" the Housing Remedy Order, the Consent Decree, and the Long Term Plan Order (Res. No. 177-1988). On June 28, 1988, the Yonkers City Council voted, 5 to 1, to reject the resolution (ibid.).

Following this action, the district court directed the plaintiffs to prepare a proposed order "requiring Yonkers to take specific implementing action pursuant to a prescribed time-table, on penalty of a finding of contempt and the imposition of bankrupting fines" (6/29/88 Order).<sup>8/</sup> On July 5, 1988, plaintiffs submitted such a proposed order, setting forth a

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<sup>7/</sup> The court indicated that it was particularly concerned in light of a resolution passed by the City Council the previous week declaring a moratorium on the development of all public housing in the City of Yonkers, despite the provisions of the Housing Remedy Order and the Consent Decree requiring the City to provide sites for 200 units of such housing (6/21/88 Tr. 4, 18; see Addendum A, ¶ 27; Addendum B).

<sup>8/</sup> The City has appealed the entry of the June 29 Order.

timetable for City actions and providing that failure to take such actions would subject the City to possible contempt sanctions (7/5/88 Plaintiffs' Notice of Motion and Proposed Order).

In its memorandum opposing entry of the proposed order, the City stated that "the City has indicated by the defeat of the [June 28] Resolution \* \* \* that it will not voluntarily adopt the legislation contemplated by [the Long Term Plan] Order" (7/12/88 Court Exh. A at 4). The City argued that, rather than imposing contempt sanctions on the City for its refusal to comply with the court's orders, the court should simply "enter an order adopting the necessary" legislation (id. at 3).

At the hearing on July 12, the district court solicited the parties' comments on the possible creation by the court of an Affordable Housing Commission, which would exercise all of the City Council's functions relating to the implementation of the housing remedy orders (7/12/88 Tr. 6-9). In written comments, the United States opposed the creation of such a commission because it would allow the City and its officials to avoid their obligation to comply with the lawful housing remedy orders of the district court and allow them to continue to inflame community opposition to the court's orders (7/22/88 Comments of the United States). The City stated that it could not support the creation of a commission because it was concerned about divesting its City Council of its "core legislative as well as executive functions"

(7/25/88 City's Comments at 2). The NAACP supported the concept of a commission (7/22/88 Brief of NAACP).

On July 26, at the United States' urging, the district court entered an Order requiring the City, on or before August 1, to enact the legislation implementing the Long Term Plan, as required by Section 17 of the Consent Decree and in accordance with the provisions of the Long Term Plan Order (7/26/88 Order). Such legislation had been drafted by the City's own consultants and incorporated the terms of the Long Term Plan Order (7/26/88 Tr. 2-6; 7/26/88 Court Exh. A). The City stated that it had no objections to the proposed legislation except for those it had previously expressed regarding the Long Term Plan Order (7/26/88 Tr. 6; see pp. 8-10, supra). The July 26 Order provided that the City's failure to enact the legislation, and to demonstrate why it should not be held in contempt at a show cause hearing on August 2, would subject the City to contempt and daily fines until it enacted the legislation.<sup>9/</sup> The fines to be imposed were set at \$100 for the first day of noncompliance with the daily rate doubling for each consecutive day of noncompliance (7/26/88

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<sup>9/</sup> The City subsequently advised the district court of state procedural requirements of notice and public hearing prior to the enactment of zoning ordinances which purportedly would have made it impossible for the City to adopt the ordinance at issue by August 1. By letter dated July 28, the Court clarified its order and advised the parties that its July 26 order would be satisfied if the City Council adopted a resolution on or before August 1 committing itself to enact the ordinance within the minimum time prescribed for notice pursuant to state law (7/28/88 Letter from Judge Sand to All Counsel). The City has filed a notice of appeal from the July 28 letter. At its August 1 meeting the City Council scheduled the required hearing on the legislation for August 15 (8/2/88 Tr. 2).

Order at 2-3). In addition, if the legislation were not passed, members of the City Council who failed to vote for it, and failed to demonstrate why they should not be held in contempt at the August 2 show cause hearing, would be held in contempt, fined \$500 per day of noncompliance, and imprisoned after ten days of noncompliance (id. at 3-4).<sup>10/</sup> The City has appealed the July 26 Order.

On August 1, by a vote of 4 to 3, the City Council defeated the resolution called for by the July 26 Order, as clarified by the July 28 letter (8/2/88 Tr. 2). On August 2, the Court held the City in contempt and imposed fines on the schedule set out in the July 26 order. The City's lawyer reiterated its argument that the court should order the legislation into effect, rather than holding the City in contempt for refusing to enact it (id. at 3). The court found that the City had been given adequate notice of the proceedings and an opportunity to be heard (id. at 23). In holding the City in contempt, the court found that the "extent of the resistance by the City \* \* \* is unprecedented" (id. at 22), and that "this is but the latest of a series of contempts" (id. at 23). The City has appealed from this contempt order.

The court also heard, on August 2, from three of the four Council members who had voted against the legislation. Councilmen Fagan and Longo stated that they had voted against the

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<sup>10/</sup> The individual sanctions would terminate if the legislation were passed or if the individuals voted for the legislation (7/26/88 Order at 3-4).

legislation because there had been no public hearing or opportunity for input from the public (id. at 40-42).

Councilman Chema gave no explanation for his vote. His attorney contended that he had not had adequate opportunity to prepare, but did not subsequently take advantage of the court's offer to hold an evidentiary hearing the following week (id. at 44-54, 58-61). The court found that all three had had adequate notice and found them in contempt (id. at 42, 62). The court gave each of the individuals until August 5 to request an evidentiary hearing, set August 8 as the date for such a hearing if requested, and ruled that the individuals' checks would not be cashed pending the outcome of such a hearing (id. at 56-60). None of the individuals requested an evidentiary hearing. Fagan, Longo, and Chema have appealed the contempt orders.

The proceedings with respect to Councilman Spallone were adjourned until August 4 to enable him to retain counsel.<sup>11/</sup> On that date, the court found that Spallone had had adequate notice of the court's order and of the consequences of his violation of that order,<sup>12/</sup> and that he had deliberately violated the order (8/4/88 Tr. 35). Spallone's defense was that the court lacked the power to order him to vote in a particular way and that he was not bound to comply with the Consent Decree because he had

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<sup>11/</sup> Spallone, like the other Council members, was given the option of requesting an evidentiary hearing to be held on August 8 (8/2/88 Tr. 63).

<sup>12/</sup> Spallone had been in court on July 26 when the order was entered (8/4/88 Tr. 4).

not voted for it in January (id. at 7-8, 10-13, 28-29, 31). The court heard uncontradicted evidence that Spallone had made a number of statements indicating that he would not comply with the court's orders (id. at 24-26; 8/2/88 Court Exh. A). The court found that no factual issues were in dispute and held him in contempt (8/4/88 Tr. 35-36). Spallone has appealed the contempt order.

