DE FACTO SEGREGATION IN LOW-RENT PUBLIC HOUSING

I. INTRODUCTION

Low-rent public housing was permanently established as a federal program by the United States Housing Act of 1937.[1] This Act provides for the operation of low-rent housing facilities by local public housing agencies[2] and authorizes annual federal financial contributions[3] to these agencies to make up the differences between operating costs and rent receipts from project tenants. The primary criterion for admission to low-rent facilities is the financial need of the applicant.[4] One problem in the administration of low-rent housing not covered by the federal statute—and a problem which has aroused much dissatisfaction—is the extent to which public housing projects have become racially segregated.[5] In view of recent trends toward improving the racial mix in the private housing stock,[6] segregation in public housing invites analysis and discussion.

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1. Act of Sept. 1, 1937, ch. 896, 50 Stat. 888. Earlier federal programs had provided housing for certain groups during World War I and the early Depression years. Comment, *Discrimination in Low Rent Housing*, 64 MICH. L. REV. 871, 873, n. 14 (1966). The present law is in 42 U.S.C. § 1401 (1964).

2. "The term 'public housing agency' means any State, county, municipality, or other governmental entity or public body (excluding the Administration), which is authorized to engage in the development or administration of low-rent housing or slum clearance." 42 U.S.C. § 1402(11) (1964).

3. "The Administration may make annual contributions to public housing agencies to assist in achieving and maintaining the low-rent character of their housing projects." 42 U.S.C. § 1410(a) (Supp. II, 1966).

4. "The dwellings in low-rent housing shall be available solely for families of low income. [I]ncome limits for occupancy and rents shall be fixed by the public housing agency and approved by the Administration after taking into consideration (A) the family size, composition, age, physical handicaps, and other factors which might affect the rent-paying ability of the family, and (B) the economic factors which affect the financial stability and solvency of the project." 42 U.S.C. § 1402(1) (Supp. II, 1966).

5. Mulvihill, *Problems in the Management of Public Housing*, 35 TEMP. L. Q. 163, 175-78 (1962); Comment, *Discrimination in Low-Rent Housing, supra* note 1, at 871-73, 875. Note, *Discrimination Against Minorities in the Federal Housing Programs*, 31 IND. L. J. 501 (1956). *See* Flipper, *De Facto Segregation in Public Housing*, Appendix (unpublished manuscript on file in Washington University School of Law Library, May, 1966).

6. The past year, for example, has seen a substantial increase in the number of states with fair housing laws applicable to all or part of the private housing market. Twenty-one states now have such legislation. Trends in Housing, May, 1967, at p. 1, col. 1.

In some communities, especially in the South, segregation has resulted from the formal, official policies of the local authority, either in tenant selection and assignment, or site selection.[7] However, even where there has been no overt discrimination by the local authority, segregation has been produced de facto.[8] That is, segregation has not resulted from conscious and formal policies of the local authority, but has been a product of the distribution of housing racially within the community. The purpose of this paper is to look into the problem of de facto segregation in public housing to determine the constitutional duty of the local authority to eliminate de facto patterns, and to consider what administrative steps dealing with de facto segregation are constitutionally permissible.

A. The Problem

De facto patterns of segregation in public housing are largely a product of the economic status of Negroes and the distribution of Negroes in the urban core. In 1963, nearly one-half of the nonwhite families living in the United States had incomes of less than $3,000.[9] Census figures for the five largest Standard Metropolitan Statistical Areas indicate that from 86% to 89% of Negroes living in these areas reside within the central city.[10] Because large numbers of Negro families reside in the urban core, many have been displaced by urban renewal and related community demolition and rehabilitation programs. What emerges from these figures is the simple fact that the incidence of eligible and preferred categories of applicants for low-rent public housing is disproportionately high among Negroes. To define what de facto segregation means in a context where the legislation aids a class composed predominantly of Negroes is an enormously difficult task.

Some of the difficulties encountered by local housing authorities pursuing non-discriminatory site selection and tenant selection and

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7. Comment, *Discrimination in Low-Rent Housing*, *supra* note 1, at 871-73, 875-76. *See* Flipper, *supra* note 5, Appendix.

8. Comment, *Discrimination in Low-Rent Housing*, *supra* note 1, at 872-73. *See* Flipper, *supra* note 5, Appendix.

9. UNITED STATES BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 344 (86th ed. 1965).

10. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, METROPOLITAN SOCIAL AND ECONOMIC DISPARITIES: IMPLICATIONS FOR INTERGOVERNMENTAL RELATIONS IN CENTRAL CITIES AND SUBURBS 234-49 (1965).

assignment policies are squarely raised by the following hypothetical problem.

Suppose, for example, that a local authority wishes to construct and operate two low-rent housing projects and to avoid racial segregation. The authority looks for sites which will not, by reason of proximity to all-white or all-Negro neighborhoods, affect the racial composition of the projects. Two sites are chosen, each in a neighborhood evenly divided between Negro and white residents. Identical projects are constructed.[11] Pursuant to its non-discriminatory policy, the authority adopts an open occupancy plan which permits applicants to state their preference in project assignment when they apply.[12] Assignment to projects is made at random as vacancies occur. The projects are completed, applications are accepted, and the projects begin to fill. Then a shift in racial patterns of residence occurs. One of the mixed neighborhoods turns all-Negro and the other becomes all-white. Application preferences for project accommodations are affected. Soon, only white applicants indicate a preference and will accept assignment in the project located in the all-white neighborhood. Only Negro applicants indicate a preference and will accept assignment in the project located within the all-Negro neighborhood. The projects soon become racially segregated.

Assuming that the local authority considers the racial mix undesirable and wishes to adopt administrative measures which will produce a change, several questions can be asked. What administrative measures can be devised to eliminate the de facto pattern? Will the remedy adopted by the housing authority fall within the ambit of what is constitutionally permissible? For example, may the authority force-assign tenants to project accommodations in order to alter the racial mix in a project? On the other hand, does the constitution command that the local authority act affirmatively to eliminate the de facto segregation? Or does the constitutional mandate extend no further than to require that tenants and sites be selected in a non-discriminatory manner? These questions will be discussed in the following pages, in light of the controlling federal statutes and regulations, and the case law.

11. Throughout this article, it is assumed that project integration is meaningful only for projects at or over a certain size. For purposes of this discussion, the writers believe that racial integration by project is meaningful only for projects which house 200 families or more. Until recently, at least in large cities, the tendency to build projects of this size or larger was the dominant pattern.

12. For discussion of free choice tenant selection and assignment plans, *see* the text at notes 63-73, *infra.*

B. Statutory Background

Maximum responsibility for the administration of the federally-assisted low-rent public housing program is vested in local public housing authorities.[13] Pursuant to state enabling legislation,[14] local authorities contract directly with the Housing Assistance Administration of the Department of Housing and Urban Development[15] for annual financial contributions. Unlike programs in which the federal government makes a one-time grant to a local recipient,[16] the contractual federal-local relationship in public housing may continue for a period of sixty years.[17] As a result, conditions written into the annual contributions contract between the federal agency and the local authority provide a continuing opportunity for federal leverage over local project administration.

