

HUD SITE AND NEIGHBORHOOD SELECTION STANDARDS: AN EASING OF PLACEMENT RESTRICTIONS

STEVEN LEV*

I. INTRODUCTION

Furthering fair housing goals¹ and the concept of spatial deconcent-

* B.A., Washington University, 1978; J.D., Washington University, 1982.

1. See Civil Rights Act of 1968, § 801, 42 U.S.C. § 3601 (1976): "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." *Id.* The Supreme Court has held that the Fair Housing Act of 1968, (Title VIII of the Civil Rights Act of 1968) 42 U.S.C. §§ 3601-3619 (1976), established a national goal of replacing segregated neighborhoods with "truly integrated and balanced living patterns." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting with approval remarks of Sen. Mondale, 114 CONG. REC. 3422 (1968)). See also Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (1976), which states: "No person in the United States shall on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

The federal courts have required public housing agencies to consider racial criteria when necessary to promote residential integration. See, e.g., *Shannon v. HUD*, 436 F.2d 809, 821-822 (3d Cir. 1970) (HUD's approval of the construction of low-income housing project without consideration of the effects on racial concentration in the area did not adequately comply with the 1949 Housing Act and 1964 and 1968 Civil Rights Acts); *Gautreaux v. Chicago Housing Authority*, 304 F. Supp. 736, 737-41 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971) (judgment order restricting construction of low-income public housing in areas more than 30 percent non-white). 42 U.S.C. § 3608(d)(5) (1976) provides the basis for this requirement. This section specifies that federally-assisted housing programs be administered "in a manner affirmatively to further the policies" of Title VIII. *Id.* See generally Rubinstein & Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs*, 74 Nw. U.L. REV. 491, 521-79 (1979) [hereinafter cited as *Affirmative Action*].

tration² are two statutory responsibilities of the Department of Hous-

2. "Spatial deconcentration" is one of the objectives of the Housing and Community Development Act of 1974. The Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified in scattered sections of 42 U.S.C.). The Act provides in part:

- (c) The primary objective of this chapter is the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. Consistent with this primary objective, the Federal assistance provided in this chapter is for the support of community development activities which are directed toward the following specific objectives
- (6) the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income.

42 U.S.C. § 5301(c)(6) (1976 & Supp. III 1979).

In seeking the "spatial deconcentration of housing opportunities for persons of lower income," *id.*, Congress realized that the principal barrier to the dispersal of low-income persons from impoverished neighborhoods is the lack of affordable housing elsewhere. Therefore, Congress sought a reduction in the concentration of lower-income persons in impoverished neighborhoods by encouraging their movement into outlying areas.

The goal of spatial deconcentration, *see* note 48 *infra*, in conjunction with the fair housing policies, *see* note 1 *supra*, is an impetus for public housing agencies to promote racial and economic integration. For cases which address the issue of racial integration, *see* King v. Harris, 464 F.Supp. 827 (E.D.N.Y. 1979), *aff'd sub nom.* King v. Faymor Dev. Co., *mem.*, 614 F.2d 1288 (2d Cir. 1979), *rev'd and remanded on other grounds*, 446 U.S. 905 (1980), in light of the Supreme Court's decision in Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980) (affirmative duty imposed upon HUD to avoid the concentration of low-income housing within an area and thereby furthering national housing policy of Fair Housing Act); Otero v. New York City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973) (housing authority enjoined from renting apartments in public housing project until all present or former renewal site occupants applying for appropriate size apartments were accommodated); Banks v. Perk, 341 F.Supp. 1175 (N.D. Ohio 1972), *aff'd in part, mem.*, 473 F.2d 910 (6th Cir. 1973) (City of Cleveland's failure to place a majority of new low-income public housing units in white neighborhoods violated federal public housing and civil rights statutes); Shannon v. Hud, 436 F.2d 809 (3d Cir. 1970) (*see* note 1 *supra*).

The language of § 5301(c)(6) contains two specific, yet contradictory objectives. On the one hand, Congress alludes to promoting racial deconcentration. On the other hand, however, Congress refers to revitalizing impoverished neighborhoods that contain a high percentage of minority residents. 42 U.S.C. § 5301(c)(6) (1976 & Supp. III 1979). These divergent goals reflect a tension within Congress that occurred during the formulation of the Act. Even today, this "tension" underlies Congress' attempt to develop a national housing policy. For a discussion of these competing objectives in the Housing and Community Development Act of 1980, *see* notes 95-97 and accompanying text *infra*.

ing and Urban Development (HUD). HUD promotes fair housing through the development of federally funded, low-income housing programs.³ Similarly, it approves locations that broaden available housing to lower-income and minority families.⁴ In order to achieve these goals, HUD has created site and neighborhood selection standards for federally subsidized low-income housing.⁵

HUD attempts to reconcile a number of significant and competing social policies in developing such standards.⁶ Most importantly,

3. HUD subsidizes lower-income housing under the Section 8 Housing Assistance Payments Program, 42 U.S.C. § 1437 f (1976 & Supp. III 1979), *as amended by* Pub. L. No. 96-153, Title II §§ 202(b), 206(b), 210, 211(b), 93 Stat. 1106, 1108-1110 (1979). The statute defines lower-income persons as those whose family income does not exceed 80 percent of the median family income of the area. 42 U.S.C. § 1437(f)(1) (1976). The Secretary establishes this median and may modify it to reflect family size or, if necessary, the cost of living in a particular area. *Id.*

The Section 8 program provides rental assistance for existing, newly constructed, and substantially rehabilitated housing. These terms are defined at 24 C.F.R. § 880.202(a) (1980) (new construction); 24 C.F.R. § 881.220(a) (1980) (substantial rehabilitation); 24 C.F.R. § 882.101(a)(2) (1980) (existing housing). The Section 8 program is part of Title II of the Housing and Community Development Act of 1974, which altered the U.S. Housing Act of 1937, 42 U.S.C. §§ 1437-1437k (1976 & Supp. III 1979), *as amended by* Pub. L. No. 96-153, Title II, § 206a, 93 Stat. 1108 (1979).

In enacting Section 8, Congress intended to aid lower-income families in obtaining a decent place in which to live and to promote economically mixed housing. 42 U.S.C. § 1437f(a) (1976).

4. *See generally*, Department of Housing and Urban Development Act of 1965, 42 U.S.C. §§ 3531-3541 (1976 & Supp. III 1979); UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT (1979); Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63, 68 (1970).

5. For the HUD regulations which apply to the Section 8 New Construction and Substantial Rehabilitation Programs, *see* 24 C.F.R. § 880.206 and § 881.206 (1980). For selection criteria which deal with traditional, federally funded low-income housing programs, *see* 24 C.F.R. §§ 200.700-710 (1980). In this Note, traditional, federally funded low-income housing programs refer to programs authorized by the U.S. Housing Act of 1937, 42 U.S.C. §§ 1437-1437k (1976 & Supp. III 1979), *as amended by* Pub. L. No. 96-153, Title II, § 206a, 93 Stat. 1108 (1979); and §§ 235 and 236 of the Housing and Community Development Act of 1968, 12 U.S.C. § 1715z (1976 & Supp. III 1979), *as amended by* Pub. L. No. 96-153, Title II, § 213, Title III, § 301(d), 93 Stat. 1111 (1979); 12 U.S.C. § 1715z-1 (1976 & Supp. III 1979) *as amended by* Pub. L. No. 96-153, Title II §§ 203(b), 205(b), Title III, § 301(e), 93 Stat. 1107, 1108, 1111 (1979).

While site selection standards apply to certain kinds of public housing (traditional, Section 8 new and substantial rehabilitation), *see* 24 C.F.R. §§ 200.700-710, §§ 880.206, 881.206 (1980), the standards do not apply to others (Section 8 existing). For a discussion of this distinction, *see* note 112 *infra*.

6. The imposition of site and neighborhood standards as a means of ensuring that local governments do not frustrate national housing policies may conflict with other statutory objectives which encourage increased autonomy for local government offi-

HUD weighs the need to provide resources to rehabilitate housing and to improve the quality of existing low-income neighborhoods against the promotion of racial and economic integration.⁷ Follow-

cial. For two statutes which further this latter objective, see 31 U.S.C. §§ 1221-1265 (1976) and the Housing Authorization Act of 1976, Pub. L. No. 94-375, 90 Stat. 1067 (codified in scattered sections of 12 and 42 U.S.C.).

HUD must also consider the location of subsidized housing in relation to such factors as racial imbalances in public schools, neighborhood transition, and social services. See notes 72, 99-100, 106-108 and accompanying text *infra*.

7. 42 Fed. Reg. 4296 (1977). Since World War II, an expanding population and increased affluence in the suburbs (in contrast to concentrations of the poor and ethnic minorities in inner cities) represents the typical inner city-suburban pattern. From 1950 to 1970, central cities grew by 19%; during the same period suburban population increased 85%. In 1950, 13 million more people lived in the central cities than in the suburbs. By 1970, the figure almost reversed itself as 12 million more people lived in the suburbs than in central cities. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 17 (1974).