On August 9, this Court granted a temporary stay of the contempt orders until argument of these appeals on the merits on August 17.

#### ARGUMENT

This Court affirmed the district court's May 28, 1986, Housing Remedy Order as "plainly reasonable," "necessary," and "appropriate and prudent," particularly in light of "[t]he City's past history of foot-dragging (e.g., nine years taken to approve sites for 750 units) and its refusals to approve any site for low-income housing outside" minority areas. United States v. Yonkers Board of Educ., 837 F.2d 1181, 1236-1237 (1987). Now, after two more years in which the City has continued to delay compliance and actively to defy the district court's remedy orders -- and during which the court has given the City every opportunity to comply voluntarily -- the court has found the City in contempt and has imposed escalating fines designed to coerce the City's compliance. As the district court stated (8/2/88 Tr. 22-23):

It would be difficult to imagine a clearer challenge to the constitution of the United

States and to a government of law than that presented this morning. If a federal court order designed to remedy racial discrimination can be flouted by a municipality because that is what appears to be the course of political expediency, then we no longer live under a constitutional form of government. Then one has to put an asterisk to the constitution and say, "Provided, however, that if the community is sufficiently hostile to remedial action designed to insure and protect these rights, then all bets are off."

As set forth below, the district court acted properly in entering the Long Term Plan Order; in imposing the contempt sanctions designed to coerce compliance with its orders; and in finding the City and four members of the City Council in civil contempt. The district court's orders should be affirmed and no further stay of the district court's contempt orders should be granted.

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION  
IN ENTERING THE LONG TERM PLAN ORDER

A district court has "substantial latitude" in devising remedies for constitutional violations. Yonkers, 837 F.2d at 1236. On appeal, the reviewing court must "acknowledge the respect owed a District Judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment," United States v. Paradise, 107 S. Ct. 1053, 1073 (1987); and the choice of remedies is entrusted "'to the sound discretion of the trial court.'" Ibid., quoting Fullilove v. Klutznick, 448 U.S. 448, 508 (1980) (Powell, J., concurring), quoting Franks v.

Bowman Transp. Co., 424 U.S. 747, 794 (1976) (Powell, J., concurring in part and dissenting in part). The district court here did not abuse its discretion in entering the Long Term Plan Order.

The City's obligation to implement a Long Term Plan for the development of affordable housing outside the southwest quadrant of Yonkers was part of the original Housing Remedy Order and, as such, has already been upheld by this Court. Yonkers, 837 F.2d at 1184. The Consent Decree, to which the City agreed and is indisputably bound, established the framework for and resolved the most controversial issues relating to the Long Term Plan. The Consent Decree set a goal of 800 units of privately developed assisted housing, to be developed in conjunction with market rate housing over a four-year period, and committed the City to enact legislation to effectuate the Plan (1/28/88 Consent Decree at 7). Thus, the City's obligation to implement a Long Term Plan, and to enact legislation, in accordance with the Housing Remedy Order and the Consent Decree, is the law of the case and is not open to further review. See Crane Co. v. American Standard, Inc., 603 F.2d 244, 248 (2d Cir. 1979).

The Consent Decree left the details of the Long Term Plan to further negotiations. However, after agreement had been reached on a basic draft, the City broke off negotiations for reasons unrelated to the Long Term Plan itself (see p. 7, supra). Thus, in order to effectuate the Consent Decree, the plaintiffs were forced to submit a proposed Long Term Plan Order to the court for

entry. The court obtained the City's comments on the proposed order and heard argument on the disputed issues. On June 13 it entered an Order that was fully consistent with both the Housing Remedy Order and the Consent Decree, that largely reflected agreements which had been reached among the parties during negotiations, and that took into account most of the objections expressed by the City (see pp. 7-10, supra).

Moreover, the City's remaining objections to the Order were relatively minor and somewhat ambiguous.<sup>13/</sup> The City contended that resale restrictions on housing developed under the Plan should be limited to 20 years, rather than 30. However, the 30-year restriction had initially been proposed by the City and was found in many of the municipal plans used as models for the Long Term Plan during negotiations. The City's lawyer acknowledged at argument that this dispute was "hard to resolve on the merits" (6/8/88 Tr. 178). The City also objected to the Order's provisions regarding the use of tax abatements, claiming that they were inconsistent with state law. However, the City had specifically agreed to grant tax abatements in the Consent Decree (1/28/88 Consent Decree at 9), and the City's lawyer stated at argument that the question of state law "would require additional study" and contended only that granting tax

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<sup>13/</sup> The City also contended that the Long Term Plan Order should not be entered because it was based on the Consent Decree, which the City had moved to vacate (see p. 8, supra). The court's denial of the City's motion to vacate, which has not been appealed, vitiates that basis for objection to the Long Term Plan Order.

abatements in the manner contemplated by the Order would be "unfair" to other residents of Yonkers (id. at 177-178). Finally, the City objected to the creation of a separate Implementation Office to administer the Plan, and argued that such responsibility should be vested in existing City agencies (id. at 178-180). However, the court found that, in light of the City's history of obstructing the development of assisted housing, a separate Implementation Office was appropriate to shield the implementation of the Plan from political interference (id. at 179).<sup>14/</sup>

The district court did not abuse its discretion in overruling the City's objections to the proposed Order and in entering the June 13 Long Term Plan Order.

## II

### THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING ITS JUNE 29 AND JULY 26 ORDERS

On June 28, 1988, in response to a direct request from the court, the City Council refused to commit itself to complying with the Housing Remedy Order, the Consent Decree, and the Long

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<sup>14/</sup> Neither the City nor any of the individual Council members cited these objections to the content of the Long Term Plan Order as a reason for their refusal to enact the resolution on August 1. See pp. 14-16, supra.

Term Plan Order.<sup>15/</sup> The City was already two months past the date on which the Consent Decree required it to enact the implementing legislation for the Long Term Plan. The Housing Remedy Order was more than two years old and, due to the City's obstruction and delay, no housing construction had begun.

Against this background, the court issued its June 29 Order directing the plaintiffs to submit a proposed order setting forth a timetable for City compliance, and contempt sanctions in case of noncompliance. After submission of the proposed order, and comments from the City, the court entered its July 26 Order.<sup>16/</sup> That order required the City to enact the legislation necessary to implement the Long Term Plan Order, and declared that if the legislation was not passed by August 1, the City and the members of the City Council who failed to vote for it would be required to show cause why they should not be held in civil contempt. A finding of contempt would result in escalating fines for the City, beginning at \$100 per day and doubling every day, and fines of \$500 per day for the individual Council members, who would also be subject to imprisonment after 10 days of noncompliance.