Eligibility criteria are stated in the federal statute. Families of low income[18] are alone[19] eligible for low-rent public housing. Although

13. "It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements (subject to the approval of the Authority), with due consideration to accomplishing the objectives of this chapter while effecting economies." 42 U.S.C. § 1401 (1964).

14. *E.g.*, N.J. Stat. Ann. § 55:14A-4 (1964) (provides for creation of housing authorities by resolution of local governing body); Pa. Stat. Ann. tit. 35, § 1544 (1964) (creates housing authorities for each city and county, to become operative upon finding of need by local governing body or Governor).

15. The United States Housing Authority was created in 1937 to administer the low-rent housing program. 50 Stat. 889 (1937). In 1947, the functions of the Authority were transferred to the Housing and Home Finance Agency and its name changed to the Public Housing Administration. Reorganization Plan No. 3 of 1947, 5 U.S.C. § 133y-16 (1964). In 1965, the functions of the Public Housing Administration were transferred to a newly created Department of Housing and Urban Development. 5 U.S.C. § 624c (Supp. II, 1966). The responsible agency is now known as the Housing Assistance Administration.

16. *See* 42 U.S.C. § 1453 (1964) (urban renewal).

17. "In no case shall any contract for annual contributions be made for a period exceeding sixty years: *Provided,* That, in the case of projects initiated after March 1, 1949, contracts for annual contributions shall not be made for a period exceeding forty years from the date the first annual contribution for the project is paid. . . ." 42 U.S.C. § 1410(c) (Supp. II, 1966).

18. The current statute provides that "families of low income" means "families (including elderly and displaced families) who are in the lowest income group and who cannot afford to pay enough to cause private enterprise in their locality or metropolitan area to build an adequate supply of decent, safe, and sanitary dwellings for their use." 42 U.S.C. § 1402(2) (Supp. II, 1966). Most amendments of this sub-section have altered the definition of "families," "elderly families," and "displaced families." However, the description of "families of low income" has remained the same.

19. "[D]wellings in low-rent housing shall be available solely for families of low income." 42 U.S.C. § 1402(1) (Supp. II, 1966).

the formula for determining income ceilings has undergone change,[20] this economic test remains the sole criterion for eligibility. However, statutory preferences[21] in admission policies have distorted the demographic characteristics of low-rent tenants. The pressure of large numbers of preferred applicants and a shortage of low-rent accommodations have worked to exclude otherwise eligible applicants from public housing. The present statute requires local authorities in determining the order of admission to consider the applicant's status as a person displaced by urban renewal or other governmental action, as a serviceman or veteran, and his health, age and family size.[22] It

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20. The original Act provided that net income of families "at the time of admission [shall] not exceed five (sic) times the rental (including the value or cost to them of heat, light, water, and cooking fuel), of the dwellings. . . ." Act of Sept. 1, 1937, ch. 896, § 2(1), 50 Stat. 888; this section was twice amended to provide exemptions in computing net income. Act of July 15, 1949, ch. 338, § 306, 63 Stat. 429; Act of July 12, 1957, Pub. L. No. 85-104, § 401 (a), 71 Stat. 301. The present provision, which appeared in a slightly modified form in the Act of Sept. 23, 1959, Pub. L. No. 86-372, § 503(a)(1), 73 Stat. 680, now reads "[I]ncome limits for occupancy and rents shall be fixed by the public housing agency and approved by the Authority after taking into consideration (A)the family size, composition, age, physical handicaps, and other factors which might affect the rent-paying ability of the family, and (B) the economic factors which affect the financial stability and solvency of the project." 42 U.S.C. § 1402 (1) (Supp. II, 1966).

21. Preferences in tenant selection were first introduced by the Act of July 15, 1949, ch. 338, § 302, 63 Stat. 423, which provided that preferences be extended to 1) "families . . . displaced by any low-rent housing project or by any slum-clearance or redevelopment project . . . and as among such families" first preference should be given families of disabled veterans, second preference to families of deceased veterans and servicemen, and third preference to families of other veterans and servicemen; 2) "families of other veterans and servicemen and as among such families" first preference should be given to families of disabled veterans, second preference to families of deceased veterans and servicemen. Generally, "veterans" and "servicemen" are persons who have served in the "active military" during World Wars I and II and in the Korean conflict. Act of Oct. 26, 1951, ch. 577, § 1, 65 Stat. 647; Presidential Proclamation No. 3080, 20 Fed. Reg. 173, January 7, 1955.

In 1954, the class of preferred "displaced families" was extended by including in addition to persons described in the Act of July 15, 1949, families displaced by an "urban renewal project, or through action of a public body or court, either through the enforcement of housing standards or through the demolition, closing, or improvement of dwelling units." Provisions relating to veterans and servicemen remained the same. Act of Aug. 2, 1954, ch. 649, § 401 (2), 68 Stat. 631. The present provision appeared, with slight modification, in the Act of June 30, 1961, Pub. L. No. 87-70, § 205(a), 75 Stat. 164.

22. "[T]he public housing agency shall adopt and promulgate regulations establishing admission policies which shall give full consideration to its responsibility

should be noted, however, that for a long period of time the preference in favor of displaced families was absolute.[23] Viewed against the backdrop of economic and demographic data presented earlier, the statutory eligibility structure itself seems to explain, at least in part, why admission policies tend to favor Negroes disproportionately.

The Housing Act of 1937 did not prohibit racial discrimination in low-rent public housing.[24] For the most part, state enabling legislation remained silent on the point.[25] Generally, racial discrimination has been attacked collaterally by civil rights legislation.[26] A few state statutes and local fair housing ordinances[27] apply to public housing. They are not considered in this article, which is limited to the impact of federal civil rights action on the public housing program.

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for the rehousing of displaced families, to the applicant's status as a serviceman or veteran or relationship to a serviceman or veteran or to a disabled serviceman or veteran, and to the applicant's age or disability, housing conditions, urgency of housing need, and source of income: Provided, That in establishing such admission policies the public housing agency shall accord to families of low income such priority over single persons as it determines to be necessary to avoid undue hardship." 42 U.S.C. § 1410(g)(2) (1964). For definitions of who is included in a "Family" see 42 U.S.C. § 1402(2) (Supp. II, 1966). The policy to provide for larger families is not new, for in the original legislation Congress declared that "In the development of low-rent housing it shall be the policy of the United States to make adequate provision for larger families and for families consisting of elderly persons." 42 U.S.C. § 1401 (1964).