In 1960, suburban residents' incomes were 32.5% greater than those in the inner cities; by 1970, the corresponding percentage was 41.7%. U.S. BUREAU OF THE CENSUS, 1960 CENSUS OF POPULATION, Vol. 1, pt. 1, Table 100 at 1-236; 1970 CENSUS OF POPULATION, Vol. 1, pt. 1, Section 1, Table 105, at 1-411.

An analysis of census data for the inner cities reveals a continuing influx of poor and relatively unskilled persons, and a simultaneous dispersal of middle and working class inner city residents. The result is a lower economic level in the inner cities than in the suburbs. Shanahan, *Study Finds Poor Blacks in Cities, Whites Outside*, N.Y. Times, August 30, 1974, at 14, col. 1.

The percentage of blacks who lived in inner cities increased 33.1% during the 1960's, while the white percentage declined 5.7%. Between 1950 and 1960, the percentage increases in the inner cities were 50.6% for blacks and .05% for whites. UNITED STATES BUREAU OF THE CENSUS STATISTICAL ABSTRACTS OF THE UNITED STATES 17 (1974). Much of this increase is attributable to the passive migration of blacks from rural areas to cities. See C. Tilly, RACE AND MIGRATION IN THE AMERICAN CITY, THE METROPOLITAN ENIGMA 124 (J.Q. Wilson ed. 1967). See also note 20 *infra*. Recent evidence suggests that such migration may constitute less of a factor in the future. Nonetheless, natural increases will account for continuing and increasingly high percentages of racial concentration in inner cities. P. Morrison, *Dimensions of the Population Problem in the United States*, 5 U.S. COMM'N ON POPULATION, GROWTH, AND THE AMERICAN FUTURE, POPULATION DISTRIBUTION AND POLICY, 26 (1973).

The housing problem for inner city poor consists of three basic elements: physically inadequate existing housing stock, excessive rental payments relative to the residents' income, and overcrowding. See D. BIRCH, AMERICA'S HOUSING NEEDS: 1970 TO 1980, Table 4 at 4-7 (1973) [hereinafter cited as *America's Housing Needs*]. A House Subcommittee found that the poorest segments of American society commonly spend over 35% of their annual incomes for housing. U.S. DEP'T. OF HOUSING AND URBAN DEVELOPMENT, HOUSING IN THE SEVENTIES, cited in *Hearings on Housing and Community Development Legislation - 1973, before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 93rd Cong., 1st Sess., at 6-13 (1973); UNITED STATES BUREAU OF THE CENSUS, SUBJECT REPORTS - LOW INCOME POPULA-

ing an examination of the history of site and neighborhood selection standards, this Note will explore the current standards. In particular, this Note investigates the significance of a recent HUD directive which encourages greater approval of federally funded, low-income projects in areas of minority concentration.⁸

II. THE HISTORICAL BACKGROUND OF SITE STANDARDS

The United States Housing Act of 1937⁹ established the first federally assisted housing program.¹⁰ Since its inception, HUD and its

TION, Table 36 at 410 (1973). See also THE REPORT OF THE PRESIDENT'S COMM. ON URBAN HOUSING, A DECENT HOME 39-45 (1968).

Some commentators addressed the third element of the acute urban housing problem:

Overcrowding, another important aspect of substandard housing, is not a property of housing quality per se, but rather of the 'fit' between the size of the unit and the number of occupants. There is reason to believe that the affects of overcrowding on mental health and family life may be more severe than the effects of physically substandard conditions, and that we ought to devote more effort to ameliorating the housing plight of families overcrowded in physically adequate units.

C. HARTMAN, HOUSING AND SOCIAL POLICY 7 (1975). See also, *America's Housing Needs*, supra at 4-1 - 4-16.

Physical dilapidation patterns include varying degrees of deterioration. These range from instances of minor deferred maintenance to deliberate and sustained "milking" in buildings heading toward abandonment. "Milking" is "the ability of a rental property to allow its owner to extract substantial gross rents in anticipation of defaulting on his mortgage." C. ABRAMS, THE LANGUAGE OF CITIES 189 (1971).

8. HUD Release No. 81-2, January 5, 1981 (hereinafter cited as *HUD Notice*).

9. 42 U.S.C. §§ 1437-1437k (1976 & Supp. III 1979), as amended by Pub. L. No. 96-153, Title II, § 206a, 93 Stat. 1108 (1979).

10. The federal government first expressed an interest in urban housing conditions in 1892. It appropriated funds for a study of slum neighborhoods. Ledbetter, *Public Housing - A Social Experiment Seeks Acceptance*, 32 LAW AND CONTEMP. PROBS. 490-491 (1967). The federal government constructed low-income housing for workers in war-related industries throughout World War I, but discontinued construction at the end of the war. Act of March 1, 1918, ch. 19, 40 Stat. 438 (1918); Act of May 16, 1918; ch. 74, 40 Stat. 550 (1918). For a description of the forerunners of the Housing Act of 1937, see Rieserfeld & Eastlund, *Public Aid to Housing and Land Redevelopment*, 34 MINN. L. REV. 610 (1950) [hereinafter cited as *Public Aid to Housing*]. For a description of the Housing Act, see T. McDonnell, THE WAGNER HOUSING ACT: A CASE STUDY OF THE LEGISLATIVE PROCESS (1957).

For a description of federal housing programs, their history and impact, see generally N. KEITH, POLITICS AND THE HOUSING CRISIS SINCE 1930 (1973); PRESIDENT'S COMMITTEE ON URBAN HOUSING: A DECENT HOME (1968); Catz, *Historical and Political Background of Federal Housing Programs*, 50 N.D.L. REV. 25 (1973) [hereinafter cited as Catz].

predecessors¹¹ have applied varied criteria in approving public housing sites for low-income and racial minority families. The early standards, however, were not concerned with the impact of site selection on housing opportunities for minorities.¹² One reason for this lack of concern was that Congress originally enacted the Housing Act of 1937 to assist the depressed housing industry in order to create jobs.¹³ Another explanation is that the "submerged middle class,"¹⁴ rather than minorities, comprised the first occupants of public housing.¹⁵

World War II radically altered the structure of the housing market.¹⁶ Consequently, a new class of residents occupied public housing. During the war, profits and wages rose as the defense industry helped reduce the unemployment lines. Private housing construction, however, came to a near standstill, causing a tremendous shortage. To help alleviate this shortage, Congress enacted legislation to provide federally insured mortgages to increase construction.¹⁷

11. HUD's predecessors included the Federal Housing Administration, the Housing and Home Finance Agency, and the Public Housing Administration. 42 U.S.C. § 3534(a) (1976).

12. See notes 13-24 and accompanying text *infra*.

13. Friedman, *Public Housing the Poor: An Overview*, 54 CALIF. L. REV. 642, 645-47 (1966) [hereinafter cited as *Public Housing and the Poor*]. This hypothesis finds support in the language of the Housing Act: "It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit . . . to alleviate present and recurring unemployment and to remedy the unsafe and unsanitary housing conditions." 42 U.S.C. § 1401 (1970).

14. *Public Housing and the Poor*, *supra* note 13, at 645-49. Professor Friedman maintained that former members of the middle class, temporarily impoverished by the Depression, comprised the initial occupants of public housing. While the Depression rendered these people impoverished, "[t]hey retained their middle class culture and their outlook, their articulateness, and their habit of expressing their desires at the polls." *Id.* at 645-46.

15. "There are some people," said Senator Wagner (the bill's sponsor), "whom we cannot possibly reach; I mean those who have no means to pay the rent. . . . [O]bviously this bill cannot provide housing for those who cannot pay the rent minus the subsidy allowed." 81 CONG. REC. 8099 (1937).

16. Even before the United States entered the war in December, 1941, Congress passed the Lanham Act, ch. 862, Title V, § 501, 54 Stat. 681 (1940). This Act allowed for the diversion of low-income units to defense housing.

17. Congress authorized the Housing Administrator to use his powers to "provide housing for distressed families of servicemen and for veterans and their families . . ." Act of June 13, 1945, Title V, § 501, 59 Stat. 260 (1945). Later that year, Congress appropriated \$160 million for the same purpose. A Joint Resolution of December 31, 1945, ch. 657, Title V, Section 502, 59 Stat. 674 (1945). See also Robinson & Robinson, *State Spending for Veterans' Housing*, 1949 WIS. L. REV. 10.

The subsequent housing boom benefitted the increasingly prosperous working class and returning veterans. Prosperity and the advent of the automobile enhanced the attractiveness of the single family suburban home. Accordingly, the movement of these groups to the suburbs precipitated a decline in demand for housing in the city.¹⁸ As prosperity allowed the "submerged middle class" to vacate public housing, a new type of tenant replaced those fleeing to the suburbs. These new tenants consisted of the "permanent poor" and new urban immigrants.¹⁹ In large cities, the latter group consisted primarily of blacks migrating from the South.²⁰

General acceptance of public housing declined as the social and economic status of the tenants fell.²¹ Suburban governments and residents utilized a variety of methods to exclude public housing from within their boundaries.²² As a consequence of suburban opposition and exclusionary practices,²³ public housing construction occurred

18. *Public Housing and the Poor*, *supra* note 13, at 646-47.