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<sup>15/</sup> On the same date, the City Council adopted a resolution calling for the withdrawal of the City's condemnation action for one of the public housing sites designated by the Consent Decree (Addendum A, ¶ 28; Addendum C). One week earlier, the City Council had adopted a resolution declaring a moratorium on the construction of all public housing in the city, in defiance of the public housing aspects of the Housing Remedy Order and the Consent Decree (Addendum A, ¶ 27; Addendum B).

<sup>16/</sup> The court also considered, as an alternative or supplement to contempt sanctions, the creation of a commission which would take over all of the executive and legislative functions of the City Council relating to the housing remedy (see pp. 12-13, supra).

A district court is vested with "wide discretion" in fashioning remedies to coerce compliance with its orders. Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979). The district court did not abuse that discretion in issuing the June 29 and July 26 orders here.

A. The district court did not err in selecting civil contempt as the appropriate sanction for the City's noncompliance

The court's orders contemplated the imposition of civil contempt sanctions, designed to coerce compliance with its orders. This approach is well grounded in the law:

Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties. \* \* \* Civil contempt proceedings may yield a conditional jail term or fine. \* \* \* If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance.

Hutto v. Finney, 437 U.S. 678, 690-691 (1978) (citations omitted).

The purpose of civil contempt fines is to coerce a party to comply with the court's orders. Local 28, Sheet Metal Workers v. EEOC, 106 S. Ct. 3019, 3033 (1986); McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); Northside Realty Assocs. v. United States, 605 F.2d 1348, 1356 (5th Cir. 1979) (contempt of injunction under the Fair Housing Act). A party subject to such coercive sanctions holds within its hands the power to end the sanctions by simply ceasing its contumacious conduct. See Shillitani v. United States, 384 U.S. 364, 368 (1966); United States v. Handler, 476 F.2d 709, 714 (2d Cir. 1973). Here the

finest will end as soon as the City enacts the ordinance (or a resolution committing itself to enact the ordinance at the earliest possible time) as required by the district court's orders. The dilemma of potentially bankrupting fines facing the City is thus one of its own making and one which it has full power to avoid.

The City argued below that the court should have chosen a different remedy for its noncompliance, and should have simply ordered the legislation into effect.<sup>17/</sup> But a court has no obligation to revise its prior orders -- particularly in a manner inconsistent with a consent decree the parties bargained for and obtained -- merely because a party decides not to comply.<sup>18/</sup> Moreover, the City's alternative would not have addressed the underlying problem here: the City's repeated refusal to obey the court's orders. It is the City, not the court, which has chosen this confrontation. It is the City which has flouted the law.

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<sup>17/</sup> This argument was inconsistent with the position adopted by the City regarding the Long Term Plan Order. In urging the court not to require it to create a separate Implementation Office, the City argued that maximum responsibility should be retained by the City's existing agencies (see pp. 8-9, supra). In addition, the City opposed the creation of a commission to carry out the City Council's responsibilities because it would divest it of "core legislative as well as executive functions" (7/25/88 City's Comments at 2).

<sup>18/</sup> In any case, direct judicial exercise of the legislative function would be more, not less intrusive than directing City officials to exercise their responsibilities in accordance with the court's remedy orders. The path now recommended by the City could only ultimately lead to continuous judicial management of the City's affairs. Contempt is the classic means of achieving compliance with court orders and is better tailored to that end than the City's suggested remedy.

It is the City that must now comply with the law. As the district court stated (8/2/88 Tr. 8-9):

[T]here does have to come a moment of truth, a moment of reckoning, a moment when the City of Yonkers seeks not to become a national symbol of defiance to civil rights and to heap shame upon shame upon itself, but to recognize its obligation to conform to the laws of the land and not step by step, order by order, but in the way in which any responsible community concerned about the welfare of its citizens functions. That is not going to be accomplished by this court adopting the ordinance.

Under the district court's orders, implementation of the Long Term Plan Order and the necessary legislation still rests substantially with City officials, including the City Council, where it belongs. The City, at long last, must be required to meet its legal obligations under the court's remedial orders. The court did not abuse its discretion in determining to impose civil contempt sanctions to compel such compliance.

B. The level of fines imposed upon the City were an appropriate means of coercing compliance

The district court has struggled with the City's extraordinary willingness to delay and obstruct the implementation of the remedy and to defy the court's orders for more than two years. The district court was thus in the best position to determine the most effective means of securing the City's compliance. The court's judgment regarding the size of fines against the City and the nature and extent of the sanctions against contemptuous City officials is entitled to considerable deference from this Court. Vuitton, supra.

Certainly the fines set by the July 26 Order will mount to bankrupting levels in a short time if the City continues to defy the court's orders. Yet to be effective in coercing this City's compliance, any fines must be quite severe. The City is already on record as being willing to refund over \$29 million dollars to the federal government to avoid compliance with the public housing aspect of the remedy, and to sell bonds in order to raise that sum (see p. 7, supra, and Addendum A, ¶ 23). Thus the City is willing to pay an extremely high price to avoid the development of assisted housing in east Yonkers. Fines which grew more slowly would only succeed in compelling compliance more slowly, but would surely have to reach the same high levels before the City would finally comply.

Here, the fines start at a very low level, thus allowing the City Council some days to reflect and to change its course, or for other authorities to intervene,<sup>19/</sup> before a bankruptcy occurs. A different fine schedule -- for example, \$100,000 per day -- might well be insufficient to compel compliance if the City Council elected to try to sell bonds, levy taxes or otherwise raise the money to pay for its continued defiance. The district court's schedule of fines does not allow the City time for such tactics. That the fines here will rise at an escalating rate means only that the time for such reflection will end sooner rather than later, and that the City will finally

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<sup>19/</sup> The City is subject to supervision by an Emergency Financial Control Board, which has broad powers over its finances. See 7/22/88 Comments of the United States at 7-12.

comply with the court's orders sooner rather than later. While a different level of fines might, at first blush, appear less harmful to the citizens of Yonkers, the district court's order better serves the interests of justice and of Yonkers residents because it ensures a rapid resolution to this controversy.

The Supreme Court approved the use of much harsher civil contempt fines in United States v. United Mine Workers, 330 U.S. 258, 304-305 (1947), when it upheld a coercive fine of \$2.8 million dollars -- in 1947 dollars -- imposed on a union. More recently, the Court has held that contemptuous conduct, including a history of "persistent or egregious discrimination" and "'foot-dragging resistance' to court orders" may authorize the granting of extraordinary relief where other methods fail, even where innocent third-parties may suffer. Local 28, 106 S. Ct. at 3050, 3051. Indeed, here no party need suffer at all if the City simply complies with the court's orders.<sup>20/</sup>

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<sup>20/</sup> In its stay papers in this Court, the City argued that the fines here violate the Excessive Fines Clause of the Eighth Amendment (City's Reply Memorandum at 5). However, the Eighth Amendment applies only to criminal proceedings and thus is irrelevant to civil contempt sanctions. Ingraham v. Wright, 430 U.S. 651, 664 (1977); see Uphaus v. Wyman, 360 U.S. 72 (1959); United States v. Dien, 598 F.2d 743, 745 (2d Cir. 1979) (Eighth Amendment inapplicable to coercive imprisonment imposed as civil contempt sanction).

