KING V. HARRIS: DEFINING THE "RELEVANT AREA" IN SECTION 8 SITE SELECTION

Under the Section 8 Housing Assistance Payments Program,[1] the Department of Housing and Urban Development (HUD) subsidizes newly constructed lower-income[2] housing.[3] In accordance with its

1. 42 U.S.C. § 1437f (1976 & Supp. I 1977), *as amended by* Pub. L. No. 95-557, Title II, § 206(d)(1)(e), (f), 92 Stat. 2091 (1978).

2. The statute identifies "lower income families" as those families with income not exceeding 80% of the local median income. 42 U.S.C. § 1437f(f)(1) (1976). The Secretary of HUD may raise or lower the 80% ceiling upon a finding that construction costs or family incomes in a particular area are extremely high or low. *Id.*

The Section 8 definition of "lower income families" is consistent with the definition of "low and moderate income families" in HUD regulations for Title I of the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 653 (codified in scattered sections of 42 U.S.C.). 24 C.F.R. § 570.3(o) (1979).

3. The Section 8 program provides subsidies for existing, newly constructed and substantially rehabilitated housing. The program is part of Title II of the Housing and Community Development Act of 1974, which revised the United States Housing Act of 1937, 42 U.S.C. §§ 1437-1437j (1976 & Supp. I 1977), *as amended by* Pub. L. No 95-557, Title II, § 206(a)-(g) and Title IV, § 412, 92 Stat. 2091 (1978); Pub. L. No. 95-619, Title II, § 251(a), 92 Stat. 3235 (1978). For the HUD regulations for Section 8 newly constructed housing, see 24 C.F.R. § 880 (1979).

The statutory purpose of the Section 8 program is to aid "lower income families in obtaining a decent place to live and [to promote] economically mixed housing." 42 U.S.C. § 1437f(a)(1976).

Section 8 provides assistance to the owner or prospective owner of a building by compensating for the percentage of rent due above and beyond what the lower income tenant is required to pay. The tenant's rent may not exceed 25% of his gross income. The total rent (tenant's cost plus HUD compensation) may not usually equal more than 10% over the fair market rental for the unit as established by HUD. 42 U.S.C. § 1437f(c)(1), (c)(3)(1976). At least 30% of the assisted units are reserved for families that earn no more than 50% of the local median income. *Id.* § 1437f(f)(2), (c)(7).

Predecessor legislation to Section 8 in the field of subsidized rental public housing includes the Section 23 program of the Housing and Urban Development Act of 1965, Pub. L. No. 89-117, Title I, § 103(a), 79 Stat. 455 (omitted as superseded by Housing and Community Development Act of 1974, Pub. L. No. 93-383, Title II, § 201(a)) (allowing local housing authorities to lease units in private buildings and release them to qualified tenants); and the Section 236 program of the Housing and Development Act of 1968, 12 U.S.C. § 1715z-1 (1976 & Supp. I 1977), *as amended by* Pub. L. No. 95-406, § 1(e), 92 Stat. 879 (1978); Pub. L. No. 95-557, Title II, § 201(i), Title III,

statutory duty to promote integration in housing,[4] HUD examines a relevant area encompassing a proposed project site to avoid subsidizing housing which would perpetuate minority or low-income concentration.[5] To aid the examination, HUD proposed regulations in 1977 authorizing it to use the census tract surrounding the project site

§ 301(e), 92 Stat. 2087, 2096 (1978) (allowing apartment owners to receive mortgage subsidies for new construction from the federal government in exchange for a promise to keep rents below a ceiling set by the government). The legislative history of Section 8 indicates it is in part a modified extension of the Section 23 program, reflecting HUD's desire for a "direct cash assistance approach" to subsidized housing. S. REP. No. 693, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4314-17.

For general discussions of Section 8 and the above programs, see Friedman and Krier, *A New Lease on Life: Section 23 Housing and the Poor*, 116 U. PA. L. REV. 611 (1968); Note, *Housing the Poor under the Section 8 New Construction Program*, 15 URBAN L. ANN. 281 (1978); Note, *Federal Leased Housing Assistance in Private Accommodations: Section 8*, 8 U. MICH. J. L. REF. 676 (1975).

4. *See* Civil Rights Act of 1968, § 801, 42 U.S.C. § 3601 (1976), which states: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." *See also* Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (1976): "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The 1968 statute requires HUD to carry out the fair housing policies. 42 U.S.C. § 3608(d)(5) (1976). These policies, in conjunction with the concept of spatial deconcentration, discussed in note 21 *infra*, have developed into an obligation for public agencies to promote racial and economic integration in housing. Regarding racial integration, see Otero v. New York City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973) (policy of accommodating present or former site occupants in public housing project should be suspended when it violates the housing authority's duty to integrate); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part*, 473 F.2d 910 (6th Cir. 1973) (where a high percentage of those on waiting list for federally subsidized housing are black, housing authority's failure to put most new projects in white areas violates federal public housing and civil rights statutes); Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970) (change in urban renewal plan from owner occupied to rental units based on land use factors only, and with no study of the effect on racial concentration, violated 1949 Housing Act and 1964 and 1968 Civil Rights acts).