19. Catz, *supra* note 10, at 29. The Housing Act of 1937 initiated a permanent federal program of public aid for low rent housing to urban environments. Prior to the passage of the Act, the Federal Emergency Relief Administration and the Division of Subsistence Homesteads developed a variety of programs for rural renewal. For a discussion of these rural projects, see *Public Aid to Housing*, *supra* note 10, at 618-19.

20. For a further discussion of the postwar movement of blacks, see generally K. TAEUBER & A. TAEUBER, *NEGROES IN CITIES* (1965); Beale, *Migration Patterns of Minorities in the United States*, 55 *AMER. J. AGRICULTURAL ECON.* 938-46 (1973); Simmons & Lee, *The Extraordinary Composition of Rural Black Population Outside the South*, 35 *PHYLON* 313-22 (1974).

21. *Public Housing and the Poor*, *supra* note 13, at 651-52.

22. These include zoning laws which exclude all public housing; minimum house size requirements; minimum lot size and minimum frontage requirements; refusal to enter into cooperation agreements with local housing authorities; prohibition of multifamily housing; denial of building permits; overzoning for nonresidential uses; and referenda prohibiting construction of lower-income housing unless approved by voters. See Aloi & Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?*, 1971 *URBAN L. ANN.* 9; Becker, *The Police Power and Minimum Lot Size Zoning - Part I: A Method of Analysis*, 1969 *WASH. U. L. Q.* 263; Binham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 *VAND. L.R.* 1111 (1972); Heyman, *Legal Assaults on Municipal Land Use Regulation*, 5 *URB. LAW.* 1 (1973); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 *STAN. L.R.* 767 (1969); Williams, *Three Systems of Land Use Controls*, 25 *RUT. L.R.* 80 (1970).

23. State courts have struck down suburban exclusionary zoning practices with a greater degree of frequency in the past few years. See, Blumstein, *A Prolegomenon to Growth Management and Exclusionary Zoning Issues*, 43 *LAW AND CONTEMP. PROB.* 5 (1979). The New Jersey Supreme Court initiated this development in the landmark

almost exclusively in low-income, inner city neighborhoods.²⁴

In response to this pattern, HUD issued site selection approval regulations for low-income housing in 1967.²⁵ These regulations specified the responsibility of local housing agencies to ensure a balanced distribution of public housing projects within the locality. In meeting their responsibilities, these agencies would enhance housing opportunities for minorities outside areas of dense racial concentration.²⁶

exclusionary zoning case, *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975). In that case, the court held that suburban communities have a responsibility to furnish their fair share of low income housing to meet regional housing needs. *Id.* at 188-91, 336 A.2d at 732-34.

Because of the difficulty in estimating regional fair share housing needs, the New Jersey Supreme Court retreated slightly from its decision in *Mt. Laurel*. In *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977), New Jersey's highest court held it not necessary for either municipalities or the lower court to devise specific quotas to estimate the exact fair share of low income housing needs of the municipality's region. *Id.* at 371 A.2d at 1200. Instead, the court advocated a "least cost housing" test. Under this test, private housing developers play a major role in ensuring the construction of housing in suburban communities. These developers, however, may not necessarily provide housing for low income persons. *Id.* at 371 A.2d at 1206-08.

Most state courts have not followed the *Mt. Laurel-Oakwood* strict review of suburban exclusionary practices. Traditionally, state courts maintain that only those who assert pecuniary or economic loss or who have a legal or equitable interest in land have standing to challenge a zoning restriction. *Suffolk Hous. Servs. v. Town of Brookhaven*, 91 Misc. 2d 80, 397 N.Y.S. 2d 302 (1977), *modified on other grounds*, 63 A.2d 731, 405 N.Y.S. 2d 302 (1978).

For a discussion of the traditional state judicial attitude, see Note, *Zoning for the Regional Welfare*, 89 YALE L.J. 748, 760-763 (1980); see generally Comment, *Standing to Challenge Exclusionary Local Zoning Decisions: Restricted Access to State Courts and the Alternative Federal Forum*, 22 SYRACUSE L. REV. 598, 598-610 (1971).

24. R. WEAVER, *THE NEGRO GHETTO* 73-74, 143-44 (1948) [hereinafter cited as WEAVER]. Local housing authorities usually operated public housing projects on a discriminatory basis with projects allotted to blacks or whites only. *Id.* at 179-80. See also R. KLUGER, *SIMPLE JUSTICE* 246-47 (1976). See generally E. MEEHAN, *PUBLIC HOUSING POLICY - CONVENTION VERSUS REALITY* (1975). Many cities excluded housing construction designated for blacks in order to contain black neighborhoods. WEAVER, *supra* at 227-29.

25. See, e.g., Department of Housing and Urban Development, *LOW-RENT HOUSING HANDBOOK*, RHA 7410.1 (1969) [hereinafter cited as *HOUSING HANDBOOK*].

26. HUD acted in response to authority that Executive Order 11063 of 1962 conferred, 3 C.F.R. § 652 (1959-1963 compilation), which barred racial discrimination in FHA-insured and VA-guaranteed housing. HUD also based the regulations upon Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), which prohibited racial discrimination in federally assisted public housing programs. On the basis of these regulations, HUD rejected any application which significantly contributed to

In 1970, under a directive of then Secretary George Romney, HUD initiated an effort to alter its site selection criteria. HUD overtook this action to meet the requirements of the Civil Rights Act of 1968.²⁷ The Third Circuit decision in *Shannon v. HUD*²⁸ hastened the development of these new site selection standards. In *Shannon*, the Third Circuit attacked HUD's consent to a low-income housing proposal because HUD failed to determine the social and economic desirability of the proposal.²⁹ The court observed that desegregation is not the only goal of the national housing policy. According to the court, this fact did not preclude HUD from approving proposals which might increase the racial concentration of a neighborhood.³⁰ HUD, however, could take such action only in those instances where proponents tendered a convincing argument for the revitalization of a minority area.³¹ HUD, the court added, must still weigh carefully the racial and socioeconomic implications of its decision.³²

racial concentrations and perpetuated housing segregation. One overcame this presumption against acceptability by pointing to an equivalent number of low rent housing units outside the area of racial concentration but within the housing authority's jurisdiction. See HOUSING HANDBOOK, *supra* note 25.

27. 42 U.S.C. § 3608(d)(5) (1976).

28. 436 F.2d 809 (3d Cir. 1970).

29. "[The Department] must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socioeconomic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts." *Id.* at 821.

30. *Id.* at 822.

31. *Id.*

32. *Id.* Subsequent decisions adapted the *Shannon* court's racial and socioeconomic evaluation requirement. In *Croskey Street Concerned Citizens v. Romney*, 335 F. Supp. 1251 (E.D. Pa. 1971), *aff'd*, 459 F.2d 109 (3d Cir. 1972), the court refused to enjoin the construction of a housing project for the elderly in a black neighborhood. The court gave great weight to the fact that the project was part of a package of balanced housing sites in both black and white neighborhoods. In *Blackshear Residents Organization v. Housing Auth. of Austin*, 347 F. Supp. 1138 (W.D. Tex. 1972), the district court held that city housing authorities and HUD failed to consider federal open housing objectives when selecting and approving a public housing project site. The court enjoined construction until the defendants showed that either the project was not located within an area of minority concentration, or a lack of alternative sites existed outside racially concentrated areas. In *Residents Advisory Bd. v. Rizzo*, 425 F. Supp. 987 (E.D. Pa. 1976), *modified*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978), the district court invalidated the City of Philadelphia's urban renewal plan on the ground that it led to the concentration of public housing in black areas. The court held that local and federal housing authorities have an affirmative duty to work toward dispersing public housing. *Id.*

In January, 1972, HUD published its revised Project Selection Criteria.³³ The regulations established guidelines for HUD evaluation of proposed sites for federally funded low-income housing.³⁴ HUD rated each proposal submitted for funding by public and private sponsors, "superior," "adequate," or "poor" based upon the standards listed in each criterion.³⁵ HUD allotted funds to projects with

33. 37 Fed. Reg. 203-09 (1972). HUD intended the Project Selection Criteria to broaden existing site criteria in order to reflect the requirements of Title VIII of the Civil Rights Act of 1968. See note 1 *supra*.

HUD also designed the standards to implement President Nixon's statement on federal policies toward equal housing opportunity. Nixon directed that:

the administrator of a housing program should include, among the various criteria by which applications for assistance are judged, the extent to which a proposed project, or the overall development plan of which it is a part, will in fact open up new, nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination.