The court did not err in setting the schedule of fines for the City at \$100 per day, doubling every day.<sup>21/</sup>

C. The district court did not err in ordering the City to enact legislation

1. The district court's orders did not unduly intrude on local prerogative

The City, through its City Council, agreed in the Consent Decree to enact the legislation necessary to effectuate the Long Term Plan. The City also agreed in the Consent Decree to negotiate the details of the Plan, which were then to be included in the implementing legislation. It refused to carry out either of these obligations. As set forth above (pp. 17-20, supra), the court did not err in entering the Long Term Plan Order, which supplied the content of the legislation. In order to ensure that its remedy orders would be implemented -- and the City's housing violations at long last remedied -- the court was also authorized to order the City to enact the legislation.

As this Court has held, a court's power to "restructure the operation of state and local entities" is "flexible but not unlimited." Yonkers, 837 F.2d at 1235. Such relief must be "tailor[ed] \* \* \* to fit the nature and extent of the violation." Ibid. An order requiring the enactment of legislation to remedy constitutional violations assuredly is

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<sup>21/</sup> Because of the simultaneous briefing order, we do not know whether the individual appellants will challenge the contempt order as unduly harsh. We note, however, that there is a question whether such a position has been preserved for this appeal. None of the individual Council members contended below that the level of fines or potential imprisonment imposed upon them was excessive.

unusual, but is not unprecedented. In Griffin v. County School Board, 377 U.S. 218, 233 (1964), the Supreme Court held that the district court was empowered, if necessary, to order county legislators "to exercise the power that is theirs to levy taxes" needed to reopen the public schools and operate them on a nondiscriminatory basis. The court also authorized the district court to issue an order to keep the schools open: "An order of this kind is within the court's power if required to assure these petitioners that their constitutional rights will no longer be denied them." Id. at 233-234.<sup>22/</sup> See also United States v. City of Parma, Ohio, 661 F.2d 562, 577 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982) (upholding order requiring City to enact "welcoming ordinance").

Here, the City had already agreed to enact the legislation necessary to effectuate the Long Term Plan. When the City

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<sup>22/</sup> In Griffin, the county government had shut down its public schools and refused to impose school taxes to avoid its constitutional duty to eliminate de jure segregation in the schools. In addition, the county provided tuition grants and tax credits to students attending white-only private schools. Here, of course, it is not the City Council's power to tax that is at issue. Rather, it is its power to affect the siting of assisted housing, which was one of the bases for the finding of liability, and therefore the proper subject of the remedial orders.

Council refused to carry out this obligation, the court properly ordered it to do so.<sup>23/</sup>

2. The doctrine of legislative immunity is inapplicable here

The doctrine of legislative immunity protects legislators<sup>24/</sup> from suits brought under 42 U.S.C. 1983 for damages or injunctive relief "based on their activities within the traditional sphere of legislative activity." Star Distributors, Ltd. v. Marino, 613 F.2d 4, 9 (2d Cir. 1980). As this Court has recognized, however, the doctrine of legislative immunity has no application in cases such as this one where the injunction is directed toward preventing "defiance of federal court desegregation orders." Id. at 10. Citing Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La.) (3-judge court), aff'd, sub nom., Denny v. Bush, 367 U.S. 908 (1961) (per curiam), this Court distinguished such a case from the traditional application of legislative immunity in a private Section 1983 action:

That case [Bush] involved an entirely different set of circumstances from that in

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<sup>23/</sup> The alternative belatedly proposed by the City -- direct judicial exercise of the Council's legislative authority to adopt the plan -- would have been a far greater intrusion on legislative prerogative. Indeed, when the court suggested an independent Commission be created that could exercise the City's "core legislative" function, the City objected (see pp. 12-13, supra). Under the circumstances, it is impossible to reconcile the City's positions (1) that the July 26 order unduly interferes with its legislative prerogative, but that (2) judicial assumption of its legislative function in this area is permissible (and even preferable).

<sup>24/</sup> Thus, whatever its applicability to the City Council and Council members here, legislative immunity provides no shield for the City itself.

the present case. The injunction was granted not pursuant to a private § 1983 civil action but on a motion by the United States to vindicate the authority of a federal court. It attacked an "obvious" pattern of "delay, evasion, obstruction, defiance and reprisal."

Star Distributors, Ltd., 613 F.2d at 10. In Bush, the 3-judge court enjoined the State Legislature of Louisiana from taking any action to enforce certain statutes "and from otherwise interfering in any way with the operation of the public schools." Bush, 191 F. Supp. at 879. As in Bush, the district court here was faced with "an 'obvious' pattern of 'delay, evasion, obstruction, defiance and reprisal'" on the part of the City of Yonkers and its City Council. Its orders requiring the City to comply with the Long Term Plan Order and the Consent Decree -- in which the City had agreed to enact the legislation at issue -- were entirely proper. Legislative immunity cannot shield legislators from sanctions for their blatant disregard for lawful court orders.

### III

#### THE DISTRICT COURT DID NOT ERR IN HOLDING THE CITY IN CONTEMPT

There is no dispute that the City had adequate notice of the court's July 26 order, as modified by its July 28 letter. Nor is there any dispute that the City failed to comply with that order. Indeed there can be no dispute that the City has violated the Housing Remedy Order, the Consent Decree, and the Long Term Plan Order. The City seeks to avoid contempt by arguing for the first time in this litigation that the City as a corporate entity

should be distinguished from the City Council, and that the City should not be forced to pay for the irresponsibility of some of its Council members.

Such a dichotomy finds no support in the law or in common sense. The City Council acts for the City. Like all municipal corporations, the City functions through its governing bodies, and the official actions of the governing body constitute actions of the City:

If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible \* \* \*.

Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986) (footnote omitted); see also City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988). Indeed, the City's original liability in this case was based in part upon the actions and inactions of the City Council and individual Council members. Yonkers, 837 F.2d at 1188-1194, 1221-1223.

By adopting the Consent Decree, the City Council bound the City to obey its mandates. The City cannot now avoid those obligations by seeking to separate itself from the only entity empowered to enact the legislation necessary to comply with the Decree. There is no authority to support the notion that a governmental entity itself cannot be held accountable if its officials fail to carry out lawful court orders.