23. This was the case from 1949 until 1961, when the present provision was substantially enacted.

24. It has been suggested that refusal to prohibit racial discrimination by public housing agencies was prompted in part by fear of losing Southern political support for the low-rent housing program. Comment, *Discrimination in Low-Rent Housing, supra,* note 1, at 871, 875. *See,* Mulvihill, *Problems in the Management of Public Housing, supra* note 5, at 163. For a discussion of subsequent proposed amendments to prohibit discrimination *see* Note, *Discrimination Against Minorities in the Federal Housing Programs, supra* note 5, at 501, 502, n. 13.

25. Initial enabling legislation frequently did not mention racial discrimination in low-rent public housing. *E.g.,* Pa. Stat. Ann. tit. 35, §§ 1544-53 (1964). In some states, a non-discrimination requirement has been incorporated into the enabling act by amendment. *E.g.,* N.J. Stat. Ann. § 55:14-A7.5 (1964) (added 1950); N.Y. Pub. Housing Law, § 223 (McKinney 1955) (added 1945).

26. *E.g.,* N.Y. Civ. Rights Law § 18(a) McKinney's Supp. 1966); N.Y. Exec. Law § 296 (McKinney's Supp. 1966).

27. For a collection of state fair housing laws and municipal fair housing ordinances *see* UNITED STATES HOUSING AND HOME FINANCE AGENCY, FAIR HOUSING LAWS (Sept. 1964).

II. Tenant Selection and Assignment

A. Judicial Reaction to Quota Systems

Up to 1954,[28] the constitutional law doctrine of *Plessy v. Ferguson*,[29] that separate but equal facilities for whites and Negroes was constitutionally permissible, chartered the racial policies of local public housing authorities.[30] For most of this period, the federal Public Housing Administration (predecessor to the present Housing Assistance Administration) left the problem of accommodating both races to local authorities, while sanctioning segregated facilities.[31] One issue arising out of deliberate segregation of Negroes was the number of units to be set aside for non-white use.[32] Early federal regulations required that the local admission policy "reflect equitable provision for [the] eligible families of all races, determined on the approximate volume and urgency of their respective needs for [low-rent] housing."[33] To implement the "equitable provision" requirement, many authorities turned to quota systems.

A simple plan was to evenly divide available dwelling units between Negro and white applicants. A more complex "neighborhood composition" plan had several variations. Originally, this plan established an occupancy ratio for public housing projects which reflected the ratio between Negroes and whites in the neighborhood in which the project was located. More equitable versions of the "neighborhood composition" plan constructed occupancy ratios from the proportion of whites and Negroes living in the community at large, instead of in the immediate neighborhood of a project. One of these "community ratio" plans established an occupancy ratio based upon the proportion of whites to Negroes living in the community; another constructed an occupancy ratio from the proportion of whites to Negroes in the community who were eligible for public housing. Each of these quota

28. Brown v. Board of Educ., 347 U.S. 483 (1954).

29. 163 U.S. 537 (1896).

30. Comment, *Discrimination in Low-Rent Housing, supra* note 1, at 871, 875; Note, *Discrimination Against Minorities in the Federal Housing Programs, supra* note 5, at 501, 502-03.

31. Note, *Discrimination Against Minorities in the Federal Housing Programs, supra* note 5, at 501, 503, n. 15.

32. Mulvihill, *Problems in the Management of Public Housing, supra* note 5, at 163; Navasky, *The Benevolent Housing Quota,* 6 How. L. J. 30 (1960).

33. *Public Housing Administration, Low-Rent Housing Manual* § 102.1 (Feb. 21, 1951), (hereinafter cited as MANUAL); Note, *Discrimination Against Minorities in the Federal Housing Programs, supra* note 5, at 501, 503, n. 14.

plans was the subject of litigation in the early 1950's. In *Woodbridge v. Evansville Housing Authority*,[34] where the facts showed that more Negroes lived in substandard housing than whites, the court held that a fifty-fifty quota between whites and Negroes denied equal protection of the laws. In *Banks v. Housing Authority of San Francisco*,[35] the court rejected a plan which retained local "neighborhood composition" ratios for existing projects, but which proposed to allocate units in all new construction so that the ratio of whites to Negroes eventually residing in all the Authority's accommodations would equal the ratio of needy whites to needy Negroes living in the San Francisco area.[36] The court's decision to open all Authority accommodations to all eligible applicants regardless of race,[37] implicitly rejected both the "neighborhood composition" quota plan and the more equitable "community ratio" concept. Although the precise basis of the decision is not clear, the court presented several reasons in the course of a lengthy opinion. First, quotas recognize only group rights, contrary to the theory that the Fourteenth Amendment protects personal rights.[38] Second, quotas exclude from low-rent housing eligible persons given statutory preference by Congress.[39] Third, the court found the plan deficient because it did not meet standards evolved under the "separate but equal" doctrine.[40] Fourth, the plan constituted state preservation of neighborhood racial patterns in violation of the spirit enunciated by the racially Restrictive Covenant Cases.[41] In *Taylor v. Leonard*,[42] Negro applicants were admitted to segregated

34. Civil No. 618, S. D. Ind. (1953).

35. 120 Cal. App. 2d 1, 260 P.2d 668 (1953), *cert denied*, 347 U.S. 974 (1954).

36. A survey showed that the ratio of need between whites and non-whites was 70/30. However, at the time the new plan was proposed less than 30 per cent of the Authority's housing was allocated to non-whites.

37. 120 Cal. App. 2d at 4, 5, 260 P.2d at 670. Actually this statement was part of the lower court's holding which was affirmed by the District Court of Appeal

38. *Id.* at 8, 9, 260 P.2d at 673.

39. *Id.* at 9, 260 P.2d. at 673.

40. *Id.* at 9-17, 260 P.2d at 673-678. The court discussed the line of cases interpreting the separate but equal doctrine enunciated in Plessy v. Ferguson, 163 U.S. 537 (1896), and rejected the result in Favors v. Randall, 40 F. Supp. 743 (E.D. Pa. 1941).

41. 120 Cal. App. 2d at 14-15, 260 P.2d at 676-79. *E.g.*, Shelly v. Kraemer, 334 U.S. 1 (1948); Harmon v. Tyler, 273 U.S. 668 (1926); Buchanan v. Warley, 245 U.S. 60 (1917); City of Birmingham v. Monk, 185 F.2d 859 (5th Cir. 1951), *cert. denied* 341 U.S. 940 (1951).