7 WEEKLY COMP. OF PRES. DOCS. 892, 901 (June 14, 1971).

President Nixon's statement of June 14 preceded the publication of the first version of the Project Selection Criteria by six days. 36 Fed. Reg. 12032-38 (1971). HUD published the criteria for comment on October 2, 1971, 36 Fed. Reg. 19316-20 (1971), before promulgating the standards in their final form. See Maxwell, *HUD's Project Selection Criteria - A Cure for "Impermissible Color Blindness?"* 48 NOTRE DAME LAW 92 (1973) [hereinafter cited as *Impermissible Color Blindness*].

34. Seven of the criteria apply to both single and multifamily applications: "(1) need for low-income housing; (2) minority housing opportunities; (3) improved location for low-income families; (4) relationship to orderly growth and development; (5) relationship of proposed project to physical environment; (6) ability to perform; (7) project potential for creating minority employment and business opportunities." 37 Fed. Reg. 203, 204-09 (1972). The eighth criterion applies solely to multifamily proposals: "(8) provision for sound housing management." *Id.* at 208-09.

The "minority housing opportunities" criterion is the most crucial of the eight factors in terms of racial integration. Its objectives are "to provide minority families with opportunities for housing in a wide range of locations [and] to open up nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination." *Id.* at 206. This criterion:

is designed to assure that building in minority areas goes forward only after three truly exist housing opportunities for minorities elsewhere [and] that the housing available to minorities outside areas of minority concentration is more than a token amount of so few units that there is in fact no true opportunity.

Id.

35. Secretary Romney explained that:

Here a proposed project will earn a "superior" rating if it is not outside an area of minority concentration only if it is either a part of a major new development . . . , which will be racially inclusive, or if it responds to overriding needs which can't feasibly be met any other way. If a project doesn't rate at least 'adequate' on the non-discriminatory location criterion, it will be disapproved.

Speech before the Practicing Law Institute Conference on Housing Law and Urban

the highest ratings. These new guidelines provided a basis for HUD assessment of potential sites for public projects³⁶ and FHA-insured assisted housing.³⁷

The criteria prohibited placing a project in a minority concentration area unless HUD deemed the project necessary to meet an "overriding need"³⁸ for housing in the area. The "overriding need" criterion corresponds to the Third Circuit's opinion in *Shannon*, in which the court allowed HUD to approve low-income housing site proposals which add to minority concentration.³⁹ In order to locate a project in a minority area, the *Shannon* court ruled, HUD must con-

Development, San Francisco (June 27, 1971), reprinted in Phillips & Agelasto, *Housing and Central Cities: The Conservation Approach*, 4 *ECOLOGY L.Q.* 797, 819 n.108 (1975) [hereinafter cited as *The Conservation Approach*].

36. Under the Housing Act of 1937, 42 U.S.C. §§ 1437-1437k (1976 & Supp III 1979), as amended by Pub. L. No. 96-153, Title II, § 206a, 93 Stat. 1108 (1979), the basic structure of the conventional housing program enabled the federal government to provide financial support to a local housing authority. This agency, in turn, planned and operated housing projects for low-income families. See generally D. MANDELKER, *HOUSING SUBSIDIES IN THE U.S. AND ENGLAND 45-80* (1973). In reaction to the pervasive criticism of the conventional public housing program, HUD initiated the Section 23 program. Housing and Urban Development Act of 1965, Title I, § 103(a), 79 Stat. 455 (superseded by Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified in scattered sections of 42 U.S.C.)). For a discussion of the criticism of pre-Section 23 housing programs, see generally Catz, *supra* note 10; *Public Housing and the Poor*, *supra* note 13.

Under the Section 23 program, local housing authorities leased units in privately-owned buildings and subsequently subleased them to low-income tenants. See Friedman & Krier, *A New Lease on Life: Section 223 Housing and the Poor*, 116 *U. PA. L. REV.* 611 (1968); Palmer, *Section 23 Housing: Low Rent Housing in Private Accommodations*, 47 *J. URB. L.* 255 (1970); Note, *Housing the Poor Under the Section 8 New Construction Program*, 15 *URBAN L. ANN.* 281, 284-86 (1978).

37. This category consisted primarily of housing under § 236 of the Housing and Community Development Act of 1968, 12 U.S.C. § 1715z (1976 & Supp. III 1979), as amended by Pub. L. No. 96-153, Title II, § 213, Title III, § 301(d), 93 Stat. 111 (1979); 12 U.S.C. § 1715z-1 (1976 & Supp. III 1979) as amended by Pub. L. No. 96-153, Title II, §§ 203(b), 205(b), Title III, § 301(e), 93 Stat. 1107, 1108, 1111 (1979). Under § 236, HUD makes interest reduction payments for any difference between any monthly payments for principal, interest, fees and charges the mortgagor pays under the actual mortgage and any monthly payment for principal, and interest that the mortgagor would pay if the mortgage bore interest at one percent. A consequence of the interest subsidy is lower mortgage payments by the homeowner and lower rental payments by the renter. The section defines basic eligibility for the program in terms of family income not exceeding 135 percent of public housing initial occupancy income limits in the area. *Id.*

38. 37 Fed. Reg. 203, 204 (1972).

39. 436 F.2d at 822.

clude that the need for additional minority housing at the particular site outweighs the disadvantage of perpetuating racial concentration.⁴⁰ The overriding need test yields to one exception.⁴¹ This exception arises when discrimination is the only reason the need cannot be met outside areas of minority concentration.⁴²

HUD could similarly exempt a project if "sufficient and comparable" opportunities for federally subsidized housing existed outside the area of dense racial concentration.⁴³ Some commentators found the basis for this formulation to be readily apparent.⁴⁴ If minorities have a choice of housing which they can afford outside segregated areas, then HUD would approve additional housing within such areas. When HUD promulgated the criteria in 1972, commentators did not expect any immediate change in the location of federally funded low-income housing.⁴⁵ They expected the construction of this housing in inner cities where a number of such projects were being built in the suburbs.⁴⁶

HUD's current primary housing assistance program appears as the Section 8 Housing Assistance Payments Program.⁴⁷ In enacting the

40. *Id.*

41. Thus, "[a]n 'overriding need' may not serve as the basis for an 'adequate' rating if the only reason the need cannot otherwise feasibly be met is that discrimination on the basis of race, color or national origin renders sites outside areas of minority concentration unavailable." 37 Fed. Reg. 206 (1972).

42. *Id.* The *Shannon* Court relied on Title VI of the Civil Rights Act, 42 U.S.C. § 2000d (1976) to reach its decision. In *Lau v. Nichols*, 414 U.S. 563 (1974), the Supreme Court held that Title VI only requires proof of discriminatory effect, not discriminatory intent. The Court weakened the validity of this analysis in *Washington v. Davis*, 426 U.S. 229 (1976), which held that proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. See also *Byron v. Koch*, 627 F.2d 612 (2d Cir. 1980) (in upholding the closing of hospital in area serving minority group members, the court considered but did not decide whether the *Lau* interpretation survived *Washington v. Davis*).

43. 37 Fed. Reg. 203, 204 (1972). The Project Selection Criteria for federally subsidized housing programs are classified at 24 C.F.R. §§ 200.700-710 (1980).

44. See, e.g., *Impermissible Color Blindness*, supra note 33, at 101.

45. *Id.*

46. *Id.*

47. See note 3 *supra*. Section 8 empowers HUD to make assistance contracts with private and public sponsors of existing, newly constructed, and substantially rehabilitated housing. 42 U.S.C. § 1437(c) (1976). Pursuant to the agreements, HUD pays the difference between the monthly rent required by the family (ranging between 15 and 25 percent of its gross income), and the monthly rent assigned by the contract to the housing unit. Such factors as income, number of children, and medical expenses dictate the amount paid by the family. 42 U.S.C. § 1437f(c)(3) (1976). Families with

Section 8 Program, Congress emphasized the importance of dispersing public housing to avoid concentrations of low-income persons.⁴⁸

incomes which do not exceed 80% of the median income of the area are eligible for the program. Each year, 30% of all Section 8 units must serve households with incomes which do not exceed 50% of the area's median income. 42 U.S.C. §§ 1437f(c)(4), (7) (1976).

Congress recently altered these percentages in the fiscal 1982 HUD reauthorization legislation. The HUD portion of the Omnibus Budget Reconciliation Bill is aimed at redirecting HUD's efforts to encourage occupancy in low-income housing by tenants with varying income levels. The legislation directs HUD to rescind 42 U.S.C. §§ 1437f(c)(4) and (c)(7). The conferees expressed some concern that in carrying out the policy of creating a mix of families having a broad range of lower incomes in assisted housing, families whose incomes are between 50 and 80 percent of median not be given a priority for occupancy by virtue of their income. [1981] 9 Hous. & Dev. Rep. (BNA) 12:225. HUD establishes a fair market rent for a project's housing area. This figure controls the amount of rent a landlord charges for each unit. Contracts provide, however, for annual up-dating of fair market rents. Contract rents should not exceed fair market rents by more than 10%, but 20% is sometimes permissible. 42 U.S.C. § 1437f(c) (1976). Under the Omnibus Budget Reconciliation Bill, however, tenants will pay the greater of 30 percent of adjusted income or 10 percent of gross income, except in nine states where welfare programs pay a family's actual rent. [1981] 9 Hous. & Dev. Rep. (BNA) 10:177.