5. The present regulations establishing site selection criteria for Section 8 newly constructed housing state that:

> Proposed sites for new construction projects must be approved by HUD as meeting the following standards:
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> . . . .
>
> (b) The site and neighborhood shall 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 . . . , and HUD regulations issued pursuant thereto.
>
> (c) The site shall not be located in:
>
> (1) An area of minority concentration unless (i) sufficient, comparable oppor-

as the relevant area.[6] In *King v. Harris*,[7] the United States District Court for the Eastern District of New York declared that using the census tract to define the area, without considering local social and economic factors, violates the federal housing policies of integration and antidiscrimination.[8]

In 1977, HUD approved a private developer's proposal to build

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tunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration . . . .

(2) A racially mixed area if the project will cause a significant increase in the proportion of minority to nonminority residents in the area.

(d) The site shall 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. § 880.112(b)-(d) (1979). These regulations were enacted in 1976, 41 Fed. Reg 17473 (1976), and amended in 1977, 42 Fed. Reg. 17110 (1977). Proposed rules for the Section 8 new construction program would reclassify these regulations to 24 C.F.R. § 880.206. *See* 44 Fed. Reg. 33804 (1979). While these proposed rules do not change the substance of the regulations, comments published with them indicate that revisions to the site selection rules have been published for comment. Presumably this reference is to the proposed site selection regulations cited in note 6 *infra*.

For project selection criteria for HUD programs in general, see 24 C.F.R. §§ 200.700-710 (1979).

6. Site and Neighborhood Standards for Subsidized Newly-Constructed or Substantially Rehabilitated Housing, 42 Fed. Reg. 4299 (1977), proposed as 24 C.F.R. § 200.704, but never enacted. The section reads in part:

(a) *Determination of minority concentration or racial mixture.* In furtherance of the objectives of the statutes and the Executive Order enumerated in this section [the Civil Rights Acts of 1964 and 1968, the Housing and Community Development Act of 1974 and Executive Order 11063 . . .] HUD shall determine:

(1) *Whether the site is in an area of minority concentration.* In making such determination, the area to be considered shall be the census tract

in which the site is located or such other area for which reliable data as to racial composition is available and which HUD determines, on the basis of functional considerations (i.e. location of neighborhood facilities such as schools, shopping centers, etc.) to be more appropriate. An area shall be determined to be an area of minority concentration if minority residents constitute (i) more than 40 percent of the residents of the area or (ii) a significantly greater proportion of the residents of the area than the proportion of minority residents of the locality as a whole.

42 Fed. Reg. 4299 (1977).

7. 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*, 100 S. Ct. 1828 (1980), in light of the Supreme Court's decision in Strycker's Bay Neighborhood Council, Inc. v. Karlen, 100 S. Ct. 497 (1980).

8. *Id.* at 839-40. The court suggested some model considerations. *See* text accompanying note 49 *infra*. Nevertheless, the court would not require specific guidelines for the agency, refusing to impede HUD's administrative discretion. *See* notes 14 & 73 and accompanying text *infra*.

low-income housing on Staten Island, New York under the Section 8 program.[9] Various groups and individuals, objecting to the proposal,[10] sued to enjoin construction of the project. On remand to HUD for further consideration, HUD reapproved the project, using the census tract encompassing the project site to determine minority concentration.[11] The Eastern District subsequently enjoined HUD from using federal funds for the project, holding that HUD violated its duty to promote integration.[12] Project approval not only would increase the volume of low-income housing in an area already inundated with such housing, but it also would cause the area to "tip" out of racial and economic balance, resulting in accelerated deterioration.[13] The court found abuse of administrative discretion[14] by

9. HUD previously had considered co-defendant Faymor Development's proposal for housing for the elderly at the same location. 464 F. Supp. at 831. Two of the six HUD divisions that review project proposals, the Equal Opportunity (EO) and Housing Management (HM) divisions, objected to that proposal, concluding that it would create an undue concentration of subsidized housing in the area. *Id.* All but the Economic and Market Analysis Division (EMAD), however, deemed the proposal at issue in *King* acceptable. EMAD had similar reservations as HM and EO had concerning the elderly project. It also criticized the use of 1970 census tract data as not reflective of present conditions. *See* note 11 *infra.*

10. Plaintiffs were Evelyn King, President of the Staten Island branch of the NAACP; Donald Asinobi and Amelia Hall, both of the Clifton Homeowners Association; Cynthia Mailman and Helen Rose of the Stapleton Civil Association; and Louis Wein of the Clayton Homeowners Association. Each sued as individuals and as organizational representatives. *Id.* at 827.

11. *Id.* at 832. The proposed project, Tenhill, was to be at a site in census tract 29, about 300 feet from tract 40 and adjacent to tract 27. A project called Stapleton Houses largely dominated tract 29; tract 40 encompassed five other complexes with high minority populations, all of which were near the proposed site. *Id.* at 833.

Despite acknowledgment in HUD's report of an increased concentration of low-income and minority residents since 1970, HUD looked only to census tract 29, to determine the relevant area. *Id.* at 832. For example, by 1978 the Stapleton Houses project had a minority population of 74.9%; also by 1978, four of the census tract 40 complexes had a combined minority population of 61.9%. *Id.* at 833 n.15. The minority population in Stapleton Houses alone, in relation to the total 1978 population of census tract 29, made the minority population in that tract more than 43%, a figure above the minimum percentage required under HUD's proposed regulations for an area to be considered concentrated. *See* note 6 *supra.*

12. 464 F. Supp. at 839, 840, 845.