42. 30 N.J. Super. 116, 103 A.2d 632 (Ch. 1954).

facilities in the same proportion as Negroes living in the community. In striking down the quota, the court found violations of the Fourteenth Amendment, the New Jersey Constitution, and the New Jersey housing authority enabling statute.[43]

Although the courts in *Woodbridge, Taylor* and *Banks* found quotas inherently repugnant to the Fourteenth Amendment,[44] the constitutionality of quota admission policies in low-rent public housing is still unsettled. The facts in those cases indicate that there were adequate non-constitutional grounds for decision and that the court need not have reached the constitutional question. A few cases have upheld quotas,[45] and the United States Supreme Court has declined to resolve the split in opinion.[46] Moreover, the constitutional issue is unlikely to reach the Supreme Court again, because Congressional legislation and implementing regulations have defined the duty of a local authority vis-a-vis applicants for low-rent housing.[47]

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43. "The evil of a quota system is that it assumes that Negroes are different from other citizens and should be treated differently. Stated another way, the alleged purpose of a quota system is to prevent Negroes from getting more than their share of the available housing units. However, this takes for granted that Negroes are only entitled to the enjoyment of civil rights on a quota basis." *Id.* at 119, 103 A.2d at 633.

44. In *Banks* and *Taylor,* at least, the opinions indicate adequate state grounds for decision. In *Banks,* the court found that the plan violated statutory preferences for admission to low-rent housing. In *Taylor,* the court found violations of both state statute and the state constitution. It is interesting to note that both the California and New Jersey courts have upheld the use of quotas to achieve integration in public schools. Jackson v. Pasadena City School Dist., 59 Cal.2d 876, 382 P.2d 818 (1963); Booker v. Board of Educ. of City of Plainfield, 45 N.J. 161, 212 A.2d 1 (1965); Morean v. Board of Educ. of Montclair, 42 N.J. 237, 200 A.2d 97 (1964). For an exhaustive treatment of the public school quota cases *see, De Facto Segregation of Races in Public Schools,* 11 A.L.R.3d 780 (1967).

45. Favors v. Randall, 40 F. Supp. 743 (E.D. Pa. 1941) (approving 20 per cent Negro quota in one project when, considering community needs, projects were overoccupied by Negroes); Kankakee County Housing Authority v. Spurlock, 3 Ill.2d 277, 120 N.E.2d 561 (1954) (two to one quota approved when "racial equity" suggested four to one ratio); Miers v. Housing Authority of City of Dallas, 266 S.W.2d 487 (Tex. Civ. App. 1954) (3/3/1 quota for whites, Negroes and Latin Americans upheld). See also, Progress Dev. Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961) *rev'g* 182 F. Supp. 681 (N.D. Ill. 1960) (upholding the constitutionality of a quota regulating the racial composition of a proposed housing subdivision).

46. *Certiorari* was denied in the *Banks* case, 347 U.S. 974 (1954).

47. *See* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964); HOUSING AND HOME FINANCE AGENCY, NONDISCRIMINATION IN FEDERALLY-ASSISTED PROGRAMS—EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, 24 C.F.R. § 1.4 (1964). PUBLIC HOUSING ADMINISTRATION, CIRCULAR TO

B. The Federal Executive Order

Although the landmark decision in *Brown v. Board of Education*[48] had discarded the doctrine of separate but equal,[49] at least in the public schools,[50] the Supreme Court's denial of *certiorari* in the *Banks*[51] case, which came up at the same time, spurred speculation that the *Brown* holding did not extend beyond education.[52] Even though a few state and lower federal courts have found racial discrimination in public housing unconstitutional,[53] segregation in public housing was virtually unaffected by the 1954 *Brown* decision.[54] Federal Executive Order No. 11063,[55] "Equal Opportunity in Housing," was the executive response to judicial reticence.

This Order directed the executive departments "to prevent" racial discrimination in the "sale, leasing, rental or other disposition" of residential accommodations in which the United States had an interest.[56] Low-rent housing projects authorized by the Housing Act of

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REGIONAL DIRECTORS AND LOCAL AUTHORITIES, August 27, 1965. *See also* the Supreme Court's disposition of the issues in Thorpe v. Housing Authority, 87 S.Ct. 1244 (1967).

48. 347 U.S. 483 (1954).

49. Plessy v. Ferguson, 163 U.S. 537 (1896).

50. Cases in areas other than public school education have relied upon Brown v. Board of Educ.; *e.g.*, Detroit Housing Comm'n v. Lewis, 226 F.2d 180 (6th Cir. 1955).

51. 347 U.S. 974 (1954).

52. Note, *Discrimination Against Minorities in the Federal Housing Programs, supra* note 5, at 501.

53. Prior to Brown v. Board of Educ., *see accord,* Jones v. City of Hamtramck, 121 F. Supp. 123 (E.D. Mich. 1954); Vann v. Toledo Metropolitan Housing Authority, 113 F. Supp. 210 (N.D. Ohio 1953); Banks v. Housing Authority of San Francisco, 120 Cal. App. 2d 1, 260 P.2d 668 (1953); *cert. denied,* 347 U.S. 974 (1954); Taylor v. Leonard, 30 N.J. Super. 116, 103 A.2d 632 (Ch. 1954); Seawell v. MacWithey, 2 N.J. Super. 255, 63 A.2d 542 (Ch. 1949). *Contra,* Favors v. Randall, 40 F. Supp. 743 (E.D. Pa. 1941); Kankakee County Housing Authority v. Spurlock, 3 Ill. 2d 277, 120 N.E.2d 561 (1954); Miers v. Housing Authority of City of Dallas, 266 S.W.2d 487 (Tex. Civ. App. 1954).

After Brown v. Board of Educ., *see accord,* Detroit Housing Comm'n v. Lewis, 226 F.2d 180 (6th Cir. 1955); Eleby v. City of Louisville Municipal Housing Comm'n, Civil No. 3240, W.D. Ky., May 24, 1957, 2 RACE REL. L. REP. 815 (1957); Davis v. St. Louis Housing Authority, Civil No. 8637, E.D. Mo., Dec. 25, 1955, 1 RACE REL. REP. 353 (1956). *See* Heyward v. Public Housing Authority, 135 F. Supp. 217 (S.D. Ga. 1955), *rev'd,* 238 F.2d 689 (5th Cir. 1956). On *remand,* the same case arose as Cohen v. Public Housing Authority, 154 F. Supp. 589 (S.D. Ga. 1957), *aff'd,* 257 F.2d 73 (5th Cir. 1958), *cert. denied,* 358 U.S. 928 (1959).

54. *See,* Flipper, *supra* note 5, Appendix.

55. Exec. Order No. 11,063, 27 Fed. Reg. 11527 (1962).

56. *Id.* at § 101.