48. The 1972 project guidelines received a measure of statutory endorsement in the Preamble to Title I of the 1974 Housing and Community Development Act, Pub. L. No. 93-383, 88 Stat. 633 (codified in scattered sections of 42 U.S.C.). "Spatial deconcentration" represented a relatively novel approach to resolving urban housing problems. The concept of "spatial deconcentration" engendered a great deal of debate before Congress passed the Act. *See, e.g.*, 120 CONG. REC. 20260 (1974) (remarks of Rep. Young). The belief that moving lower-income persons into middle-or upper-income areas could alleviate urban social and housing problems received little consensus in Congress. *See* Kandell, *Opposition to Scatter-Site Housing Transcends Racial and Economic Lines*, N.Y. Times, Feb. 6, 1972, at 60, col. 1. Housing strategy in the past relied predominantly on increased production of low income housing in ghetto areas (the policy of containment). It rested also upon increased development of other new housing so that a "filter effect" occurred, freeing existing housing in good condition for lower-income persons. *See, e.g.*, C. HAAR, *BETWEEN THE IDEA AND THE REALITY, A STUDY IN THE ORIGIN, FATE AND LEGACY OF THE MODEL CITIES PROGRAM* (1975); N. KEITH, *HOUSING AMERICA'S LOW AND MODERATE INCOME FAMILIES* (1968); *HOUSING IN AMERICA* (D. Mandelker & R. Montgomery eds. 1973).

Almost no legislative history exists on the intended role of the spatial deconcentration objective. The goal simply appeared in the Senate version of the Act. S. 3066, 93rd Cong., 2nd Sess. (1974), *reprinted in* 120 CONG. REC. 6172 (1974). The House bill, H.R. 15361, 93rd Cong., 2nd Sess. (1974), *reprinted in* 120 CONG. REC. 20315 (1974), did not contain similar language. The Conference Report incorporated the entire language of the Senate bill. H.R. Rep. No. 1279, 93rd 2nd Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4449.

For more information on concentration of low-income persons *see generally*, Warren, "Spatial Deconcentration" *A Problem Greater Than School Desegregation*, 29 AD.

A community must prepare a housing assistance plan⁴⁹ as a condition to receipt of federal funds.⁵⁰ By requiring these plans, Congress "requires" communities to meet the housing needs of low-income persons before the community receives federal funds.⁵¹

LAW REV. 577 (1978); Comment, *Site Selection for Public Housing and the Expanded Equal Protection Concept*, 7 URBAN L. ANN. 336 (1974).

49. The Housing Assistance Plan (HAP) must: (1) accurately survey the condition of existing housing in the community, 42 U.S.C. § 5304(a)(4)(A) (1976); (2) assess the housing assistance needs of lower-income persons residing or expected to reside in the community; (3) specify a realistic annual goal for the number of families to be assisted, *Id.* at (a)(4)(B); and (4) indicate the general location of proposed housing for low-income persons. *Id.* at (a)(4)(C).

Included in the second criterion assessment are families expected to reside in the community as a result of new jobs generated by planned commercial or industrial development. It also includes those currently working in the community but not living there. The regulations detail the method for calculating the number of such families. 24 C.F.R. § 570.306(b)(2)(ii)(B)(1)-(2) (1980). Suggested sources of data for this HAP component include: approved development plans, building permits, awards of significant contracts, federal census data, and planning agencies reports. 24 C.F.R. § 570.306(b)(2) (1980).

Courts have utilized the second requirement of the HAP to require communities to plan for low income, but not necessarily racially-mixed, housing. *See Coalition for Block Grant Compliance v. HUD*, 450 F. Supp. 43 (E.D. Mich. 1978). Statutory and regulatory provisions provide the basis for enforcing minority deconcentration. *See Title VI of the Civil Rights Act of 1964*, 42 U.S.C. § 2000d (1976), *supra* note 1; *The Fair Housing Act of 1968*, 42 U.S.C. §§ 3601-3619 (1976), *supra* note 1; *Executive Order 11063 of 1962*, *supra* note 26; 42 U.S.C. § 1982 (1976); and HUD regulations set forth in 24 C.F.R. §§ 880.206(b)-(d) (1980), *supra* note 52.

50. *See Community Development Block Grant Program (CDBG)*, 42 U.S.C. §§ 5301-5317 (1976 & Supp. III 1979) and the *Urban Development Action Grant Program (UDAG)*, 42 U.S.C. § 5318 (1976 & Supp. III 1979). The *Community Development Block Grant Program* attempts to solve a number of related problems. These problems, delineated in the statement of congressional findings involve: ghettoization or "the concentration of persons of lower income in central cities," 42 U.S.C. § 5301(a)(1) (1976), urban slums and blight, and the social and physical deterioration of urban area. *Id.* at (a)(2).

In order to receive UDAG funds, municipalities must demonstrate success in housing low income residents and provide equal opportunity for minorities. 42 U.S.C. § 5318(b) (1976 & Supp. III 1979). The plaintiffs in *NAACP, Boston Chapter v. Harris*, 607 F.2d 514 (1st Cir. 1979), charged the City of Boston with pervasive housing and employment discrimination, as grounds for its ineligibility for a UDAG. The court held that the minority residents and NAACP lacked standing to challenge the city's eligibility for a UDAG. *Id.* at 520-22. The court found, however, that plaintiffs could still seek to compel HUD to condition funds upon Boston's meeting certain equal opportunity and affirmative action standards. *Id.* at 522-23. *NAACP, Boston Chapter* helps demonstrate the judicial court that exists to help enforce the requirements set out in 42 U.S.C. § 5318(b).

51. Sloane, *Changing Shape of Land Use Litigation: Federal Court Challenges to*

In 1976, HUD promulgated regulations concerning Section 8 New Construction project sites. These regulations established criteria for HUD to study the efficacy of each site.⁵² HUD designed these regulations, in part, to assist local field offices in avoiding the perpetuation of established concentrations of minority or low-income persons. HUD proposed additional regulations in 1977 to facilitate this goal toward federally funded low-income housing in general.⁵³

The Project Selection Criteria discouraged the placement of subsi-

Exclusionary Land Use Practices, 51 NOTRE DAME LAW. 48, 76 (1975) [hereinafter cited as *Land Use Litigation*].

When a community does not seek community development funds, HUD has discretion to fund a housing project in the municipality. In so doing, HUD must determine that a need for such assistance exists, taking into consideration any applicable State housing plans. 42 U.S.C. § 1439(c) (1976). HUD, however, may choose not to exercise this power. It may wish not to appropriate scarce funds for housing projects located in communities which do not desire them. *Land Use Litigation, supra*, at 77.

A second reason why Congress' requirement is theoretical at best and lies in the method by which communities calculate their low-income housing needs. *See* note 49 *supra*. With this format, suburban communities containing relatively few present or anticipated employment opportunities for low-income people, may be eligible for community development funds without providing low-income housing.

A third problem consists of HUD's ability to carefully scrutinize housing assistance plans. *See generally*, *City of Hartford Hills*, 408 F. Supp. 889 (D. Conn. 1976).

52. The regulations state that:

- (b) The site and neighborhood must be suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, Executive Order 11063, and HUD regulations issued pursuant thereto.
- (c) The site must not be located in:
 - (1) An area of minority concentration unless (i) sufficient comparable opportunity exists for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration or (ii) the project is necessary to meet overriding needs which cannot otherwise feasibly be met in that housing market area . . . or
 - (2) A racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area.
- (d) The site must promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

24 C.F.R. §§ 880.206(b)-(d) (1980). HUD enacted these regulations in 1976, 41 Fed. Reg. 17474 (1976) and amended them in 1977, 42 Fed. Reg. 17110 (1977).

These regulations and HUD's comprehensive regulations regarding other federally subsidized housing programs exhibit the goal of spatial deconcentration. *See* note 48 *supra*.

53. 42 Fed. Reg. 4299 (1977), proposed as 24 C.F.R. § 200.704. These regulations

dized public housing in an area of minority concentration.⁵⁴ In contrast, the proposed standards of 1977 eased restrictions on the distribution of subsidized housing.⁵⁵ The proposed rules allowed HUD to consent to a site in an area of dense racial concentration if builders could not feasibly construct projects outside the minority areas.⁵⁶ HUD never published the proposed revisions in final form because of widespread conflicting comments.⁵⁷

In March 1980, HUD initiated a study to determine whether site and neighborhood standards successfully implement HUD's statutory duty to affirmatively promote fair housing policies.⁵⁸ While HUD analyzed the problem, Congress expressed an interest in the site and neighborhood standards. In Section 216 of the Housing and Community Development Act of 1980,⁵⁹ Congress specified that HUD shall not exclude an assisted housing project from consideration for funding solely because of its location in an area of minority

would have replaced the Project Selection Criteria regulations. *See* notes 33-35, 38-46 and accompanying text *supra*.