13. *Id.* at 841-44. *See* notes 27-30 and accompanying text *infra.*

14. *Id.* at 839-40. The scope of review for HUD decisions is based upon the Administrative Procedure Act, 5 U.S.C. § 706 (1976), which states in part, "the reviewing court shall . . . (2) hold unlawful and set aside agency actions, findings and conclu-

HUD's use of the census tract alone to define the relevant area.[15]

Since 1949, the federal government has actively supported racial integration in housing.[16] The Civil Rights Acts of 1964[17] and 1968[18] facilitate that support through antidiscrimination and open housing policies.[19] As an extension of this policy, the Housing and Community Development Act of 1974[20] attempts economic integration in an effort to disperse low-income housing.[21]

In compliance with the statutorily defined racial and economic integration policies, HUD has promulgated various regulations which establish standards for project site selection.[22] Notwithstanding the

sions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), the Supreme Court indicated that the standard for judicial review of administrative actions is a narrow one; as long as a decision was "based on a consideration of the relevant factors," the court may not impose its own judgment. *Id.* at 416. *See* City of Lebanon v. HUD, 422 F. Supp. 803 (M.D. Pa. 1976) (review of HUD decision to subsidize elderly housing is extremely narrow).

The relevant factors which an agency must consider include any statutory requirements. *See* Schick v. Romney, 474 F.2d 309 (7th Cir. 1973) (informal agency action which doesn't comply with statutory requirements may be set aside). *See also* the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1976), which places the requirement on federal agencies to consider possible environmental effects of their actions.

15. 464 F. Supp. at 839-40.

16. *See* Housing Act of 1949, ch. 338, 63 Stat. 413 (codified in various sections of 12, 42 U.S.C.), which requires the government to encourage "the development of well-planned, integrated residential neighborhoods." 42 U.S.C. § 1441 (1976).

17. 42 U.S.C. § 2000d (1976).

18. *Id.* §§ 3601-3631.

19. *See* note 4 *supra.*

20. Pub. L. No. 93-383, 88 Stat. 633 (codified in various sections of 42 U.S.C.).

21. The statute calls for the revitalization of deteriorated neighborhoods, and the "spatial deconcentration of housing opportunities" for low-income persons. 42 U.S.C. § 5301(c)(6) (1976). *See* Hills v. Gautreaux, 425 U.S. 284 (1976) (remedy ordering dispersal of public housing throughout metropolitan area permissible for violation of federal integration policy that occurred inside central city); City of Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976) (HUD approval of a city's application for grants under Housing and Community Development Act of 1974, without appraisal of number of low- and moderate-income persons expected to reside in area, held arbitrary and capricious). *See generally* City of Hartford v. Towns of Glastonbury, 561 F.2d 1032 (2d Cir. 1976) (relation of deconcentration policy to expected to reside figures); *See also* Warren, *"Spatial Deconcentration:" A Problem Greater than School Desegregation*, 29 AD. L. REV. 577 (1977).

22. *See* 24 C.F.R. § 880.112 (1979) and discussion at note 5 *supra.* As early as 1967, HUD implemented rules for site approval for low-rent housing, using Title VI

apparent legality of the regulations, courts have declared the agency's administrative actions inconsistent with the federal policies.[23] In *Shannon v. HUD*,[24] the Third Circuit held that changing the type of proposed housing in an urban renewal area from owner occupied to rental, without considering the effect on racial concentration, violated the 1964 and 1968 civil rights statutes.[25] Under the court's ruling, HUD no longer could approve projects that would perpetuate minority concentration in an area and eventually result in urban blight.[26]

Similar analyses led to the adoption of the "tipping" doctrine in *Otero v. New York City Housing Authority*.[27] Initially this doctrine

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of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976); later, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 (1976), also served as statutory authority. *See, e.g.*, Department of Housing and Urban Development, LOW-RENT HOUSING HANDBOOK, RHA 7401.1 (1969). *See also* 24 C.F.R. § 1.4(b)(2)(i), (ii) (1979), placing responsibility on those agencies administering federally funded housing programs to comply with the objectives of the 1964 Civil Rights Act in selecting housing type and location. The court in Croskey Street Concerned Citizens v. Romney, 335 F. Supp. 1251 (E.D. Pa. 1971), *aff'd* 459 F.2d 109 (3d Cir. 1972), discussed the effect of this regulation. *See* note 31 *infra*.

In 1969 the new Secretary of HUD, George Romney, ordered new site selection regulations. These rules were published twice for comment. 36 Fed. Reg. 12032-38, 19316-20 (1971). HUD adopted the regulations in final form in 1972. Evaluation of Rent-Supplement Projects and Low-Rent Housing Assistance Applications, 37 Fed. Reg. 203 (1972). These regulations, now superseded by the regulations discussed below, were a response not only to Romney's initiative, but also to indications by courts that HUD should establish fixed criteria for site selection and approval. *See* notes 31-34 and accompanying text *infra*. For a criticism of the 1972 regulations, see Maxwell, *HUD's Project Selection Criteria—A Cure for "Impermissible Color Blindness"?*, 48 NOTRE DAME LAW. 92 (1972). *See also* Comment, 7 URBAN L. ANN. 336 (1974).

More recently, HUD assembled comprehensive regulations regarding project selection, in the form of an evaluation checklist for prospective projects. *See* 24 C.F.R. § 200.710 (1979). *Compare* these regulations *with* the regulations at 24 C.F.R. § 880.112 (1979), discussed in note 5 *supra*. The two sets of regulations coexist, and both exhibit the federal policy of deconcentration.

23. *See* notes 25-31 and accompanying text *infra*.

24. 436 F.2d 809 (3d Cir. 1970).

25. *Id.* at 820-21. The court considered land use, but not racial or social factors.