1937 fell within this mandate. However, the impact of the Order upon segregation in low-rent facilities was only nominal. According to federal implementing regulations, issued by the Public Housing Administration (PHA), only projects initially covered by an annual contributions contract executed after November 20, 1962, were subject to the non-discrimination requirement.[57] With respect to projects administered under a contributions contract executed prior to that date, the Public Housing Administration merely encouraged abandonment of discriminatory practices on the part of the local authority.[58] This interpretation of the Order, and the enforcement of the regulations promulgated to implement the non-discrimination requirement were severely criticized.[59]

C. Federal Civil Rights Act of 1964

The Civil Rights Act of 1964[60] greatly extended the coverage of the Executive Order with respect to non-discrimination in low-rent housing. Title VI of that Act provides that "no person . . . shall, on the ground of race, . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program . . . receiving Federal financial assistance."[61] Therefore, low-rent housing is subject to the federal non-discrimination prohibition and depends, not upon the execution date of the annual contributions con-

57. MANUAL § 102.1(1) (May 1963). All projects not covered by an annual contributions contract on or before November 21, 1962 became subject to a new contract provision. "The Local Authority shall not discriminate because of race . . . in the sale, leasing, rental, or other disposition of housing or related facilities (including land) included in any Project or Projects initially covered after November 20, 1962, by a contract for annual contributions under the United States Housing Act of 1937, or in the use or occupancy thereof. The Local Authority shall not, on account of race . . . deny to any eligible applicant the opportunity to lease or rent any dwelling in any such housing suitable to its needs."

58. This position was taken with reference to the so-called "good offices" section of the Executive Order. The MANUAL provided that "[P]ursuant to Section 102 [Exec. Order No. 11,063, 27 Fed. Reg. 11527, § 102 (1962)], the Public Housing Administration will use its good offices to promote the abandonment of discriminatory practices with respect to projects not subject to the contract requirement. . . ." *Id.* at § 102.1(3). The contract requirement is set out in MANUAL, *supra* note 57.

59. Comment, *Discrimination in Low-Rent Housing, supra* note 1, at 871, 878, 879 (critical); Sauer, *Free Choice in Housing,* 10 N.Y.L.F. 525, 533-36 (1964) (optimistic); Sloane, *One Year's Experience: Current and Potential Impact of the Housing Order,* 32 GEO. WASH. L. REV. 457, 464-66 (1964) potential scope of Executive Order).

60. 42 U.S.C. §§ 1971, 2000a-2000h (1964).

61. 42 U.S.C. § 2000d (1964).

tract for individual projects, but upon actual receipt of Federal financial contributions.[62] As a result of the change from contract date to date of actual receipt of federal assistance, the bulk of the public housing projects not affected by the Executive Order are now subject to Title VI.

Two tenant selection and assignment plans meet current standards established by Housing Assistance Administration regulations promulgated under Title VI.[63] Under the "Louisville"[64] or free choice plan, each applicant may state his preference for project accommodations. Insofar as it administratively feasible, the local authority will assign tenants to the projects indicated in their applications. Available units for which no preference has been expressed will be offered to applicants in order of priority.[65] Under an alternative "first come-first served" plan,[66] the importance of applicant preference for project accommodations is diminished. Tenants are assigned in the order their applications are received by the authority, subject to statutory

62. Prior to the first request for funds on or after January 3, 1965, local authorities are required to file with the Public Housing Administration Regional Office a completed Form PHA-3037. This form includes a statement of the local authority's policies and practices in receiving applications, selecting tenants, and assigning applicants to dwelling units. MANUAL § 102.1, Exhibit 1 (May 1965). Except for certain specified categories of sums, the "Regional Director shall not approve any request for funds . . . or request for execution of a further contract for financial assistance, for any Local Authority which has failed to file an acceptable Form PHA-3037." *Id.* at § 102.1A(3)(b).

63. PUBLIC HOUSING ADMINISTRATION, CIRCULAR TO REGIONAL DIRECTORS AND LOCAL AUTHORITIES, *supra* note 47. The CIRCULAR provides an example o plans of the type found acceptable to the Public Housing Administration.

64. So called because it was first adopted by the City of Louisville Municipal Housing Commission. Eleby v. City of Louisville Municipal Housing Comm'n, Civil No. 3240, W.D. Ky., May 24, 1957, 2 RACE REL. L. REP. 815 (1957). The "Plan of Integration" adopted in Louisville is reprinted in 2 RACE REL. L. REP. 815, 816 (1957).

65. "[A]ny family who wishes to obtain housing files a registration form, on which it may specify the project or location of its choice in any part of the City, including alternate choices. Each registration is given a number, and all registrations are kept in a permanent alphabetical file in a single Central Rental Office for the City. When a vacancy occurs, no matter in which project, the project office must receive a referral from the Central Rental Office, which draws from those registrations expressing preference for the project in which the vacancy has occurred. Among registrations with the same priority, selection is based on date of registration, the applicant having the lower registration number taking precedence." Letter from Marie C. McGuire, Comm'r, Public Housing Administration, to The Rev. S. Jerome Hall, Chairman, The Westside Federation, Chicago, Illinois, Oct. 14, 1965, p. 3, copy on file with URBAN LAW ANNUAL.

66. PUBLIC HOUSING ADMINISTRATION, CIRCULAR TO REGIONAL DIRECTORS AND LOCAL AUTHORITIES, *supra.* note 47.

preferences or priority. When a dwelling unit in one project is offered to the applicant who has a first choice on that unit, he may exercise his personal preference for another project by refusing the offered accommodations. Under currently acceptable plans, applicants who refuse the accommodations offered may be given one or two additional first choices for suitable accommodations, or may be dropped immediately to the bottom of the waiting list.[67]

Experience with these plans is limited, but several conclusions are suggested by observation. One city, which had adopted a free choice plan in 1957, recently switched to a first come-first served plan because the desired change from segregated occupancy patterns in public housing throughout the city had failed to materialize.[68] It would seem that if applicants may exercise their choice of project accommodations, de facto segregation will remain a serious problem in low-rent public housing.[69] Official recognition of this fact is contained in proposed amendments to the tenant selection and assignment regulations under which the free choice plan would no longer be acceptable.[70]

The first come-first served plan, however, is not without difficulties. Although applicants may exercise an ultimate choice to seek dwellings

67. *Id.*

68. Apparently the free choice plan in Louisville had less effect upon occupancy than anticipated, for it was dropped in favor of a first come-first served plan because "in conjunction with segregated site selection," it had "resulted in only minimal desegregation of the [Louisville] public housing projects. . . ." Comment, *Discrimination in Low-Rent Housing, supra* note 1, at 871, 881. Until 1957, housing projects had been built in pairs—one for Negroes and one for whites. The free choice plan was adopted in a context of total segregation. In a written statement prepared in 1957, the Housing Commission of Louisville voiced its belief that "the proposed plan [free choice plan] will not materially change the present occupancy but will incorporate the voluntary principle." 2 RACE REL. L. REP. 817 (1957).

69. "If the people involved think that [actual segregation is essential to the success of the program] . . . and if Negroes and whites desire to maintain voluntary segregation for their common good, there is certainly no law to prevent such cooperation." Cohen v. Public Housing Authority, 257 F.2d 73, 78, (5th Cir. 1958). At an earlier stage of litigation, Heyward v. Public Housing Authority, 238 F.2d 689 (5th Cir. 1956), the court indicated that defendant had a free choice plan in effect. 238 F.2d at 692.