54. *See* notes 38-46 and accompanying text *supra*.

55. The publication date of the proposed regulations reflects the reason for the change of attitudes between the Project Selection Criteria and the new standards. HUD submitted the 1977 standards during the last week of the Ford Administration. 42 Fed. Reg. 4300 (1977). In advancing the regulations, the outgoing administration said its purpose was "to allow full and open public discussion" of a complex issue - balancing the goal of dispersing low-income housing against the need for improving existing low-income areas. *Id.* at 4296. HUD presented the proposed rules "as an option whose specificity will give form and substance" to the discussion. *Id.*

56. 42 Fed. Reg. 4297 (1977). These proposed regulations defined an area of minority concentration as one with a minority population either greater than 40% or significantly higher than the percentage in the community. *Id.* at 4299.

Under the proposal, a project site was unavailable if assisted housing constituted an incompatible land use or if it frustrated legitimate land use policies. *Id.* at 4298. Exclusionary large-lot zoning did not, however, establish an adequate justification.

The rules exempted areas undergoing concentrated neighborhood preservation or revitalization efforts. The rules granted the exemption if the community's allocation of subsidized housing was too small to provide units for both the neighborhood plan and comparable outside units. *Id.* at 4299.

57. *See* [1980] 7 HOUS. & DEV. REP. (BNA) 38:790. Some commentators criticized that the proposed rules addressed only the concentrations of minorities, and failed to mention comparable standards for the concentration of low-income families. Others felt that HUD devised too rigid a standard in setting the 40% minority population level. [1977] 4 HOUS. & DEV. REP. (BNA) 28:1002.

58. For an acknowledgement of Secretary Landrieu's preliminary study, *see* [1980] 7 HOUS. & DEV. REP. (BNA) 38:790.

59. Housing and Community Development Act of 1980, Pub. L. No. 96-399, § 216, 94 Stat. 1638 (1980).

concentration.⁶⁰ In light of this congressional concern, HUD issued a notice to clarify certain provisions of the site and neighborhood standards.⁶¹

III. THE NOTICE

A. *Restatement Of Standard*

In the notice, HUD reaffirmed its duty to ensure equal opportunity and expanded choice in housing selection regardless of race.⁶² To attain this objective, the site selection and neighborhood standards for new Section 8 construction⁶³ and other public housing⁶⁴ permit a project site approval only under certain circumstances. A builder may construct a federally funded housing project in a minority concentration area if "sufficient and comparable" opportunities for minority family housing exist in the proposed project's specified income range.⁶⁵ A developer may also construct a project in a minority concentration area if it is necessary to meet "overriding needs."⁶⁶

B. *Defining Areas Of Minority Concentration*

HUD encourages local field offices to interpret these site selection and neighborhood standard exceptions with some degree of flexibility. For instance, the notice suggests that HUD define minority areas in relation to local conditions.⁶⁷ An area of minority concen-

60. *Id.* The Housing Project Site Location Amendment originated in the House. The Senate bill did not contain it. The Conference Report incorporated the entire language of the House bill. H.R. Rep. No. 96-1420, 96th Cong., 2nd Sess. (1980), reprinted in [1980] U.S. CODE CONG. & AD. NEWS 3512.

61. *HUD Notice, supra* note 8, at 1. The notice does not pertain to the approval of Section 8 substantial rehabilitation projects or the acquisition of existing public housing. The notice applies only to new construction programs. *See* note 52 *supra*.

62. *HUD Notice, supra* note 8, at 2. *See* notes 1-2 and accompanying text *supra*.

63. 24 C.F.R. § 880.206 (1980). *See also* 24 C.F.R. § 883.309 (1980).

64. 24 C.F.R. § 200.700-710 (1980). *See also* 24 C.F.R. § 841.107 (1980).

65. 24 C.F.R. § 880.206(1)(i) (1980). *See* note 52 *supra*. *See also* *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973) where the court reiterated the restrictions placed on housing agencies in selecting housing sites. In *Otero*, the court found "the Authority is obligated to take affirmative steps to promote racial integration. *Id.* at 1125. "An authority may not, for instance, select sites for projects which will be occupied by non-whites only in areas already heavily concentrated with a high proportion of non-whites." *Id.* at 1133.

66. 24 C.F.R. § 880.206(1)(ii) (1980). *See* note 52 *supra*.

67. *HUD Notice, supra* note 8, at 2.

tration is defined as "any area where the proportion of minority residents substantially exceeds, or, as a result of the construction of new assisted housing, would substantially exceed that of the jurisdiction as a whole."⁶⁸ The notice directs field offices to apply this test flexibly and to construe the definition reasonably.⁶⁹ For instance, local HUD officials may determine whether a site is located in an impacted area without relying solely upon census tract data.⁷⁰

The definition of "substantially" may vary with the conditions in the area. The notice suggests that HUD officials examine a small difference between the proportion of minority residents in an area and in the municipality as a whole. Under this fact pattern, a small difference may be "substantial" in a municipality with a low percentage of minority residents and movement towards increased concentration. HUD could find the same difference "insubstantial" in a municipality with a large percentage of minority residents in which the level of concentration is stable or decreasing.⁷¹

The current racial composition of an area is not necessarily conclusive in applying this minority concentration definition. HUD officials must consider demographic trends in an area "brought about by private housing reinvestment, disinvestment or other causes . . . in determining whether an area is one of minority concentration."⁷²

68. *Id.*

69. *Id.*

70. *Id.* One court observed that "[W]hile census tracts may provide HUD with a general indication of residential patterns, they are inadequate as the sole indicators of the racial or economic composition of housing in a neighborhood." *King v. Harris*, 464 F. Supp. 827, 839 (E.D.N.Y. 1979). *See also Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part, mem.*, 473 F.2d 910 (6th Cir. 1973). In *Banks*, the court found census tracts drawn so as to perpetuate segregation. It held that such artificial boundaries prevented integrated housing. The court chose, instead, to define the relevant areas on an ad hoc basis. 341 F. Supp. at 1182.

71. *HUD Notice, supra* note 8, at 2.

72. *Id.* at 3. In *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970), the Third Circuit enjoined HUD's site selection procedures on the ground that the department failed to consider the demographic characteristics of the local area selected. *Id.* at 821-23.

In *Otero*, the Second Circuit utilized a similar line of reasoning in applying the "tipping" doctrine. The court defined the "tipping" point of a neighborhood as the "percentage of concentration of nonwhite residents in a given area that will cause white residents to flee." 484 F.2d at 1135. In *Trinity Episcopal School Corp. v. Romney*, 387 F. Supp. 1044 (S.D.N.Y. 1974), *aff'd in part*, 523 F.2d 88 (2d Cir. 1975), the district court elaborated upon this concept. To determine whether an area is at or close to the "tipping" point, the court found three factors must be satisfied:

(1) the gross numbers of minority group families in a measurable economic or social group which are likely to affect adversely area conditions,

C. *Assuring "Sufficient And Comparable" Housing Opportunities Outside Areas Of Minority Concentration*

HUD officials apply the "sufficient and comparable" standard on a fiscal year basis when they approve new Section 8 and public housing project sites. The notice states that "sufficient" does not require every locality to maintain an equal number of housing units within and outside areas of minority concentration.⁷³ When HUD applies this standard it should find a reasonable distribution of units. Over a period of several years, HUD attempts to approach a proper balance of housing opportunities within and outside minority areas.⁷⁴ A proper balance includes an assessment of the locality's racial mix and conditions affecting the range of available housing choices for low-income persons or minorities.⁷⁵

Under this standard, HUD deems a unit "comparable" if it meets the following requirements. First, the unit must contain the same household and tenant type. Second, the unit must require approximately the same tenant contribution toward rent. Third, it must serve a similar income group. Fourth, the unit must be located in the same housing market, and finally, it must be in habitable condition.⁷⁶

D. *Overriding Need: New Construction In Neighborhood Preservation Or Revitalization Areas*

In addition to the "sufficient and comparable" standard, the notice sets out another exception to the site and neighborhood selection standards. The notice reiterates that HUD approves projects in minority concentration areas that meet an overriding need which cannot otherwise be met in the housing market. If HUD determines that a project fulfills an overriding need, the project's failure to meet the

-
- (2) the quality of community services and facilities, and
 - (3) the attitudes of majority group residents who might be persuaded by their subjective reactions to the first and second criteria to leave the area.

Id. at 1066.

Some courts apply the "tipping" doctrine to encompass low-income, in addition to minority concentrations. *See King v. Harris*, 464 F. Supp. 827, 843-44 (E.D.N.Y. 1979); *Karlen v. Harris*, 590 F.2d 39, 43-45 (2d Cir. 1978).