Nor did the City's objection to entry of the Long Term Plan Order justify its refusal to comply. First, the obligation to enact the legislation was derived from the Consent Decree, to which the City was a party. Second, as we have demonstrated (pp. 17-20, supra), the entry of the Long Term Plan Order was entirely proper. Third, none of the Council members who voted against the resolution even mentioned the City's previously stated objections to the content of the Long Term Plan Order as a basis for their votes. Most importantly, disagreement with a court's order does not justify its violation:

[There is] impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings \* \* \*. " \* \* \* It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

United Mine Workers, 330 U.S. at 293 (citations omitted). Such is true even where, as is emphatically not the case here, the injunction would "raise substantial \* \* \* issues concerning \* \* \* its provisions." Walker v. City of Birmingham, 388 U.S. 307, 316 (1967). Nor can refusal to comply with a federal court order be defended by claims of the "political difficulties" of compliance. Badgley v. Santacroce, 800 F.2d 33, 37 (2d Cir. 1986), cert. denied, 107 S. Ct. 955 (1987).

Thus the City was properly found in contempt of court.

IV

THE DISTRICT COURT DID NOT ERR IN HOLDING  
THE INDIVIDUAL COUNCIL MEMBERS IN CONTEMPT

There is no dispute that the individual Council members had notice of the July 26 order (as modified by the July 28 letter), that they violated that order by failing to vote for the resolution, or that they had adequate opportunity to be heard prior to the court's contempt findings.<sup>25/</sup> Nor is there any doubt that the Council members were bound by the court's orders. In committing the City to the Consent Decree, the City Council bound itself to its terms.<sup>26/</sup> Pursuant to Rule 65(d) of the Federal Rules of Civil Procedure, an injunction is binding upon the parties to an action and their "officers, agents, servants, [and] employees." As the Court stated in United States v. City of Providence, 492 F. Supp. 602, 610 (D.R.I. 1980):

[A]lthough no City officers are specifically before the Court, the Decree is specifically binding upon them, and \* \* \* they also might be brought before the Court and be required to adhere to the provisions of the Amended Consent Decree.

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<sup>25/</sup> See pp. 14-16, supra. In addition, as the district court ruled on August 2, the City Council members received adequate notice of the possible need for counsel at the contempt hearing (8/2/88 Tr. 31-32, 44-52). Thus, any claim of inadequate time for preparation by counsel for the hearing due to last minute retention by any Council member must be rejected. In any event, the district court offered to hold an additional hearing if any Council member so requested (id. at 58-62).

<sup>26/</sup> The fact that the January 28, 1988, judgment was entered by consent does not lessen the respect due that judgment by the City and the City Council. Badgley v. Santacroce, 800 F.2d at 38.

See also Shakman v. Democratic Org., 533 F.2d 344, 352 (7th Cir.) cert. denied, 429 U.S. 858 (1976).

Where civil contempt is concerned, the inquiry ends here. The intent of the individual Council members or their motivation for disobeying the district court's mandate are irrelevant to that court's finding of civil contempt. The Supreme Court held in McComb v. Jacksonville Paper Co., 336 U.S. at 191 (citations and footnote omitted):

The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court \* \* \*. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents.

See SEC v. American Board of Trade, Inc., 830 F.2d 431, 441 (2d Cir. 1987), cert. denied, 108 S. Ct. 1118 (1988); Donovan v. Sovereign Security, Ltd., 726 F.2d 55, 59 (2d Cir. 1984). In any case, it cannot be disputed that the City Council members here did willfully violate the court's order (see 8/2/88 Tr. 41-42, 62; 8/4/88 Tr. 23-26; 8/2/88 Court Exh. A).

The district court did not err in holding the City Council members in contempt.

V

NO ADDITIONAL STAY OF THE DISTRICT COURT'S  
CONTEMPT ORDERS SHOULD BE GRANTED

On August 9, this Court granted a temporary stay of the contempt order "only until the appeals are argued on Wednesday,

August 17, 1988" (8/9/88 Order). When that stay was issued, this Court had not had the opportunity to hear the merits of these appeals. Now, however, the merits have been fully briefed and, as we have demonstrated above, the district court's orders were entirely justified. Because there is no substantial possibility that the appellants will succeed on the merits, no further stay should be granted.<sup>27/</sup> Indeed, we urge this Court to affirm the district court's orders forthwith.

Neither the City nor the Council members can show that they will be irreparably harmed if no further stay is granted. Each has the ability to purge the contempt, and avoid any harm, by the simple act of complying with the district court's orders.

Indeed, any further delay in the enforcement of the contempt orders would irreparably harm the public interest and the interests of the plaintiffs here because it would permit the City and the Council members to continue to violate the district court's orders with impunity. For more than two years the City has defied the court's authority. This nearly total disrespect for the judicial process continues today and will continue as

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<sup>27/</sup> The standards for granting a stay pending appeal are well established. A movant must show that there is a substantial possibility that it will prevail on the merits of its appeal, that it will be irreparably harmed if a stay is not granted, and that granting a stay will not irreparably harm the nonmoving parties or the public interest. Dubose v. Pierce, 761 F.2d 913, 920 (2d Cir. 1985), vacated on other grounds, 108 S. Ct. 2890 (1988), citing Coleman v. Paccar, Inc., 424 U.S. 1301, 1305 (1976) (Rehnquist, Circuit Justice), and O'Brien v. Brown, 409 U.S. 1, 3 (1972) (per curiam).

long as the contempt order is stayed. As the Supreme Court has stated:

[R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

Walker v. City of Birmingham, 388 U.S. at 321. A stay of the contempt order would stay "the civilizing hand of law" and irreparably harm the public interest.

A stay also would further delay the implementation of the remedy and the vindication of the constitutional rights of the citizens of Yonkers to equal opportunity in housing, and would further delay the enforcement of the nation's civil rights laws in Yonkers. In Griffin, 377 U.S. at 234, the Supreme Court declared that "[t]he time for mere 'deliberate speed' has run out." Here, the time for the City of Yonkers to comply with the court's orders has run out. If this Court does not affirm before the stay expires, certainly it should not extend the stay.

CONCLUSION

For the reasons stated above, the district court's orders should be affirmed forthwith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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This <sup>15<sup>th</sup></sup> day of August, 1988.

  
\_\_\_\_\_  
Linda F. Thome  
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## ADDENDUM A

## ADDENDUM A

1. Part IV.A. of the May 28, 1986, Housing Remedy Order required the City to submit its Housing Assistance Plan (HAP) to the Department of Housing and Urban Development (HUD) within 15 days of the Order. United States v. Yonkers Board of Educ., 635 F. Supp. 1577, 1580 (S.D.N.Y. 1986). The submission of such a HAP was a prerequisite to the City's receipt of Community Development Block Grant (CDBG) funds. Ibid. The Order provided that if the City failed to submit a HAP, the plaintiff and plaintiff-intervenor were to do so, with court approval. Ibid. The City refused to submit its HAP in 1986; instead, counsel for the United States prepared the HAP, which was deemed by the court to have been submitted by the City to HUD (6/9/86 letter, Vanderwicken to Judge Sand; 7/14/87 Deft. Proposed Findings of Fact & Conclusions of Law, ¶ 5). The City also refused to submit its fiscal year 1987 HAP until the court ordered it to do so under penalty of contempt (7/1/87 Order).