26. *Id. See* WARREN, *supra* note 21.

27. 484 F.2d 1122 (2d Cir. 1973). The *Otero* court described the "tipping" point of an area as the "percentage of concentration of nonwhite residents in a given area that will cause white residents to flee." *Id.* at 1135. The notion of "tipping" was further amplified in Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044 (S.D. N.Y. 1974), *modified*, 523 F.2d 88 (2d Cir. 1975). The district court established three criteria for determining if an area will tip: (1) the numbers of minority or other families which will likely affect the area in an adverse manner; (2) the quality of area facilities and services; and (3) the majority residents' attitudes as to the first two crite-

described the increase in minority concentration caused by accelerated majority flight and subsequent deterioration.[28] Courts more recently have extended "tipping" to include low-income concentrations as well.[29] Regardless of whether a project will cause a neighborhood

ria, which might influence their decision to remain in or leave the area. 387 F. Supp. at 1066.

28. The tipping doctrine evolved from a line of cases holding that building a project which will result in a disproportionate increase in minority concentration in an area is unacceptable under federal guidelines. Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044, 1064 (S.D. N.Y. 1974). Cases leading up to *Trinity* include Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970), discussed in note 21 *supra*; Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part*, 473 F.2d 910 (6th Cir. 1973) (where low-income projects were built only in predominantly black census tracts, the court ordered future construction in white areas); Blackshear Residents Organization v. Housing Auth. of City of Austin, 337 F. Supp. 1138 (W.D. Tex. 1971) (since procedures to choose and approve project site were inadequate, construction was enjoined until the area was shown not to be one of minority concentration).

Some school desegregation cases reflect a different view, *i.e.*, that the resulting possibility of majority emigration does not justify municipality's failure to carry out a court order of desegregation. *See, e.g.*, United States v. Scotland Neck Bd. of Educ., 407 U.S. 484 (1972) and Monroe v. Board of Comm'rs, 391 U.S. 450 (1968) (both involved resistance to a court ordered duty to integrate). *But see* Higgins v. Board of Educ., 508 F.2d 779 (6th Cir. 1974), where the court said that a school board formulating a voluntary desegregation plan may take the probability of "white flight" into consideration. *Id.* at 794. Both points of view were recognized in Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705 (2d Cir. 1979). The court distinguished *Higgins* from *Monroe* and *Scotland Neck* on the voluntary/involuntary basis. *Id.* at 719. The court then likened the "tipping" point considerations discussed in this note and in note 25 *supra* to the voluntary integrative actions applied by the school board in *Higgins*. *Id.* at 720.

It is questionable whether that analogy was proper. Courts require involuntary desegregation when the municipality or school board affirmatively caused all or part of the segregation. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (test for imposing remedial decree upon school board requires (1) proof of segregative intent on the part of the school board; (2) a showing that such intent caused a segregative effect; and (3) a remedy geared toward correcting any incremental segregative effect resulting from step 2, *i.e.*, from governmentally caused segregation). *But see* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, *reh. denied*, 444 U.S. 887 (1979) (Court may impose an affirmative duty to integrate schools regardless of past school board action). If HUD has an affirmative duty to integrate via statutory directive, its responsibility to do so is as strong as the constitutional duty to cure state-imposed school segregation. The court in *Ambach* may have erred, therefore, in analogizing the "tipping" doctrine only to voluntary desegregation cases.

29. In *King*, the court stated that the court in *Trinity* failed to recognize an economic "tipping" doctrine only because plaintiffs did not prove a correlation between minority and low-income populations. 464 F. Supp. at 844. But the court in *King* was willing to let a showing of such a correlation support a "tipping" approach. *Id.* For a discussion of the theory of economic "tipping", see Note, *Economic Tipping: An Approach to a Balanced Neighborhood*, 4 FORDHAM URB. L.J. 167 (1975).

to "tip," a high concentration of minority or low-income persons is inconsistent with federal policies.[30]

Such court decisions forced HUD to consider racial and socioeconomic factors in its site selection process. In *Shannon*, the court called on HUD to adopt an "institutionalized method" to examine these factors.[31] Having developed standardized methods, the Depart-

30. This view is consistent with the "spatial deconcentration" theory of the Housing and Community Development Act of 1974, as the cases in note 21 *supra* demonstrate. The National Environmental Policy Act of 1969 (NEPA) also has served as a basis for deciding low-income concentrations. *See* Karlen v. Harris, 590 F.2d 39 (2d Cir. 1978) *rev'd sub nom.*, Strycker's Bay Neighborhood Council, Inc. v. Karlen, 100 S. Ct. 497 (1980), a case spawned by the Second Circuit's remand in *Trinity*. In rejecting a site proposal for a public housing project, the court reasoned that building a high rise apartment for low-income tenants in an area where a large percentage of low-income housing already existed, constituted unacceptable concentration. The court said that, "tipping" aside, the concentration created by such construction would violate the policies established in NEPA, 42 U.S.C. § 4321 (1976). 590 F.2d at 43.