73. *HUD Notice*, supra note 8, at 3.

74. *Id.*

75. *Id.*

76. *Id.*

sufficient and comparable opportunities test is irrelevant.⁷⁷ The notice specifies that HUD evaluate overriding need on a case-by-case basis.⁷⁸

Under this criterion, HUD will approve a project in an area of minority concentration if the area lacks available sites for new construction.⁷⁹ HUD also will consent to the building of projects if they comprise an integral part of a comprehensive local strategy for the preservation or rehabilitation of the immediate area.⁸⁰ HUD will also approve a project in a neighborhood which is the focus of private investment. These funds, however, must effectuate a change in the economic character of the area (a 'revitalizing area').⁸¹

When HUD applies the "sufficient and comparable" standard, officials need not consider new construction built in minority areas and approved on the basis of overriding need. HUD does not permit construction in those areas of overriding need if the recent use of this standard results in circumventing HUD's obligation to provide housing choice.⁸² Nor will HUD allow construction if the inability to meet housing needs outside minority neighborhoods results from racial discrimination.⁸³

HUD determines whether a project is part of a neighborhood preservation or restoration strategy. As part of this process, the Department must find adequate support for the strategy in the locality's Community Block Grant application⁸⁴ or in local comments on subsidized housing proposals.⁸⁵ The municipality must also illustrate the efforts undertaken to improve the neighborhood, the amount of the public funds expended, and other methods used to revitalize or preserve the area.⁸⁶

The notice asserts that the data must demonstrate meaningful pri-

77. *Id.* See note 52 *supra*.

78. *HUD Notice*, *supra* note 8, at 3.

79. *Id.* at 4.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. See notes 49-50 and accompanying text *supra*.

85. Under § 213 of the Housing and Community Development Act of 1974, a community can object to the approval of another community's HAP application on the basis of inconsistency with its approved HAP. 42 U.S.C. § 1439 (1976).

86. *HUD Notice*, *supra* note 8, at 4-5.

vate reinvestment in conjunction with changes in an area's economic characteristics to constitute a revitalized area.⁸⁷ Consequently, HUD must conclude that some long-term change in the economic structure of the area will occur.⁸⁸ The notice also provides that the magnitude of these changes must be substantial and demonstrable.⁸⁹

The notice emphasizes that Area Office Managers should designate revitalizing areas at the beginning of each fiscal year. They should develop appropriate means to analyze and update findings of area revitalization.⁹⁰

E. *Assessment Of Housing Choice*

The Area Manager must assess local conditions which affect housing choices. Managers must also weigh the significance of public housing when they determine the availability of housing opportunities for minorities within and outside minority neighborhoods.⁹¹ In making this determination, the Area Manager arranges priorities among areas and considers staffing constraints which limit the comprehensiveness of a feasible assessment.⁹² The Area Manager, for example, limits the assessments to localities and neighborhoods from which they reasonably foresee receiving applications for public housing units.⁹³

Before arriving at these assessments, the Area Manager analyzes the full range of conditions which affect the availability of housing opportunities outside impacted areas. Accordingly, HUD considers the extent to which certain conditions are present in the area in addition to any other factors relevant to housing choice.⁹⁴

87. *Id.* at 5.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 5-6.

92. *Id.* at 6.

93. *Id.*

94. These conditions include:

- (a) A significant number of assisted housing units has been made available outside areas of minority concentration. Units reserved but not yet completed may be taken into account unless there is in the locality a pattern of failure to bring family projects to completion outside areas of minority concentration;
- (b) There is significant integration of assisted housing projects constructed or

IV. ANALYSIS

The House Conference Report of the Housing and Community Development Act of 1980⁹⁵ addressed the concern that HUD arbitrarily implements the site and neighborhood selection standards.⁹⁶ Specifically, some congressmen feared that HUD interpreted the regulations to deny assisted housing to minority areas.⁹⁷ The HUD notice attempted, in part, to alleviate some of that concern. A central theme of the notice is the suggestion that Area Office Managers exert greater discretion in approving development of public housing in areas of minority concentration. The directive does not noticeably affect existing site criteria. The notice, instead, encourages Area Managers to construe the regulations less strictly and to grant greater consideration to local conditions.

A principal objective of the notice is to reduce the wide disparity in interpretation by local HUD officials of the applicable HUD regulations.⁹⁸ The notice is not intended to discontinue efforts to promote

rehabilitated in the past ten years, relative to the racial mix of the eligible population;

- (c) There are racially integrated neighborhoods in the locality,
- (d) Programs are operated by the locality to assist minority families who wish to find housing outside areas of minority concentration;
- (e) Minority families have benefitted from local activities (*e.g.*, acquisition and write-down of sites, tax relief programs for homeowners, acquisitions of units for use of assisted housing units, etc.) undertaken to expand choice for minority families outside areas of minority concentration;
- (f) The locality is participating in an approved Areawide Housing Assistance Plan;
- (g) A significant proportion of minority households have been successful in finding units in non-minority areas under the § 8 Existing Program;
- (h) Comparable housing opportunities have been made available outside areas of minority concentration through programs other than now construction (*e.g.*, public housing acquisition of existing housing with or without rehabilitation, § 8 Moderate Rehabilitation)

Id. at 6-7.

95. H.R. Rep. No. 95-1420, 96th Cong., 2nd Sess. (1980), *reprinted* in [1980] U.S. CODE CONG. & AD. NEWS 3506.

96. *See Id.* at 3512. *See* notes 38-46, 52 and accompanying text *supra*. The House Conference Report emphasized, however, that Congress did not intend for § 216 to diminish "HUD's duty to promote equal opportunity and to enforce statutory and constitutional prohibitions against racial discrimination." H.R. Rep. No. 95-1420, 96th Cong., 2d Sess. (1980).

97. *Id.* at 3595.

98. Interview with Kenneth Lange, HUD Deputy Area Manager, St. Louis Office, (February 24, 1981).

racial and economic integration.⁹⁹ Areas subject to school desegregation plans provide an example of HUD's efforts to further integration. In localities under court-ordered school desegregation plans, the Area Manager must condition approval of new construction housing projects upon their consistency with applicable court orders.¹⁰⁰

The notice seeks to strike a balance between the need to address inner-city deterioration, and the discouragement of locating new assisted housing projects in minority areas.¹⁰¹ A district court case decided just prior to the notice examined the ramifications of HUD investigations of local conditions in studying low-income housing sites. In *Business Association of University City v. Landrieu*,¹⁰² a group of businessmen alleged that HUD violated Title VIII of the Civil Rights Act of 1968.¹⁰³ HUD did not contest the fact that it chose a minority area for the project site.¹⁰⁴ Area officials argued, instead, that they based approval of the project upon socioeconomic factors and land use considerations.¹⁰⁵ Based upon the evidence, the court found the business groups' allegations equivocal at best.¹⁰⁶ The court therefore dismissed a motion for a preliminary injunction to prevent the building of the section 8 housing.¹⁰⁷

Business Association of University City is an important case for all HUD field offices. Local HUD officials based their choice of the par-

99. *Id.*

100. *HUD Notice, supra* note 8, at 6.

101. *See* notes 7, 38-46 and accompanying text *supra*.

102. No. 80-3725 (E.D. Pa. Nov. 10, 1980).

103. 42 U.S.C. §§ 3601-3619 (1976).

104. *Business Association of University City v. Landrieu, No. 80-3725 (E.D. Pa. Nov. 10, 1980).*

105. *Id.* The *Shannon* court discussed the effect of these factors. *See* notes 28-32 and accompanying text *supra*.

106. *Business Association of University City v. Landrieu, No. 80-3725 (E.D. Pa. Nov. 10, 1980).* In addition to the census tract data, HUD introduced other evidence bearing on the racial composition of neighborhoods bordering the site. Some witnesses noted that the area experienced a problem of displacement of low- and moderate-income persons by those in higher income brackets. The court found this testimony significant for two reasons. First, even if HUD selected an area of dense racial concentration for the site, an overriding need for federal financed low-income housing could justify the location. Second, given the influx of wealthier persons, the area could constitute a racially mixed one. *Id.*

107. *Id.*

ticular site on existing local conditions.¹⁰⁸ The court implicitly supported HUD's action in reaching its decision. The court held that HUD did not violate its duty to further desegregation by choosing an assisted housing project in an area populated by a significant number of minority group members.¹⁰⁹ This case, along with the recent HUD notice, will perhaps further encourage HUD Area Office Managers to exercise more discretion in approving the construction of public housing projects in minority areas. This potential development is admirable, but HUD officials may frustrate the policy of racial and economic integration if they fail to exercise this "discretion" with care and sound judgment.