2. Part IV.B. of the Housing Remedy Order required the City to execute a grant agreement with HUD within 15 days of the Order. By executing the grant agreement, the City would formally accept the condition that its receipt of CDBG funds was dependent upon its submission of sites for public housing on the east side of Yonkers. Yonkers, 635 F. Supp. at 1580. The Order provided that if the City failed to execute the grant agreement, the plaintiff and plaintiff-intervenor were to do so, with court approval. Ibid. The City refused to execute a grant agreement in 1986; instead, the grant agreement was prepared by counsel for

the United States and deemed by the court to have been executed by the City (6/19/86 letter, Vanderwicken to Judge Sand; 7/14/87 Deft. Proposed Findings of Fact & Conclusions of Law, ¶ 6).

3. Part IV.C. of the Housing Remedy Order required the City to submit at least two sites for 140 units of public housing on the east side of Yonkers within 30 days of the Order. Yonkers, 635 F. Supp. at 1580-1581. The Order provided that if the City failed to do so, three unused schools sites -- School 4, School 15, and Walt Whitman School -- would be deemed to have been submitted. The City refused to designate any public housing sites. School 4, 15, and Whitman thus were automatically designated (R. 229, p. 3). HUD later approved only School 4 and Whitman for public housing (ibid.).

4. Part IV.D. of the Housing Remedy Order required the City to submit sites from a list of privately owned sites for 60 additional units of public housing within 90 days of the Order. Yonkers, 635 F. Supp. at 1581. The City took no action except to write letters to the owners of these sites, asking them if they wanted to sell their properties. The City did not designate any of these sites or exercise its power of eminent domain to obtain them (id. at 3-4).

5. Part VI. of the Housing Remedy Order required the City to submit a plan for the development of additional subsidized housing (the Long Term Plan) by November 15, 1986. The City refused to do so (7/1/87 Order).

6. On December 5, 1986, the United States moved to have the City held in contempt for its refusal to comply with the Housing Remedy Order. On December 9, the NAACP moved for the appointment of a special master to develop and implement the Long Term Plan. On January 20, 1987, under threat of contempt, the City Council passed a resolution agreeing to appoint an Outside Housing Advisor (OHA) to submit a Long Term Plan in compliance with Part VI of the Housing Remedy Order and to seek additional sites for public housing (R. 233; 7/1/87 Order).

7. At a hearing on April 9, 1987, the OHA gave an interim report of his activities to the court and the parties. He stated that he had identified as many as eighteen vacant sites in east Yonkers which might be suitable for public housing and that the use of these sites would allow for a more even distribution of public housing and for less density than the existing plan to place 100 units of public housing on the Whitman site and 60 units at School 4. Under this "alternative plan," the OHA envisioned approximately eight sites for public housing, dispersed throughout the east side of Yonkers (R. 246, pp. 1-15). The court indicated its willingness to consider the adoption of such an alternative plan if specific sites were identified and assurances were given that the plan could be implemented expeditiously (id. at 17). The court emphasized the need for community support and its preference for allowing the City to design its own plan for complying with the Housing Remedy Order (id. at 30). On April 13, the court issued an order to show

cause why the Housing Remedy Order should not be amended, in light of the OHA's interim report, in order to reduce the density of public housing on the Whitman site (4/13/87 Order).

8. At a hearing on April 21, the City reported the adoption, on April 15, of City Council Resolution 19, which, inter alia, expressed the City Council's opposition to the existing plan for public housing and advocated the adoption of the alternative plan, whereby the 200 units of public housing would be located on at least 6 sites in addition to Whitman and School 4, dispersed throughout all the wards in east and northwest Yonkers (4/21/87 Court Exh. C). This resolution, however, conditioned the City's support, inter alia, on the granting of a stay of construction pending appeal,<sup>1/</sup> and the limitation of additional affordable housing under the Long Term Plan to 200 units (ibid.).

9. At the same hearing, the OHA testified about the six sites which he was recommending for public housing, stating that he expected that no more than 40 to 45 units would be placed on any one site (id. at 11-21). The OHA explained that one site was owned by New York City and its use would require action by the New York City Water Board. Two of the sites were owned by the Yonkers School Board, and their use would require a resolution by the School Board returning the property to the

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<sup>1/</sup> The City's motions for a stay of the Housing Remedy Order pending appeal had been denied by the district court (R. 207), by this Court (6/13/86 Order (No. 86-6136)) and by the Supreme Court (107 S. Ct. 10 (1986)).

City. The remaining sites were owned by the City of Yonkers, but had been transferred to the City by Westchester County for use as parkland. Their use for public housing, therefore, would require action by the County (ibid.).

10. On May 8, 1987, the City moved to modify the Housing Remedy Order to provide for an alternative plan for the development of the 200 units of public housing, to be dispersed throughout the east and northwest sections of Yonkers, on sites to be identified by the OHA, in consultation with site selection committees. The motion and the resolution upon which it was based included the following conditions, inter alia: that all construction under the Housing Remedy Order would be stayed pending appeal to the Supreme Court, and the Long Term Housing Plan would be limited to no more than 200 units of affordable housing (5/8/87 Deft. Notice of Motion).

11. At a hearing on the City's motion on May 12, the court again emphasized its willingness to entertain the City's alternative proposals for the development of public housing under the Housing Remedy Order, and expressed its preference that the remedy should embody the views of the affected community (R. 252, pp. 12-14). In order to ensure that the City's proposal was not merely a delay tactic, the court asked the City to take the following actions to demonstrate its willingness to act to actually implement the plan: 1) the adoption of appropriate resolutions directed to the County and New York City, asking those entities to make available the sites over which they had

control; 2) the adoption of a resolution indicating the City's willingness to make any necessary changes in zoning, etc. which might be required to make the sites available for public housing; and 3) a meeting between the City and the School Board to discuss the availability of the school sites for public housing (id. at 15-18, 39-40). The court stated that the remedy order would not be amended until the City had specified sites, and any third parties, such as the County, had acted to make them available. Informed at the end of the hearing that the City had not passed its second year HAP, the court directed the City to do so as a prerequisite to further consideration of its motion (id. at 42-43).

12. Through June 1987, the City had taken no action to try to gain control over the sites (R. 262, pp. 3, 54).

13. On July 1, 1987, the court entered an order finding (7/1/87 Order):

The city of Yonkers has failed to take many of the actions required by the Housing Remedy Order. Instead, the City has delayed meaningful remedial action and declined repeated opportunities accorded to the City to act itself in the first instance in taking remedial action.