70. Statement by Robert C. Weaver, Secretary, Department of Housing and Urban Development, Feb. 8, 1967, at 5. "The rules for tenant selection incident to Title VI . . . have been strengthened. Applicants will be assigned in numerical order, on the basis of date of application, need, and family size. Any suitable vacancy in the localities' public housing program will be offered to an applicant. Where there are vacancies in several projects, the unit in a project with the largest number of vacancies will be proferred. If, after three offers, the applicant declines to accept any of them, he will go to the bottom of the list of eligibles." No mention is made of a free choice tenant selection plan.

on the private housing market, those who are unable to do so may only refuse offered accommodations at the risk of losing first place on the waiting list. The consequences of refusing offered accommodations is critical to the operation of the first come-first served plan. If, for example, the plan provides that applicants who refuse the first offered accommodations fall to the bottom of the waiting list, the element of personal preference for project accommodations is largely eliminated. However, currently acceptable versions of the first come-first served plan may provide for one or two offers of accommodations to the applicant after his initial refusal.[71] This option permits an applicant who does not wish to live in the project accommodations first offered to refuse them, and await the probability that suitable accommodations next becoming available will be located in another project in which the racial mix is more acceptable to him. Thus the weakness of the free choice plan is re-introduced. The newly-proposed tenant selection and assignment regulations,[72] although they eliminate the free choice plan, do not recognize the consequences of allowing an applicant more than one refusal.[73]

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71. PUBLIC HOUSING ADMINISTRATION, CIRCULAR TO REGIONAL DIRECTORS AND LOCAL AUTHORITIES, *supra* note 47.

72. It seems that the proposed regulation may be less able to prevent tenant "shopping" for project accommodations because of personal racial prejudices than currently acceptable plans. The willingness of an applicant to refuse the first offered accommodations is based largely upon his knowledge that he will have at least another first choice for accommodations. If applicants know that if they refuse a dwelling unit offered them they will be placed at the bottom of the waiting list, they will be less likely to refuse simply because they do not want to live in a project inhabited by Negroes. Although the current regulation permits removal from the top of the list after the first refusal, PUBLIC HOUSING ADMINISTRATION, CIRCULAR TO REGIONAL DIRECTORS AND LOCAL AUTHORITIES, *supra* note 47, the proposed regulation would permit three first choices before removal to the bottom of the waiting list. Statement by Robert Weaver, *supra* note 70, at 5.

73. Possible judicial responses to more direct tenant selection policies which would attempt to secure project integration through the use of quota and forced-assignment policies are suggested by those state and federal cases that have considered pupil and grade reassignment programs that are intended to eliminate de facto patterns of segregation in the public schools. These programs have been upheld against attack in the east. *See* Fuller v. Volk, 230 F. Supp. 25 (D.N.J. 1964); UNITED STATES COMM'N ON CIVIL RIGHTS, 1 RACIAL ISOLATION IN THE PUBLIC SCHOOLS 234-36 (1967). However, the school cases do not seem analogous, since they deal solely with programs which require a redistribution of the existing school population. The tenant selection problem in public housing is concerned with the assignment of prospective tenants but not the redistribution or reassignment of present occupants. There is no equivalent in the public school system to a tenant selection policy in public housing which would deny and thus defer admission to the public housing program.

III. Site Selection

Site selection may be the most powerful tool available to prevent or alleviate de facto segregation in low-rent public housing. Where Negroes predominate among eligible applicants for low-rent housing and projects located in ghetto neighborhoods, tenant selection and assignment schemes can do little to effect meaningful integration. Perhaps what is needed is a broader perspective: a shift from integration within projects to integration within the community.

Site selection is also subject to constitutional and statutory restraints. Although the nature of these restraints is presently unknown, several issues are presented. What, for example, are the constitutional limitations on the local authority's discretion to select sites? Have statutory directives and administrative regulations altered the range of local authority?

A. Constitutional Limitations

Thompson v. Housing Authority of Miami[74] was the first judicial consideration of site selection as it affects de facto segregation in public housing.[75] Defendant in 1962 selected sites to relocate 2,600 families displaced from the "Central Negro District" by urban renewal and expressway construction. The sites chosen were located in neighborhoods having Negro and white residents, a "considerable distance" from the central Negro area.[76] The Public Housing Administration approved the sites in 1963. Thereafter, but prior to construction, the neighborhoods turned "predominantly Negro."[77] Plaintiff sued[78] to enjoin construction on the approved sites on the ground that defendant housing authority had selected them purposely to produce de facto segregation,[79] in violation of the Fourteenth Amendment. In denying

74. 251 F. Supp. 121 (S.D. Fla. 1966).

75. *See also* the discussion of Gautreaux v. Chicago Housing Authority, 265 F. Supp. 582 (N.D. Ill. 1967), at notes 83-85, *infra*.

76. 251 F. Supp. at 123. The court mentions that the area where the sites were selected "was designated by the County as the 'Northwest Transition Area.'" If this means that the area was in the process of changing from white to Negro rather than a stabilized mixed neighborhood, then the court should have given more consideration to the Housing Authority's lack of good faith in selecting the sites.

77. *Id.* at 123. The 1960 Census tracts showed population by both races, and although the area was still mixed, it had turned predominantly Negro.

78. There is no indication in the case that there was more than one plaintiff, what race the plaintiff was, nor what relation the plaintiff had to the public housing in question.

79. 251 F. Supp. at 122. The complaint charged that the "sites were purposely selected for the purpose of effecting de facto segregation," but the court changed

the injunction, the court relied upon its findings that the neighborhoods were still racially mixed, that the housing authority had been motivated solely by non-racial considerations and had complied with federal standards, that the federal agency had approved the sites, and that Negro spokesmen and leaders, consulted prior to final selection, had not opposed these locations.[80]

By finding that defendant housing authority had not acted in bad faith and had not engaged in discriminatory practices, the court avoided ruling on the question raised by plaintiffs—whether there are constitutional limits on the local authority's discretion to place relocation housing for Negroes in areas of racial concentration.[81] At the very least, the *Thompson* case appears to stand for the proposition that if the neighborhoods in which the sites are located were racially mixed at the time of local approval, courts will not later interfere with the local determinations.[82]

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the wording of the issue to "fostering de facto segregation." *Id.* at 123. The plaintiff seemed to be trying to get an issue of intention to discriminate into the charge. The court, by using the word, "fostering," turned the issue from the factual question of whether there was an intent to discriminate, which presumably would be unconstitutional, to the undecided constitutional question of whether de facto segregation violates the 14th Amendment, when the facts clearly showed de facto segregation.

80. *Id.* at 124.

81. The court said, "if this argument is accepted [location in a predominantly Negro area as de facto segregation] then it is equally true that the location of public housing units in any predominantly White area would also constitute de facto segregation." *Id.* at 124. The court ignores the fact that patterns of housing segregation have normally meant denial of entry to Negroes, not whites.