HUD effectuates many desirable goals by promoting racial and economic integration in public housing. First, residentially integrated communities find less need for the socially divisive use of busing to achieve integrated schools.¹¹⁰ Second, through suburban integration, the poor and minorities gain access to employment opportunities at companies which followed the massive business exodus from deteriorating inner cities.¹¹¹ Third, residential integration allows for a more equitable distribution of government services because low-income persons and minorities are not all concentrated in segregated areas.¹¹² Finally, suburban residential integration may reduce the racial and social prejudice which divides American society.¹¹³

The importance of HUD's approval of low-income housing sites to foster racial and economic integration is undisputed.¹¹⁴ Nonetheless, wide areas of inner city housing have recently deteriorated below

108. *Id.*

109. *Id.*

110. See e.g., *Affirmative Action*, *supra* note 1, at 560 n.260; *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 127 n.66 (1979).

111. See J. KAIN, *The Distribution and Movement of Jobs and Industry*, THE METROPOLITAN ENIGMA 1 (J. G. Wilson ed. 1967); A. DOWNS, *OPENING UP THE SUBURBS* 26-28 (1973); Kain, *Failure in Diagnosis: A Critique of the National Urban Policy*, 11 URB. LAW, 247, 255-56 (1979).

112. See *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *aff'd on rehearing en banc*, 461 F.2d 1171 (5th Cir. 1972) (black residents proved that the town provided a lower level of services to black neighborhoods in a grossly disparate manner compared to those provided in white neighborhoods); Kaplan, *Equal Justice in an Unequal World - Equality for the Negro: The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 389 (1966).

113. See e.g., *Navasky, The Benevolent Housing Quota*, 6 How. L.J. 30, 37 (1960).

114. A recent consent decree, which could represent a final settlement of the protracted *Gautreaux* litigation, recognized the significance of residential integration.

minimum levels of human habitability. In these areas the almost nonexistent maintenance of buildings and general neighborhood de-

See note 1 *supra*. For a discussion of the *Gautreaux* consent decree, *see* [1981] 9 HOUS. & DEV. REP. (BNA) 6:85-86.

Dorothy Gautreaux and other black plaintiffs filed two actions in 1966 against the Chicago Housing Authority (CHA) and HUD. One action charged CHA with selecting public housing sites in order to perpetuate residential segregation by race in the City of Chicago. The second action charged HUD with condoning CHA's discriminatory practices. The district court held that CHA purposely engaged in discriminatory site selection procedures. *Gautreaux v. Chicago Housing Authority*, 304 F. Supp. 736 (N.D. Ill. 1969). To grant relief to the plaintiffs, the court devised a plan whereby it divided the Chicago metropolitan region into limited areas (which consisted of census tracts of at least 30 percent minority residents) and general areas (tracts with less than 30 percent minority residents). *Id.* The plan prohibited the development of public housing in limited areas without concomitant construction in general areas. *Id.* The 7th Circuit consolidated the two cases after it held that HUD cooperated in the scheme to segregate public housing in Chicago. *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir., 1971). The Supreme Court upheld the use of a metropolitan remedy in *Hills v. Gautreaux*, 425 U.S. 284 (1976).

HUD and the plaintiffs entered into an agreement in June 1976, just after the Supreme Court handed down its decision in *Hills v. Gautreaux*. The plaintiffs agreed to delay any request for a metropolitan wide relief order. In exchange, HUD agreed to allocate 400 units of § 8 existing housing in the metropolitan area under a demonstration program. HUD also consented to furnish an additional 2,700 § 8 existing housing units in the metropolitan area outside Chicago. *See* D. MANDELKER, C. DAYE, O. HETZEL, J. KUSHNER, H. MCGEE, JR. & R. WASHBURN, HOUSING AND COMMUNITY DEVELOPMENT 609 (1981).

The agreement is important for its use of § 8 existing housing. Due to the control of local political officials over dispersal of public housing, HUD could not force CHA to place those units in areas to foster racial integration if the agreement called for traditional or other types of § 8 housing. Under these circumstances, HUD could merely cut off community development and other public housing funds. In utilizing § 8 existing housing, however, HUD can work directly with local landlords, *see* 42 U.S.C. § 1437f(b)(1), and can work around those local political officials who are not interested in promoting fair housing policies. *See* note 5 *supra*. The 1976 agreement is a basis for the latest *Gautreaux* consent decree. [1981] 9 HOUS. & DEV. REP. (BNA) 6:85-86.

The June 16th consent decree adds a third area to the public housing development plan: " 'revitalizing', or 'buffer zones' between limited and general areas, where ongoing or planned private reinvestment creates the potential for racial and economic integration." [1981] 9 HOUS. & DEV. REP. (BNA) 6:86. The decree acknowledges the necessity of adding these areas because, "total relief to *Gautreaux* families outside the limited areas could not be provided in the foreseeable future" under the 1969 plan. *Id.*

As part of the terms of the consent decree:

HUD must provide a set-aside of 150 Section 8 existing units per year; 250 Section 8 new construction and/or substantial rehabilitation units per year to be located in general and revitalizing areas; 100 units of Section 8 new and substantial rehab per year for use in projects that will increase housing choice in general and revitalizing areas for large minority families now living in the limited areas.

cline are concentrated and intense.¹¹⁵ Human self-image and self-respect rely heavily upon home and neighborhood identification. Deteriorating and undermaintained buildings in collapsing neighborhoods contribute to human frustration, anger, and social alienation.

The need for new, habitable, and affordable housing in these neighborhoods is readily apparent.¹¹⁶ It is critical for HUD officials to consider this fact when they evaluate subsidized housing sites.¹¹⁷ Undoubtedly, HUD deems the policy of racial and economic integration as significant. Notwithstanding this policy, people should have the right, if feasible, to live in the neighborhood of their choice. The poor and racial minorities are no exception. They should not have to leave their neighborhoods to receive federally funded low-income housing.¹¹⁸

V. CONCLUSION

The recent HUD notice allows HUD officials to exercise a greater

Id. These units are not included in the normal § 8 allocations for the Chicago metropolitan area. *Id.*

In addition to the required set-asides, the consent decree directs HUD to place at least one-third of § 8 new construction housing units in general areas. *Id.* The specificity of the percentages set out in the consent decree, (*see infra*), is a contrast to the inherent flexibility of public housing location in the *HUD Notice*.

115. *See The Conservation Approach, supra* note 35, at 807.

116. The *Gautreaux* consent decree, (*see* note 114 *supra*), addressed this housing shortage problem. While the underlying theme of the decree undoubtedly promotes racial integration, the decree requires HUD to locate as much as one-third of § 8 new construction and existing units in "limited" areas. [1981] 9 Hous. & Dev. Rep. (BNA) 6:86.

117. The recently enacted Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, contains the Housing and Community Development Amendments of 1981. The Amendments illustrate the added importance of HUD's evaluation. The bill provides enough funds to produce an estimated 153,000 units of housing, compared to the 175,000 units proposed by the Reagan Administration and the 260,000 units originally proposed by the Carter Administration. This reduction in public housing units (and in light of Reagan economic and social policies, a potential continued reduction of these units in fiscal 1983 and 1984) makes it even more necessary for HUD to consider critical housing shortages in impoverished neighborhoods. For a discussion of the Omnibus Budget Reconciliation Act, *see* [1981] Hous. & Dev. Rep. (BNA) 9:176-77.

118. A recently published HUD report on the *Gautreaux* interjurisdictional mobility demonstration addressed the problem. It notes that although most public housing and § 8 tenants in Chicago say they like to live in racially mixed neighborhoods, a large majority would rather live in the city than the suburbs. [1980] 8 Hous. & Dev. Rep. (BNA) 10:192.

degree of flexibility when they analyze low-income housing sites. If this order permits HUD at the very least to address the housing problems of inner city poor and minorities, the notice is a favorable development.

It is possible, however, to regard the potential revitalization of impoverished areas from a different perspective. Many older cities in the "Industrial Northeast" have lost thousands of residents, black and white, in recent years.¹¹⁹ To protect their declining political base, minority political leaders may press HUD to refrain from dispersing public housing. Similarly, suburban white politicians may continue to fight to keep minorities and low income public housing tenants out of their communities.

There is also reason to doubt whether HUD will successfully restore deteriorating neighborhoods. Federal housing and urban renewal programs failed to achieve this objective in the past. In light of reduced federal funding for public housing,¹²⁰ HUD may discover the revitalization of impoverished areas even more difficult to accomplish.

The "new conservatism" in the United States may provide, however, some reason to view inner city development with a greater degree of optimism. Conservative thought might signal a retreat from a strong emphasis on dispersal policies. This retreat and the potential increase in revitalization for impoverished areas may resolve the tension between the two contradictory objectives of the Housing and Community Development Act: racial deconcentration and the revitalization of impoverished neighborhoods.¹²¹

119. For a discussion of regional shifts in capital, income jobs and people, see *The New Economic Geography of America*, REVITALIZING THE NORTHEAST 75 (G. Sternlieb and J. Hughes, eds. 1978).

120. See note 115 *supra*.

121. See note 2 *supra*.

COMMENTS