While *Karlen* and *Trinity* dealt with the provisions of NEPA and their effects on concentration, the *King* court did not reach the NEPA issue. In a footnote, however, the court referred to plaintiffs' post-trial memorandum and its claim that HUD violated NEPA by approving the project. Plaintiffs asserted that despite HUD's claim that NEPA was inapplicable, HUD was indeed bound by the Act. *See* Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044 (S.D. N.Y. 1974), *modified*, 523 F.2d 88 (2d Cir. 1975) (NEPA encompasses quality of urban life and environment); Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972) (jail construction enjoined pending General Services Administration determination of whether the jail would significantly affect environment). *See generally* Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972) (establishes considerations for determining if agency action will significantly affect environment); Note, *HUD's NEPA Responsibilities Under the Housing and Community Development Act of 1974: Delegation or Derogation?*, 10 URBAN L. ANN. 179 (1975) (discussing HUD's ability under the statute to give the basic responsibility for enforcing NEPA to grantee cities and counties). *See also* 24 C.F.R. § 880.208(e)(5) (1979), requiring HUD compliance with rules that list thresholds the agency must use to determine which projects will significantly affect quality of environment.

31. 436 F.2d at 821. The court suggested some considerations it would deem proper in analyzing the effect of site selection. These included the local public housing authority's analysis of effects on concentration, prospective tenant selection methods, present location of low-income housing, and alternative sites for the proposed project. *Id.* at 821-22.

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 said that HUD did consider the factors relevant to racial concentration. HUD regulations precluded the agency from approving housing in areas of racial concentration unless "alternative or additional sites in other areas provide a balanced distribution of the proposed housing." 24 C.F.R. § 1.4(b)(2)(i). The agency approved a site for elderly housing in a concentrated area noting that HUD had analyzed the racial composition of the area, had provided that projects would also be located outside concentrated areas, and had determined that elderly housing in concentrated areas is more integrated than the sur-

ment had sometimes managed to shield itself from judicial review. In *Jones v. Tully*,[32] HUD allowed a project in a predominantly black area after considering the factors relevant to concentration.[33] Since HUD had acted within its administrative discretion, the court refused to substitute its own judgment for the agency's[34] and upheld HUD's action.

While *Shannon* and *Jones* considered the effects of site selection on minority and low-income concentration,[35] only one court prior to *King* addressed the specific issue of relevant area definition.[36] In *Blackshear Residents Organization v. Housing Authority of the City of Austin*,[37] the district court held that HUD failed to consider federal antidiscrimination and open housing objectives when it had approved a project site.[38] Consistent with other site selection cases,[39] the court interpreted HUD's regulations to require an analysis of the effects site would have on concentration.[40] For that analysis, the *Blackshear* court suggested guidelines to define the relevant area by

rounding area. These considerations, the court stated, satisfied the requirements imposed by the two civil rights acts and by the *Shannon* case. 335 F. Supp. at 1255-57. *Also see* Marin City Council v. Marin City Redevel. Agency, 416 F. Supp. 707 (N.D. Cal. 1976) (agency's procedures apparently were adequate means of examining relevant factors in excluding further subsidized housing from city).

32 378 F. Supp. 286 (E.D. N.Y. 1974), *aff'd* 510 F.2d 961 (2d Cir. 1975).

33. 378 F. Supp. at 292-93. The court and evidently HUD believed that certain factors may "outweigh the disadvantages of racial concentration," and that "low income housing and racial concentration at a particular site are not mutually exclusive if justified by the relevant housing factors." *Id.* at 293. Here the apparent relevant factors were the need for both more low-income housing in the area and the rehabilitation of a blighted neighborhood. *Id. Compare* these rationales *with* the exceptions in the HUD regulations which allow sites in concentrated areas. *See* note 5 *supra*.

34. 378 F. Supp. at 292-93. The court followed the *Volpe* and *Schicke* approaches discussed in note 14 *supra*.

35. *See* notes 21 & 27-30 *supra*.

36. Blackshear Residents Organization v. Housing Auth. of City of Austin, 347 F. Supp. 1138 (W.D. Tex. 1972).

37. *Id.*

38. *Id.* at 1148.

39. *See* notes 31-34 *supra*.

40. 347 F. Supp. at 1145-46. HUD's regulations at the time did not allow the location of federally financed public housing in a racially concentrated area without an actual showing that no acceptable sites exist outside the area. The court cited HUD's LOW RENT HOUSING PRECONSTRUCTION HANDBOOK, RHA 7410.1, Chap. 1, § 1(2)(g). Since the regulation was the agency's interpretation of the civil rights laws, the court held HUD's administrative actions "judicially reviewable under the standard" set forth in the regulations. 347 F. Supp. at 1147.

considering the proximity of the project site to community facilities serving local residents.[41]

Relying only partially on *Blackshear*, the court in *King* cited several groups of cases to support its holding. The first group was school desegregation cases in which the courts stressed the importance of *ad hoc* determinations in framing effective remedies for *de jure* segregation.[42] Although the *King* court used this broad doctrine merely to point out the value of considering relevant social factors, one case provides a close parallel to *King*.[43] *Swann v. Charlotte-Mecklenburg Board of Education*[44] involved a segregated school system characterized by high concentrations of black students.[45] The Supreme Court, in ordering further desegregation, held local authorities and the district court responsible for the prevention of new school construction tending to encourage segregation.[46]

In addition to applying analyses from the school desegregation

41. *Id.* at 1148-49. Some of the facilities the court referred to were schools, parks, hospitals, libraries and community centers. *Id. Compare* the use of community facilities by the *Blackshear* court in defining the relevant area *with* HUD's proposed site selection regulations, *supra* note 6.