Site selection in schools has also met with little litigation. In Henry v. Godsell, 165 F. Supp. 87 (E.D. Mich. 1958), the court dismissed a complaint alleging discrimination in the selection of a new school site in a predominantly Negro area. *See also* Sealy v. Department of Public Instruction, 159 F. Supp. 561 (E.D. Pa. 1957), *aff'd.* 252 F.2d 898 (3d Cir. 1958), *cert. denied,* 356 U.S. 975 (1958).

82. Site selection may be reviewed by the courts on a motion to dismiss condemnation proceedings instituted by a housing authority. The issue before the court on the motion is whether the housing authority was capricious or arbitrary in condeming the condemnee's land. If the motion to dismiss contains allegations which, if true, would constitute a bar to the condemnation proceeding, a triable issue of fact has been presented. Housing Authority of City of Wilson v. Wooten, 257 N.C. 358, 126 S.E.2d 101 (1962) (motion to dismiss alleging failure of authority to condemn slum sites held insufficient); Deerfield Park Dist. v. Progress Dev. Corp., 22 Ill. 2d 132, 174 N.E.2d 850 (1961) (motion to dismiss alleging that condemnor acted solely to prevent development of a racially integrated private housing subdivision held to present issue of fact). Ordinarily, the scope of judicial review in these cases is quite narrow. *See also* Philbrook v. Chapel Hill Housing Authority, 153 S.E.2d 153 (N.C. 1967), dismissing an action brought to enjoin the selection of public housing sites in a neighborhood containing substantial, above-standard dwellings.

Additional light on judicial power to review public housing site selections alleged to create racially segregated patterns is provided by *Gautreaux v. Chicago Housing Authority*.[83] Plaintiff's complaint alleged that the Authority, since 1950, had selected sites which were almost exclusively within neighborhoods that were substantially entirely Negro. Violations of constitutional Due Process protections and the federal Civil Rights Act of 1964 were claimed. On defendant's motion for summary judgment, the court dismissed the complaint insofar as it rested on a site selection policy not motivated by a deliberate attempt to create patterns of racial segregation.[84] The court pointed out that "A public housing program, consciously administered in accord with the statutory mandates surrounding its inception and free of any intent or purpose, however slight, to segregate the races, cannot be condemned even though it may not affirmatively achieve alterations in existing practices of racial concentration in housing."[85]

B. Statutory Restrictions

Limitations on judicial review of the site selection process again suggests the need for more positive administrative intervention. Federal regulations adopted under Title VI of the Civil Rights Act of 1964 initially provided that local authorities should aim to select from otherwise suitable sites those that afford the "greatest acceptability" to eligible applicants regardless of race, color, creed, or national origin.[86] How this policy operated can be illustrated by a more detailed review of the site selection policies in the City of Chicago, which eventually were presented for judicial consideration in the *Gautreaux* case.

In April, 1965, the City Council of Chicago approved seven low-rent housing sites, all of which were located on Chicago's South and West Sides in areas of high Negro concentration.[87] Pending federal ap-

83. 265 F. Supp. 582 (N.D. Ill. 1967).

84. This is the inference to be derived from the court's failure to dismiss those counts of the complaint which alleged a deliberate motivation to create patterns of segregation. Complaint, pp. 11, 12. These counts were returned for trial.

85. 265 F. Supp. at 584. There has been some recognition of an affirmative duty to integrate in the school segregation cases. *See* Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 818 (1963). *But see* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concept* 78 HARV. L. REV. 564 (1965).

86. MANUAL § 205.1(4)(g) (Sept. 1965).

87. "[Chicago] City Council approval of sites is required as a matter of state law. . . ." Letter from Marie C. McGuire to the Westside Federation, *supra* note 65, at 5.

proval, the Westside Federation submitted[88] a complaint to the Housing and Home Finance Agency alleging that site selection "within the confines of the Negro community"[89] when non-whites constituted 93% of those waiting for low-rent housing[90] violated Title VI of the Civil Rights Act of 1964 and federal administrative criteria governing site selection. Specifically, the complaint alleged impairment of objectives of the low-rent housing program,[91] perpetuation of racial patterns of residence in Chicago,[92] violations of the Chicago city plan,[93] and intensification of segregation within projects.[94]

In response,[95] the federal public housing agency stated that new public housing would have a rehabilitative effect upon surrounding neighborhoods, and so would further the objectives of the federal public housing act.[96] In addition, the "greatest acceptability" stan-

88. Letter from Westside Federation to Robert Weaver, Adm'r, Housing and Home Finance Agency, Aug. 18, 1965, p. 1, unsigned copy on file with URBAN LAW ANNUAL. (Westside Federation is an organization representing 49 community and neighborhood groups on the West Side of Chicago.) *See also,* Testimony of Chicago Urban League before Committee on Planning and Housing, Chicago City Council (April 6, 1965).

89. Letter from Westside Federation to Robert Weaver, *supra* note 88, at 1.

90. Non-whites constitute 23 per cent of Chicago's population, yet comprise 90 per cent of all public housing tenants and 93 per cent of public housing applicants. Letter from Westside Federation to Robert Weaver, *supra* note 88, at 2; Flipper, *supra* note 5, Appendix.

91. This argument was based upon the assumption that the site selection violated Housing and Home Finance Agency regulations, 24 C.F.R. § 1.4 (1964), and Public Housing Administration criteria, MANUAL § 205.1(4) (g) (Sept. 1965).

92. The complaint alleged that restricting low-rent projects to the "Negro community" would reinforce private pressures against racial freedom of residence, and thus inhibit the possibility of residential integration in Chicago.

93. "[T]he city will seek to change these trends [toward racial neighborhood patterns] and to achieve harmonious, stabilized neighborhoods attractive to families of all races. . . ." Quoted from Basic Policies for the Comprehensive Plan of Chicago by the City Planning Department in Letter from Westside Federation to Robert Weaver, *supra* note 88, at 5.

94. This statement apparently was based upon the fact that 93 per cent of public housing applicants in Chicago are non-white. Westside Federation alleged that each project having over 90 per cent Negro occupancy was, by definition, segregated. Letter from Westside Federation to Robert Weaver, *supra* note 88, at 3. It is not clear how site selection could make a substantial difference in the preponderance of Negroes in projects, given the lop-sided characteristics of the waiting list.