The July 1 Order, inter alia, required the City to take action to gain control over sites for both the public housing and the Long Term Plan, under penalty of contempt and fines beginning at \$100 per day, to be doubled every day. The order specifically required the City, by July 15, 1987, to ask Westchester County to waive its reverter interests in certain properties identified for

use as potential assisted housing sites (id. at ¶ 10). Such request was to be submitted to the court and the parties before it was sent to the County (ibid.).

14. On July 9, 1987, the City Council adopted 3 resolutions, 2 of which were responsive to the court's July 1 Order, and 1 which was inconsistent with it. In Resolution 139-1987, the City Council adopted its FY 87 HAP, in compliance with ¶ 14 of the July 1 Order (R. 253, App. A). In Resolution 140-1987, the City Council asked Westchester County to waive its reverter interest in specific sites designated by the OHA, in compliance with ¶ 9 of the July 1 Order (R. 253, App. B). In Resolution 141-1987, the City Council proposed an alternative plan which designated 8 specific sites for the 200 units of public housing, and asked the County to waive its reverter rights as to 2 sites (R. 253, App. C). However, this request in Resolution 141 was conditioned, inter alia, on the court's granting of a stay pending appeal, limiting the numbers of units on any given site, and limiting the number of units under the long term plan to 200 units (100 new construction). The last paragraph of Resolution 141 stated that if any portion of the resolution was not complied with, the entire resolution would be null and void (ibid.).

15. In a conference July 9, the City's attorney represented that Resolutions 139 and 140 had been adopted pursuant to the July 1 Order, and that Resolution 141 was intended as a proposed alternative plan (R. 263, pp. 4-5). The City's counsel stated

that Resolution 141, with its conditions and qualifications, was not intended to supersede the request to the County set forth in Resolution 140 (id. at 14-16; see also R. 264, p. 4). The court stated that it would entertain the City's alternative plan if and when the City could show that it had obtained site control over all of the necessary sites; that it would entertain a motion for a stay of construction pending appeal if and when it appeared that construction was about to commence prior to a decision by the Court of Appeals; and that any determination as to the number of units to be developed under the Long Term Plan, or as to any mix of public and market rate housing was premature (id. at 32-33; R. 253).

16. On July 10, 1987, without notice to the court or the parties, the City wrote to Westchester County, asking it to waive its reverter interest in the two sites identified in Resolution 141, and enclosing a copy of Resolution 141 (R. 264, pp. 2-3, 6-7). The court found that this letter had the effect of sending a message to the County that the City wanted the County to accept its alternative plan (with conditions) and to reject the request that the court had ordered it to make (id. at 11-14). The court ordered the parties to draft a new letter to the County retracting the July 10 letter from the City (id. at 14-15).

17. On November 19, 1987, the County Board voted to refuse the City's request that it release its reverter rights in the sites identified by the OHA.

18. On November 19, 1987, the court issued an order imposing a freeze on discretionary City actions "in furtherance or implementation of" four private development projects identified by the OHA as having potential use toward implementation of the Housing Remedy Order (R. 278). The freeze was to be lifted if either of two events occurred: 1) if the court concluded that a given project could be of no utility in furthering the housing remedy; or 2) if the City designated sites for the 200 units of public housing (ibid.). In the November 19 order, the court found (Order at 1-2):

The progress to date in identifying available sites has been extremely disheartening and the attitude of the representatives of Yonkers has been to do nothing affirmative, to place the entire onus of implementation on the Court, and to engage in obstructive and dilatory tactics. To date, there have been untoward delays in implementing the Housing Remedy Order some 18 months after its promulgation. Only the threat of bankrupting fines has produced any action by the City.

19. On December 15, 1987, the district court entered an order scheduling a status conference for January 11, 1988, and requesting the attendance at that conference of the Mayor and members of the City Council of Yonkers. The Order stated that at the conference, "the Court will call upon the representatives of Yonkers to advise what affirmative actions, if any, Yonkers is taking or planning to take to implement the Housing Remedy Order" (12/15/87 Order).

20. On December 28, 1987, this Court unanimously affirmed the district court's liability and remedial determinations "in

all respects." Yonkers, 837 F.2d 1181, 1184. Following this decision, the parties engaged in extensive negotiations aimed at resolution of the housing issues in the case.<sup>2/</sup> These negotiations resulted in agreement, on January 25, 1988, on the terms of a settlement. On that date, the district court announced that, had such a settlement not been reached, it would have entered an order requiring certain actions by the City of Yonkers with regard to its obligations under the Housing Remedy Order. The court also vacated its November 19, 1987 freeze order (1/25/88 Tr. 20, 23). On January 27, 1988, the City Council adopted the Consent Decree, which was entered by the district court on January 28 (1/28/88 Tr. 2).

22. Following entry of the Consent Decree, intense community opposition to the housing remedy continued (3/21/88 Deft. Motion to Amend). Some of this opposition centered on claims that too many of the 200 public housing units were to be sited in southeast Yonkers (3/31/88 Tr. 54). In addition, it was discovered that one of the public housing sites slated for 22 units could accommodate only 12 units. Consequently, the parties and the court discussed the possibility of designating an additional public housing site (id. at 57-62).

23. On March 21, 1988, the City moved the court to amend the Consent Decree to delete that portion of the Decree in which it agreed not to petition for certiorari on the public housing

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<sup>2/</sup> Because of these negotiations, the hearing scheduled for January 11 was not held.

aspect of the court's Housing Remedy Order. In support of this motion, the City cited the intense citizen opposition to the Consent Decree and, particularly, to the agreement not to pursue an appeal of the public housing remedy. Accompanying the City's motion was a proposed order that provided for the entry of a judgment against the City in favor of the United States government not to exceed \$29.86 million should the Supreme Court ultimately relieve the City of its obligation to provide sites for the construction of 200 units of public housing. This amount represented the aggregate amount of CDBG funds received by the City of Yonkers for fiscal years 1980-1987.<sup>3/</sup> The City's proposed order also provided, in case the City decided to stop any public housing construction that might have begun at the time of such Supreme Court action, for payment to the builder of one- and one-half times the profit it would have realized from completion of the development (3/21/88 Deft. Motion to Amend). The district court denied the City's motion on March 31, 1988 (3/31/88 Tr. 64), and the City has not appealed from that ruling.<sup>4/</sup>

24. At an April 12, 1988, meeting in chambers with the district court and the parties, counsel for the City of Yonkers informed the court and plaintiffs that the City of Yonkers was

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<sup>3/</sup> The City had previously obligated itself to provide sites for such housing in east Yonkers as a condition to the receipt of CDBG funds from the HUD. Yonkers, 635 F. Supp. at 1580.

<sup>4/</sup> The court found that the City's motion "pander[ed] \* \* \* to those who were violently opposed to any and all public housing" (3/31/88 Tr. 65).