The court's "definition" of relevant area was only one of several factors the court suggested HUD might consider in determining effects on concentration. The other factors were similar to those the *Shannon* court listed. *See* note 31 *supra.*

Although other cases have stated the need for a "relevant area" determination, they have done so in a more general fashion than the *Blackshear* court. *Cf.* Otero v. New York City Hous. Auth., 484 F.2d 1122, 1137 (2d Cir. 1973) (parties may introduce evidence necessary to ascertain the "relevant community" for purposes of discovering whether "tipping" will occur); Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044, 1066-69 (S.D.N.Y. 1974) (district court used such evidence as the *Otero* court discussed in its "tipping" consideration). The *Trinity* court accepted the West Side renewal district as the relevant area, but qualified its acceptance by stating that the relevant community must be "measured against some standard or norm." *Id.* at 1066. The court did not elaborate upon the factors a court might use to establish such a norm; nevertheless, an official of the New York City Housing Authority testified that a norm is necessary.

42. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), *rehearing denied*, 403 U.S. 912 (1971); Green v. County School Bd. of New Kent, 391 U.S. 430 (1968).

43. *See* King v. Harris, 464 F. Supp. 827 (E.D. N.Y. 1979).

44. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), *rehearing denied*, 403 U.S. 912 (1971).

45. The Fourth Circuit approved the district court's desegregation plan for the secondary schools in question, but vacated and remanded on the issue of remedy regarding the elementary schools. The Supreme Court reinstated the district court's order in its entirety. 402 U.S. at 31.

46. The Court stated that school location may influence residential development

area, the *King* court adopted a general "relevant factor" analysis for housing, implying a strong correlation between neighborhood definition and the achievement of residential integration.[47] Since neighborhood definition requires consideration of many unique abstract factors, the court mandated an *ad hoc* definition in each case.[48] Elements which might enter the consideration include common public facilities, shared perceptions, social and economic status of residents, and physical and ephemeral boundaries.[49]

The *King* court reinforced its argument by explaining that courts[50]

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in an urban area and may have a strong impact on the make-up of inner-city neighborhoods. *Id.* at 20-21.

In reaching its conclusion, the *Swann* court relied on Green v. County School Bd. of New Kent, 391 U.S. 430 (1968). *Green* involved a freedom-of-choice school program which the lower court found maintained a dual system. Overturning the school board's plan, the Court stated that each desegregation case must promise "immediate progress," and that the lower courts should consider if that goal has been reached "*in light of the facts at hand* and in light of any alternatives which may be shown as feasible and more promising in their effectiveness." (Emphasis added) *Id.* at 439.

47. King v. Harris, 464 F. Supp. 827, 839 (E.D. N.Y. 1979).

48. *Id.* at 839, 841.

49 *Id.* at 839.

50. Gautreaux v. City of Chicago, 480 F.2d 210 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974) (metropolitan area remedy for segregation in inner city); Henry v. Clarksdale Mun. Separate School Dist., 409 F.2d 682 (5th Cir. 1969), *cert. denied*, 396 U.S. 940 (1969) (school zone boundaries maintaining segregated system were held impermissible); Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987 (E.D. Pa. 1976), *modified*, 564 F.2d 126 (3d Cir. 1977) ("freedom-of-choice" housing plan which led in practice to concentration of public housing in black areas was invalid); Blackshear Residents Organization v. Housing Auth. of City of Austin, 347 F. Supp. 1138 (W.D. Tex. 1972), discussed in notes 31-34 and accompanying text *supra*; Banks v. Perk, 341 F Supp. 1175 (N.D. Ohio 1972), *aff'd in part*, 473 F.2d 910 (6th Cir. 1973) (history of locating public housing in predominantly black census tracts was inconsistent with national housing policy).

Gautreaux is one of several cases extending from the same nucleus of facts. Claiming the Chicago Housing Authority (CHA) site selection process for public housing was unconstitutional, black tenants in and applicants for that housing sued HUD and CHA in separate lawsuits. In 1969, the district court upheld plaintiffs' motion for summary judgment in the CHA suit, finding the CHA violated plaintiffs' constitutional rights by choosing sites on the basis of race. Gautreaux v. CHA, 296 F. Supp. 907 (N.D. Ill. 1969). The court ordered CHA to build a certain number and percentage of public housing units in white areas. Ignoring the city's boundaries, the court included the Chicago metropolitan area in the remedial plan. Gautreaux v. CHA, 304 F. Supp. 736, 738-39 (N.D. Ill. 1969).

The court grouped *Henry*, a school desegregation case, with the cases ignoring existing boundaries. The *Henry* court held that as long as all-black or all-white schools exist, the desegregation plan was unconstitutional, and the local school board must redraw its attendance zone boundaries. 409 F.2d at 690. Ignoring existing bounda-

often ignore existing physical and designated boundaries in defining the relevant area for integration. In *Banks v. Perk*,[51] the local housing authority consistently built projects in census tracts having primarily black populations.[52] Devising a remedy to disperse public housing,[53] the court ordered the authority to compensate for its past actions by building projects in predominantly white areas.[54] The Supreme Court reaffirmed the goal of dispersion in *Hills v. Gautreaux*.[55] Since both HUD and the local housing authority had regional jurisdiction, the Court upheld a remedial order which

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ries, however, especially in the desegregation context, is merely one application of the *ad hoc* determination doctrine. *See* notes 42-46 and accompanying text *supra*.

The *Henry* court cited Braxton v. Board of Pub. Instruction of Duval, 303 F. Supp. 958 (M.D. Fla. 1967), for the proposition that school boards may not use zone boundaries which maintain segregated school sytems. 409 F.2d at 690. *Accord*, United States v. Texas Educ. Agency, 467 F.2d 848 (5th Cir. 1972) (where attendance zones were drawn sending almost all students to schools where they composed either a large racial majority or a small racial minority, court made the school board abandon its present system).