95. Letter from Marie C. McGuire to the Westside Federation, *supra* note 65.

96. The letter cited the written report of the Department of City Planning submitted to the City Council Committee on Planning and Housing. The report stated that development of the proposed sites "[would] be a forward step in the city's continuing program of improving its housing supply." *Id.* at 60. For the

dard was cited.[97] Since no alternative sites were suggested at public hearings held before a City Council Committee,[98] apparently there were no "otherwise available and suitable site."[99] Because approximately 90 per cent of low-rent housing applicants had specified a preference under Chicago's free choice plan for project accommodations on the South and West Sides, the federal agency found that the sites met the "greatest acceptability" test.[100] Furthermore, since no additional sites had been suggested, the Department of City Planning gave approval of the sites as conforming to the city plan.[101] Under these circumstances—including the known hostility of the City Council to low-rent housing on the North Side[102]—the federal agency concluded that the Housing Authority had "made a sincere effort"[103] and had done its best to select sites "most nearly meet[ing]" federal requirements,[104]

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importance of rehabilitation of substandard neighborhoods see Statement of Robert C. Weaver, *supra* note 70, at 3.

97. Letter from Marie C. McGuire to the Westside Federation, *supra* note 65, at 4, citing MANUAL § 205.1(4)(g) (Sept. 1965). A subsequent revision of the so-called "greatest acceptability" test is discussed in the text at notes 107-113 *infra*.

98. In fact, two separate hearings were held. The first, on April 1, 1965, was held before the City Plan Commission, which approved the sites and cited prior approval by the Department of City Planning. The second hearing was held on April 6, 1965, before the City Council Committee on Planning and Housing. Complaints similar to those raised by the Westside Federation were presented by the Chicago Urban League at these hearings. See, Testimony of the Chicago Urban League before Committee on Planning and Housing, Chicago City Council, *supra* note 88.

99. Even though it had not suggested additional sites at the hearings, apparently the Chicago Housing Authority felt that others might be available to it. The Public Housing Administration defended the Housing Authority for not suggesting additional sites, because they were located in the same general area as the sites under protest, and would be subject to the same criticism. Letter from Marie C. McGuire to the Westside Federation, *supra* note 65, at 6.

100. Of the 10,072 non-elderly Negro family applicants, 94 per cent expressed a preference for project accommodations on the South and West sides of Chicago. Only 45 per cent of the 642 white family applicants expressed preferences for project accommodations in the same areas. *Id.* at 5. The fallacy of the Public Housing Administration argument is seen when the nature of "preferences" is considered. An applicant's expression of project accommodations indicates his selection from among exiting public housing stock, and does not reflect a vote in favor of additional project sites.

101. *Id.* Conformance to the city plan is also required under federal administrative regulations. MANUAL § 205.1(4)(c)(1) (May 1965).

102. Candidly, the Public Housing Administration admitted that "sites other than in the South or West side, if proposed for regular family housing, invariably encounter sufficient objection in the [City] Council to preclude Council approval." Letter from Marie C. McGuire to the Westside Federation, *supra* note 65, at 6.

103. *Id.* at 7.

104. *Id.* at 6.

and that to withhold approval would constitute an "arbitrary denial of . . . housing" to Chicago's needy.[105]

Especially in a city in which political resistance to an active program of integration in public housing is considerable,[106] the principal effect of the federal interpretation of its site selection criteria is to disable any local attempts to deal with the de facto segregation problem. However, changes in the federal regulations governing site selection criteria may force a reappraisal of federal attitudes. Two major changes were made in the amended regulations. First, site selection must achieve the "greatest opportunity" for the "inclusion of eligible applicants of all groups regardless of race."[107] Note that the standard of "acceptability" has been dropped. Second, site selection must afford "members of minority groups an opportunity to locate outside areas of concentration of their own minority group."[108] The new criteria considerably strengthen the nondiscrimination requirements of the federal regulations, and meet to some extent the objections raised in Chicago.[109]

The location of sites in areas of racial concentration will *prima facie* be unacceptable.[110] If the local authority bears successfully its burden of proof by showing that "no acceptable sites are available outside the areas of racial concentration," the federal agency will reconsider its rejection.[111] Should the local authority fail to show the unavailability of other sites, it must submit for approval "alternative or additional sites in other areas so as to provide more balanced distribution of the proposed housing."[112]

At best, the substitution of the new regulation for the "greatest acceptability" test indicates increased official recognition of the subtleties of site selection. Many issues remain unresolved. For example, what is an "area of racial concentration?" Should the federal agency define in objective terms what is an area of racial concentration, or should it accept, upon review, the finding of the local housing authority if there is "substantial evidence" to support the finding? The

105. *Id.* at 7.
106. For an early description of the difficulties in placing housing projects in white areas in Chicago *see* M. MEYERSON AND E. BANFIELD, POLITICS, AND THE PUBLIC INTEREST (1955).
107. MANUAL § 205.1(4)(g) (Feb. 1967).
108. *Id.*
109. Letter from Westside Federation to Robert Weaver, *supra* note 88, at 5.
110. MANUAL § 205.1(4)(g) (Feb. 1967).
111. *Id.*
112. *Id.*

regulation applies to sites which are selected *only* in areas of racial concentration.[113] Does this standard mean that as long as the local authority chooses at least *one* site outside an area of racial concentration it is immune from attack under this provision?

The standard of proof required of a local authority to show that no acceptable sites are available outside the area of racial concentration is unclear. There is no definition of an "acceptable" site, and local authorities and governing bodies may well be racially influenced in deciding whether or not a given site is unacceptable. If the federal agency is too willing to credit the findings of local agencies, the new regulations may not mark a significant departure from the regulations in effect when the Westside Federation protested the location of public housing sites in Chicago.

IV. Conclusion

Experience with attempts to deal with de facto patterns of discrimination in public housing have met with considerable frustration. Judicial reluctance to find constitutional violations in the absence of deliberate motivation to encourage segregated patterns makes it difficult to control decisions on site selection, which appear to provide the best leverage over the segregation problem. Federal regulations imposing site selection criteria may have been formally strengthened, but how effective they will be in operation is still open to question.

Effective programs of tenant selection are inhibited, not only by the location of many existing projects in areas of high racial concentration, and by economic and demographic pressures which create highly disproportionate ratios of Negro eligibles for public housing projects, but also by serious limitations on what is constitutionally permissible by way of administrative and statutory answers to the segregation problem. Uncertainties about judicial acceptance of quota systems seriously limit any experimentation with forced-assignment policies, which must necessarily incorporate a quota. Nor is there any indication that the concentration of Negroes in the city core will decrease in the near future to any considerable extent.

Probably the best hope for improved racial patterns in public housing lies in institutional changes in the public housing program. Large-scale public housing projects have been subject to severe criticism on grounds not associated with racial issues. Experiments are under way

113. *Id.*

which may lead to an alteration in the public housing concept, with public housing authorities concentrating on the leasing of individual units throughout the community, and the construction and operation of smaller projects. Integration by projects, when projects are built on a small scale, is not meaningful. As public housing units penetrate the community, the integration of minorities into residential neighborhoods through occupation of individual dwellings and smaller multi-family units may in time provide the most effective opportunity for dealing with patterns of housing segregation.

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