"not interested" in completing negotiations on the terms of a long term plan as required by Section 18 of the Consent Decree (5/2/88 Joint Motion of the United States and NAACP at 6). The April 12 meeting, held to discuss implementation of the public housing portion of the Consent Decree, took place after the court and the parties were "advised by representatives of the City of Yonkers that under no circumstances would the City Council designate an alternate site in Yonkers to substitute for any site in southeast Yonkers \* \* \* despite the availability of an entirely acceptable site already approved by the parties and tentatively approved by HUD, in Northwest Yonkers, vacant and already available" (4/19/88 Tr. 3).

25. On May 2, 1988, the City moved to vacate the Consent Decree, on the ground of alleged mutual mistake, claiming that the parties' agreement had been contingent on the approval of the Decree by Cardinal O'Connor, which had since been withdrawn (5/2/88 Deft. Motion to Vacate).

26. On May 19, 1988, at a hearing on the City's motion to vacate, the court offered the City time to confer with Cardinal O'Connor to determine whether another site could be designated in place of a site owned by the Archdiocese, or to authorize the court to select an alternative site (5/19/88 Tr. 12-17). On May 27, the City informed the district court that the City Council would not submit an alternative site. The court denied the City's motion to vacate the Consent Decree on June 8, finding that, in light of the City's refusal to designate another site,

the motion to vacate was "a transparent ploy either to regain the right to appeal, and even more symbolically to avoid any responsibility for the court decree or implementation of the housing remedy order" (6/8/88 Tr. 146).

27. On June 14, 1988, the day after the Supreme Court denied the City's petition for certiorari of this Court's affirmance of the district court's liability and remedy orders, the City Council adopted Resolution 144-1988, imposing a moratorium on all public housing construction in Yonkers (Addendum B).

28. On June 28, 1988, the City Council adopted Resolution 165-1988, calling for the termination of the City's condemnation action, taken pursuant to the Consent Decree, of that portion of the St. Joseph's Seminary site designated for public housing (Addendum C). The preamble of this resolution stated, in part (ibid.):

WHEREAS, the present Supreme Court directed by a Judge who is acting as a philosopher king in that he is illegally socially engineering the destruction of the Catholic church as well as endangering the rights of all other religious orders must be resisted as unjust and unlawful,

\* \* \* \* \*

WHEREAS, we must remember that unjust laws need not be obeyed, and

\* \* \* \* \*

WHEREAS, the conduct of the present Court can only be compared with the abuse of power found in dictatorial government \* \* \*.

## **ADDENDUM B**

ADDENDUM B

RESOLUTION NO.144-1988

BY VICE MAYOR SPALLONE:

WHEREAS, recent on site inspections of Federal and State funded housing projects in the City of Yonkers reveal serious violations of law, including violations of:

Health Codes  
Safety Codes  
Building Codes  
Fire Codes  
Environmental Codes and  
Sanitary Codes, and

WHEREAS, such inspections also reveal serious drug related activities that are reducing the living conditions of tenants to a condition that could best be described as bordering upon a sub-human state, and

WHEREAS, the presence of human waste is found in almost every basement and hallway in existing public housing projects and defies imagination and the impact upon air quality in these areas is sickening and the threat of disease and infection upon the community is everywhere, and

WHEREAS, garbage can be found in hallways, courtyards, stairwells, parking areas, elevators and playgrounds, and

WHEREAS, in addition to the above, broken fire doors, windows, elevators, hallway lighting, asbestos violations are common conditions that affect the residents of these areas, and said fire violations present further hazards to safety and welfare of tenants and their families, and

WHEREAS, park and playground areas in these public housing complexes no longer function as recreational areas for children and adults, and appear comparable to bombed out areas of Europe in World War II, and

WHEREAS, no further housing developments should be commenced until the present estimated 2500 units are preserved, and

WHEREAS, unless the aforesaid 2500 units are given immediate priority in terms of addressing the monstrous violations of sanitary, safety and environmental codes, the inhabitants will be added to the scores of homeless in our City.

NOW THEREFORE, BE IT RESOLVED, that this City Council requests and authorizes an immediate investigation into the conditions of the present public housing complexes in the City of Yonkers and the quality of life existing therein by the appropriate Federal, State, County and City Agencies, and

BE IT FURTHER RESOLVED, that the City Council impose a moratorium on the building of all Federal and State funded public housing development in the City of Yonkers until such time as the results of the above requested investigations are known, and until the violations referred to above are corrected, thereby at the very least, making the quality of life of the aforesaid inhabitants tolerable.

ADOPTED: JUNE 14, 1988

ALOYSIUS MOCZYDLOWSKI: CITY CLERK

This is to certify that the foregoing is a true and correct copy of the record on file with the City Clerk, City of Yonkers, N.Y.

*Aloysius Moczydlowski*

CITY CLERK  
Yonkers, New York

## ADDENDUM C

ADDENDUM C

RESOLUTION NO. 165-1988

BY VICE MAYOR SPALLONE:

WHEREAS, the religious rights of all Americans must be preserved as intended by the framers of our Constitution, and

WHEREAS, there has never been nor was there ever an intent by those great Americans to allow the judicial segment of our government to usurp the religious rights of Americans, and

WHEREAS, the present attempt to seize religious property at St. Joseph's Seminary must be viewed as an assault upon religious freedom granted under the 1st Amendment of the Constitution, and

WHEREAS, the present Supreme Court directed by a Judge who is acting as a philosopher king in that he is illegally socially engineering the destruction of the Catholic Church as well as endangering the rights of all other religious orders must be resisted as unjust and unlawful, and

WHEREAS, the act of seizure of religious property predicated upon the threat of bankruptcy, removal from office and imprisonment can only be interpreted as part of an attempt to assassinate the religious freedom of all Americans, and

WHEREAS, we must remember that unjust laws need not be obeyed, and

WHEREAS, it must be recognized that the main purpose of the construction of the Constitution was to set up a system that would protect property interests and provide checks and balances to prevent the return of a monarchy and safeguard the rights of all Americans in the democratic system of government, and

WHEREAS, the conduct of the present Court can only be compared with the abuse of power found in dictatorial government, and

RESOLUTION NO. 165-1988- Continued

WHEREAS, the present attack upon the Catholic Church can only be associated and compared with the assaults upon religious freedom by those nations which will go unnamed,

NOW, THEREFORE, BE IT RESOLVED, that the condemnation proceedings entered upon by this City Council under intimidation and threat be immediately terminated.

Adopted by the City Council at a stated meeting held on June 28, 1988, by a vote of 5 to 1, Mayor Wasicsko voting "NAY" and Councilmember Oxman abstained.

This is to certify that the foregoing is a true and correct copy of the record on file with the City Clerk, City of Yonkers, N. Y.

*Aloysius Mazzyellowski*

CITY CLERK  
Yonkers, New York