51. 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part*, 473 F.2d 910 (6th Cir. 1973).

52. *Id.* The court held that the local housing authority and the city, by allowing revocation of permits for projects in predominantly white areas, denied plaintiffs equal protection. 341 F. Supp. at 1179. The court in King v. Harris did not reach a constitutional issue, nor was one presented by the parties. For a case which explicitly considered the constitutionality of site selection, see Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969). The court in *Hicks* said that where the purpose for choosing a particular site was to perpetuate segregation, HUD approval of the site violated not only the 1964 Civil Rights Act, but also the Fourteenth Amendment. *Id.* at 623.

53. 341 F. Supp. at 1184. The court acknowledged that "dispersal" was susceptible of many definitions. The definition the court adopted was "that if historically housing has been built primarily in one area or section of the city, housing must be built in other areas or sections of the city until such time as all the public housing in the city is dispersed." *Id. Compare Banks with* Resident Advisory Bd. v. Rizzo, 425 F. Supp. 987 (E.D. Pa. 1976), *modified*, 564 F.2d 126 (3d Cir. 1977) (housing authority had an affirmative duty to work toward dispersing public housing).

54. 341 F. Supp. 1175, 1184. It is unclear which "boundary" the *King* court perceived in the *Banks* situation. It is likely the boundaries in question were census tract divisions, since, by the end of 1964, nine of 11 public housing estates in the city of Cleveland reflected the racial composition of the surrounding census tracts. 341 F. Supp. at 1181.

For a school case analogous to *Banks*, see Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941 (1979) (Supreme Court approved lower court's reliance on board's school site selection and construction patterns in finding school system segregated).

55. 425 U.S. 284 (1976). This is the parallel case to Gautreaux v. City of Chicago, discussed in note 50 *supra*. In another *Gautreaux* case, after the district court originally granted HUD's motion for dismissal, the Seventh Circuit reversed and ordered summary judgment for plaintiffs on the grounds that HUD violated the Fifth Amendment and the Civil Rights Act of 1964 by supporting CHA's program. Gautreaux v.

transcended the boundaries of the offending city.[56] Dispersing low-income housing throughout the metropolitan market would, according to the *Gautreax* Court, best fulfill the goal of integration.[57]

The court in *King* thus borrowed doctrine from several lines of cases to argue that the isolated use of census tracts constituted an abuse of HUD's administrative discretion.[58] The defendants argued to the contrary, that previous agency reliance on census tract data should similarly allow reliance by HUD in the *King* situation.[59] The court refuted that argument on two grounds. First, defendants did not prove such reliance; the local HUD field office did not agree upon the appropriate criteria to apply.[60] Second, the court clarified that it was not eliminating census tract analysis as a tool for defining the relevant area; rather, it held that using census tract data alone is insufficient.[61]

By adopting an *ad hoc* test to define a relevant area[62] and by refus-

Romney, 448 F.2d 731, 739-40 (7th Cir. 1973). The case again was remanded and eventually reached the Supreme Court in the decision discussed in notes 56-57 *infra*.

56. 425 U.S. 284, 293-95 (1976). The decision dealt with the effect of Milliken v. Bradley, 418 U.S. 717 (1974), on remedies directed toward a broader area than the violating municipality. In *Milliken*, the Court overturned a plan incorporating school districts throughout metropolitan Detroit in a remedy for discrimination in the central city. Local autonomy was a major reason in the Court's holding. 418 U.S. at 738-40. In *Hills*, the Court only viewed *Milliken* as a bar in situations where no constitutional violation had occurred. The *Hills* Court found that HUD violated the Fourteenth Amendment. 425 U.S. at 297.

57. 425 U.S. at 299-300. The Court said that HUD acknowledged this type of metropolitan market analysis, citing HUD's FHA TECHNIQUES OF HOUSING MARKET ANALYSIS 13 (January 1970). 425 U.S. at 300.

58. *See* notes 42-57 and accompanying text *supra*.

59. King v. Harris, 464 F. Supp. 827 (E.D. N.Y. 1979). *See, e.g.*, Leary v. United States, 395 U.S. 6, 25 (1969) (a long standing construction of a statute is "entitled to great weight"); Udall v. Tallman, 380 U.S. 1, 16 (1965) (court shows "great deference" toward agency interpretation of statute); Kenai Peninsula Borough v. Andrus, 436 F. Supp. 288, 291 (D. Alaska 1977) (long standing, practical interpretation of statute by executive officers who administer it is "strong evidence of meaning"). *But see* Fletcher v. Housing Auth. of Louisville, 491 F.2d 793 (6th Cir. 1974). The court in *Fletcher* held that to the extent a local regulation conflicts with a housing authority's duty to integrate, the regulation must yield. *Id.* at 798.

60. 464 F. Supp. at 840. Plaintiffs-appellees stated in their brief that conflict arose between HUD's experts as to which criteria to apply. The EO specialist believed that the census tract was the only datum he was allowed to consider. The director of the HUD Office of Program Standards testified that the agency's policy did not preclude looking at other data besides the census tract. Brief for Plaintiffs-Appellees at 23.

61. 464 F. Supp. at 839-40.

62. *See* notes 36-41 and accompanying text *supra*.

ing to sanction construction which would accelerate minority- or low-income concentration within the relevant area,[63] the *King* court consistently reasserted HUD's duty to promote integration in public housing.[64] The decision is also consistent with sociological and economic analyses[65] by urban geographers who have studied residents' perceptions of their neighborhoods,[66] and have used these perceptions to construct models for community planning and development.[67] Economic studies of neighborhoods indicate that blight and disinvestment do not fit within the lines drawn by census tract divisions.[68]

As *King* rejects methods which fail to consider relevant features of the particular project area,[69] the proposed site selection regulations violate *King* to the extent they allow HUD to define an area by the

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63. *Cf.*, Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973).

64. *See* notes 5 & 23-29 and accompanying text *supra.*

65. *See* Hunter, *The Urban Neighborhood: Its Analytical and Social Contexts*, 14 URB. AFF. Q. 267 (1979).

66. *See* A. RICHMAN & F. CHAPIN, A REVIEW OF THE SOCIAL AND PHYSICAL CONCEPTS OF THE NEIGHBORHOOD AS A BASIS FOR PLANNING RESIDENTIAL ENVIRONMENTS (1977); R. DOWNS & D. STEA, IMAGE AND ENVIRONMENT: COGNITIVE MAPPING AND SPATIAL BEHAVIOR (1973); UNIVERSITY OF PITTSBURGH, GRADUATE SCHOOL OF PUBLIC AND INT'L AFFAIRS, PERCEPTION OF THE HOUSING ENVIRONMENT: A COMPARISON OF RACIAL AND DENSITY PREFERENCES (1971); Ladd, *Black Youths View Their Environment*, 2 ENVIRONMENT & BEHAVIOR 74 (1970). *See generally* K. LYNCH, THE IMAGE OF THE CITY (1960).

67. Two of the studies cited in note 66 *supra* are especially helpful in understanding how planners explore and apply people's perceptions of their environments. The Pittsburgh study presents an excellent social science construct of the actual process of perception, and then applies the analysis to a number of variables in the neighborhood context, e.g., life styles, familial ties, social stratification, and housing densities. The Richman and Chapin study, on the other hand, relies more on the work of prominent planning analysts, and uses their work on neighborhood structure as a springboard for their own approach to residential planning. People's perceptions, however, also play an important part in their study. *See* A. RICHMAN & E. CHAPIN, *supra* note 66, at 7-17.

68. *See* Werner, Frej & Madway, *Redlining and Disinvestment: Causes, Consequences, and Proposed Remedies*, 10 CLEARINGHOUSE REV. 501 (1976). *See generally* M. STEGMAN, HOUSING INVESTMENT IN THE INNER CITY: THE DYNAMICS OF DECLINE (1972).

69. 464 F. Supp. 827, 839 (E.D. N.Y. 1979). "While 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." *Id.*

surrounding census tract.[70] The regulations, however, also allow HUD to use as an alternative method, an area for which racial composition data is available, and which HUD determines is appropriate in light of "functional considerations."[71] Such a test might well remain consistent with *King*.

King's consistency with strong national policy should win the holding further judicial support.[72] Nevertheless, the case may create problems on two levels. First, HUD is likely to argue that the ambiguity of the *King* decision, by failing to require specific criteria for defining the relevant area, may leave the agency open to attacks on its administrative discretion.[73] The typical limitation on that discretion, arbitrariness and capriciousness,[74] however, will be exercised only if HUD ignores the federal housing policies in making its decisions.[75] The importance of *King* may be to effectuate HUD's examination of social and economic indicia when determining the make-up of a relevant area.

More generally, the case questions the use of census tracts and census data in administrative decisionmaking. HUD and other agencies use the data to obtain information about neighborhoods and communities because it is reliable and administratively convenient to do

70. *Compare* the proposed regulations, *supra* note 6, *with* the court's comment cited in note 64 *supra*.

71. Proposed Regulation 24 C.F.R. § 200.704(1), 42 Fed. Reg. 4299 (1977).

72. The Second Circuit has consistently supported policies of integration, deconcentration and dispersal of public housing. *See, e.g.*, Karlen v. Harris, 590 F.2d 39 (2d Cir. 1978) (building low-income project in area with high percentage of low-income persons violates deconcentration policy); Otero v. New York City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973) (policy of providing space for former site occupants must be suspended when it violates housing authority's duty to integrate); Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044 (S.D. N.Y. 1974), *modified*, 523 F.2d 88 (2d Cir. 1975) (building project in area already mainly low-income violates policy of the National Environmental Policy Act of 1969).

73. But the agency's discretion has been recognized as extremely wide. *See, e.g.*, South East Chicago Comm'n v. HUD, 488 F.2d 1119 (7th Cir. 1973). HUD made a decision to maintain a commitment to a federally subsidized housing project, based on the conclusions that 1) the project would probably be integrated when rented, 2) even if not, no significant impact on local stability or on racial concentration of the area would result, and 3) the project was needed by low-income residents of the area. The Seventh Circuit held that these considerations alone proved that HUD did not make its decision in ignorance of the particular facts of the situation. *Id.* at 1129-30. *See also* Jones v. Tully, discussed in notes 32-34 and accompanying text *supra*.

74. *See* note 15 *supra*.

75. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

so.[76] *King* requires the federal government to develop more sensitive mechanisms for defining and studying neighborhood characteristics in those situations in which reliance on census tracts might violate the federal policies of antidiscrimination and integration.

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76. For an excellent example of the many uses to which census data is put, see the DATA USER NEWS, published by the Bureau of the Census. The publication regularly describes programs undertaken by the Bureau in conjunction with federal agencies and departments.